

J. ten Kate & P.J. van Koppen (1995) The Netherlands: Towards a form of judicial review. In: C.N. Tate & T. Vallinder (red.), *The global expansion of judicial power* (pp. 369-380). New York: New York University Press

**THE  
GLOBAL  
EXPANSION  
OF  
JUDICIAL  
POWER**

Edited by

C. Neal Tate  
and  
Torbjörn Vallinder

NEW YORK UNIVERSITY PRESS  
New York and London

NEW YORK UNIVERSITY PRESS  
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Library of Congress Cataloging-in-Publication Data  
The global expansion of judicial power / edited by C. Neal Tate and  
Torbjörn Vallinder.

p. cm.

Some papers were originally presented at the theme meeting  
"Judicialization of Politics", hosted by the Centro studi  
sull'ordinamento giudiziario, Bologna, University of Bologna, Forlì,  
Italy, June 1992.

Includes bibliographical references and index.

ISBN 0-8147-8209-4 (alk. paper)

1. Judicial power. 2. Judicial review of administrative acts.  
3. Judicial process. I. Tate, C. Neal (Chester Neal), 1943-  
II. Vallinder, Torbjörn.

K3367.G58 1995

347'.012 — dc20

[342.712] 95-11510

CIP

New York University Press Books are printed on acid-free paper.  
and their binding materials are chosen for strength and durability.

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

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# The Netherlands: Toward a Form of Judicial Review

JAN TEN KATE AND PETER J. VAN KOPPEN

On 23 October 1985 the European Court of Human Rights made a decision in the *Benthem* case (ECHR 23 October 1985, AB 1986, no. 1) that caused much turmoil among Dutch judicial authorities and legal scholars. Albert Benthem owned a garage in the village of Noordwolde. In 1976 he applied for a license under the Nuisance Act of 1952 for operating an installation for the delivery of liquid gas to motor vehicles, involving use of a surface storage tank with a capacity of eight cubic meters. The Regional Health Inspector advised against granting the license, because of the excessive risks to the neighboring houses. The municipal council nevertheless granted the license. The health inspector lodged an appeal with the Crown as head of the executive (*in casu* the minister of public health and environmental protection).

When such an administrative appeal is brought before the Crown, the Crown will not make a decision until the Administrative Litigation Division of the Council of State (Afdeling Geschillen van Bestuur van de Raad van State) has looked into the matter and prepared an advisory decision. The Crown's decision (a Crown's Decree, Koninklijk Besluit) almost never departs from the Litigation Division's advice.

In 1979 the Crown decided that Benthem should be refused the license and quashed the decision of the municipal council. Subsequently Benthem was ordered by the municipal authorities to cease operating his

installation. He appealed against this decision, but the decision was confirmed by the Crown. Meanwhile Benthem filed an application with the Commission of Human Rights, claiming that his case had not been heard by an independent and impartial tribunal, contrary to the requirements of Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (The Treaty of Rome of 1950). In its decision the European Court ruled that Article 6, paragraph 1 indeed was applicable because in this case a civil right was at stake. Thus the court had to determine whether the proceedings in appeal to the Crown satisfied the requirements of Article 6. The Dutch government stated that the Crown followed the Litigation Division's advice in the vast majority of the cases. This did not provide, in the court's view, the determination by a tribunal of the matters in dispute, because the Crown still is entitled to depart from the advice. Thus the Crown—hierarchical superior to the regional health inspector and to the ministry's director general, who had submitted the technical report to the Litigation Division—could not be seen as an independent and impartial tribunal that guarantees a judicial procedure.

As a result of the judgment of the court, the Dutch legislature had to abandon the provision in many statutes of an appeal to the Crown. The Administrative Litigation Division of the Council of State was subsequently upgraded to an independent administrative court (*Tijdelijke Wet Kroongeschillen* 1987). This change of law caused by the court's judgment is an example of the judicialization of politics in the Netherlands; as a result of this decision some disputes can no longer be decided upon by the Crown, but instead have to be referred to a truly independent administrative judge.<sup>1</sup>

In the Netherlands politics has been increasingly judicialized: there has been, in Vallinder's words, a substantial "transfer of decision-making rights from the legislature, the cabinet or the civil service to the courts." Not only did the European Commission of Human Rights (ECHR) further the protection of civil rights against the Dutch executive, but decisions of the Dutch Supreme Court (Hoge Raad der Nederlanden) have also been of great importance. This development in the Netherlands is not unique. The Dutch government, legislature, and judiciary have been propelled by international developments and the perhaps not fully expected dynamics and consequences of international treaties, such as those on human rights. In the following pages we will give some examples of this tendency to shift decision-making competence

from political to judicial bodies. We will end with some remarks on one of the major points in which the Dutch constitutional law differs from that of adjacent countries: the absence of constitutionally-sanctioned judicial review of Acts of Parliament.

### THE ADVANCE OF ADMINISTRATIVE LAW

The roots of the Dutch Constitution (*Grondwet*) lie in the *Trias Politica*, the separation of the legislative, administrative, and judicial powers. The first Constitution of 1814 has been changed and enlarged many times, but even after the last important revision in 1983,<sup>2</sup> several concepts establishing the *Trias Politica* still remain (Kortmann 1990, 30). Constitutional development has brought changes in different fields, including the extension of the fundamental human rights, the superiority of self-executing provisions of treaties, and the maturation of administrative law. But not only have the contents changed; so have the interpretation and nature of some provisions. For example, originally human rights were considered to guarantee the right to defend oneself in the field of criminal law; nowadays these rights make it possible to demand the conditions for fulfillment of these rights from the government (Akkermans, Bax, and Verhey 1988, 30).

Constitutions that stem from the *Trias Politica* can have different forms, witness the French and American constitutions. The original Dutch Constitution incorporated the French version of the idea of separation of powers, in which the democratic element of political decision making was dominant. In essence, majority rule determined political questions and therefore the outcome of the legislative process. The question of constitutional incompatibility had to be decided by the Parliament itself, not by the judiciary; the judiciary merely was the *bouche de la loi*, which should strictly apply legislation without its own interpretation. Thus, contrary to the American version given by Hamilton (see Kramnick 1987), according to which the division of powers led to a system of checks and balances, the French and Dutch versions led to a *separation* of powers (Cliteur 1989). This may be one of the reasons why in the nineteenth century little emphasis was given to the possible mistakes of the executive or the legislature. One could not imagine that these bodies would make mistakes or make decisions that were unjust or disproportionately disadvantageous for individuals or groups of citizens. Dominant legal doctrine considered democratic deci-

sion making the best guarantee against these kinds of failure (Struycken 1910; Stroink 1990, 5).

More recently has come the realization that, for instance, withdrawing a subsidy could be unjust; that changes in zoning-regulations can be unduly disadvantageous to individual citizens; or that either granting or denying a license can involve abuse of power by the executive. Starting in 1887, some statutes provided for a right to appeal decisions of the executive. Usually, decisions had to be appealed to the next hierarchically superior authority or to a special administrative court. Gradually, several special administrative courts were introduced, each with a limited jurisdiction based on a specific statute. The Dutch legislature did not create administrative courts with general jurisdiction. Therefore, today the field of administrative law is considered rather chaotic and complicated and hard for the ordinary citizen to understand (Scheltema 1986, 39; Kortmann 1990, 253).

The increasing demand for civil protections against executive actions led to the AROB Act of 1976 (Administratieve Rechtspraak Overheidsbeschikkingen [Administrative Jurisdiction on Public Authorities' Decrees]). This statute granted individuals the right to appeal any decree of a public authority to the newly formed Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State) if no other special administrative court was available for an appeal. Since then the Judicial Division has energetically built a strong position by elaborating on the general principles of proper administration (*beginselen van behoorlijk bestuur*) in its case law (Stroink 1990, 5). The AROB Act proved to be very important. Appealing to the Judicial Division became so popular that the workload of this court became unmanageable: in the near future lower administrative courts in each district will be created and incorporated into the ordinary courts of first instance. The final piece of this development may be that the coming reorganization of the judicial system will lead to the creation of a chamber of the Supreme Court dealing with cassation in administrative law cases (Rommeling 1992, 15). So not only has the number of decisions by which the public authorities can influence the position of individuals and groups grown in the last decades so also have the possibilities of appealing these decisions, and of having these appeals decided by an impartial judge.

## THE ROLE OF THE SUPREME COURT

The Dutch Supreme Court has come far from the *bouche de la loi* ideology of the nineteenth century (Hirsch Ballin 1988; Schoordijk 1988). The Supreme Court always had some influence on the law, merely by the interpretations given to statutes in the court's decisions. These interpretations, of course, set precedents, both for the court itself and for lower courts. But the important task of looking after the uniformity of the law has gradually come to be equalled by the court's function of developing the law. Starting with the famous decision in *Lindenbaum v. Cohen* (HR 31 January 1919, *NJ* 161, *WvHR* 10365; see van Koppen 1990), the Supreme Court has taken up the role of deputy legislature. That very decision, in which the Supreme Court widened the definition of tort from a mere breach of written rights or duties to any kind of breach of duty of care, made a bill on the same subject superfluous.

In recent years the Supreme Court has given new interpretations to existing statutes or formulated new rules for unforeseen problems in many decisions, making legislation unnecessary, even on issues where a clear political majority in Parliament would have produced legislation relatively swiftly. More important, the court produced case law on issues, such as the right to strike, euthanasia, and abortion, on which Parliament was unable to pass legislation. Supreme Court decisions play such an important role in these matters because of some peculiarities of Dutch politics.

For a long time the Dutch government has been built on a coalition of more than two or three, sometimes even five political parties. No party has ever reached a majority in Parliament. When one of the coalition parties agrees with the opposition on a hot issue and could join with the opposition to create a majority vote on such an issue, that party still has to consider the opinion of the coalition partner(s) in order to avoid the risk of breaking up the coalition. So even if there is a majority for a political choice on a certain issue, it is not certain that that choice will be made. More often the decision on these issues is postponed and the Supreme Court has to fill the gap (see van Koppen 1990, 1991).<sup>3</sup>

The permanent coalition character of the Dutch government also introduces compromise into the content of legislation: conflicting coalition opinions have to be assimilated in the text of new laws. Clear-cut legislation on controversial issues would often endanger cooperation

within the coalition. This means that the compromise imparts a diffuse and vague nature to statutes. Such legislation often needs extensive interpretation before it can be applied in practice, which opens up the opportunity for the judiciary to play an important role in many controversial matters (Schuyt 1988, 332).

In the last two decades coalition parties became even more bound to each other through the introduction of the *regeerackoord* (government agreement), an extensive written document dealing with all major and many minor political issues. The agreement is binding not only on members of the cabinet, but also on members of the parliamentary majority. Voting against any government proposal covered by the agreement is considered a breach of political contract and endangers the coalition. The government agreement, made in covert negotiations, in fact ties members of Parliament to cabinet decisions and thus turns the traditional dualism between cabinet and Parliament into a monistic ruling by the cabinet, thus enabling the government to run bills through Parliament by sheer political force, sometimes producing acts of low quality. In such political circumstances the Supreme Court may receive a new function: guardian of the quality of the law (van Koppen 1990).

Considering the growth of the public policy-making function of the Supreme Court it is not surprising that politicians nowadays seem to pay more attention to appointments to the Supreme Court than they have for decades. According to the law, Parliament has an almost decisive influence on the appointments in the Supreme Court, because it is Parliament's<sup>4</sup> competence to put forward a list of three nominees, from which the Crown (that is, the cabinet) has to choose. In practice, however, co-optation takes place. When there is a vacancy in the Supreme Court, the court draws up a list of six candidates, who are recommended for the position. Thereupon Parliament, without any discussion or public attention, puts the first three candidates of that recommendation list on the list of nominees, from which the first always is appointed by the Crown (van Koppen and ten Kate 1987; van Koppen 1990).

All justices appointed after World War II have had very low political profiles, compared to the appointments in the nineteenth century. No specific strategy or political prevalence can be discerned, except that lawyers who have extreme points of view do not have a chance to be appointed. Nevertheless we cannot rule out the possibility that, in private, the sitting justices, when they draw up the list of candidates, take

into account the recommended lawyers' political affinities and philosophies of life in order not to depart too much from the proportional composition of the Second Chamber of Parliament. This could explain why the Supreme Court has succeeded in maintaining this co-optation system.

Nevertheless, in the future appointments to the Supreme Court will not take place so automatically and unobtrusively as they have in the past. In the summer of 1991 a Christian-Democratic member of Parliament started to ask questions about the procedure for the appointments of justices of the Supreme Court because he had the impression that too many judges and justices were adherents of one of the opposition parties (D66, a mildly liberal party). For the first time this question was covered heavily by the press. The Supreme Court promised to give more biographical data on the candidates in the future, and we may expect more debate about forthcoming appointments in the Supreme Court.

#### FROM NATIONAL LAW TO INTERNATIONAL LAW

Since World War II Dutch law has become more and more interwoven with international law, international treaties, and the law and case law of supranational institutions. This development has restricted Dutch political autonomy largely because many important decisions are no longer made in The Hague, but in Brussels, as a result of the Dutch membership in the EC, and because the government and the legislature are committed to the case law of some international courts. The fact that the interpretation of many treaties is reserved to independent international courts has had a rather unexpected impact on Dutch politics, especially in the field of fundamental human rights.

A major step toward the internationalization of law was made in the 1953 change in the Constitution, which explicitly stated that national law shall not be applied if it is incompatible with a self-executing provision of a treaty.<sup>5</sup> So the Constitution made it possible to subject national law, including constitutional law, to certain provisions of treaties, with no distinction made between treaties that were entered into before and after the enactment of the national law. Throughout the following decades this prevalence of treaties was properly taught in the law faculties, but it was of no great practical importance. The Supreme Court tried to avoid any reference to international law by giving an

interpretation, sometimes rather strained, of a comparable constitutional provision that corresponded to the international treaty. The year 1980 was a turning point. By then the Supreme Court had begun to review openly the compliance of national law with international law, especially with the European Convention of Human Rights (for examples, see Van Dijk 1988).

After 1980 many citizens started to use the right to appeal individually to the European Court of Human Rights for alleged violation of the convention. This resulted in judgments of the European Court in which Dutch national law was considered to be in conflict with specific provisions of that convention (van Dijk 1988). International and supranational law, as interpreted by the European Court or the EC Court, has a considerable influence on national law, for instance by prohibiting the legislature from making any rule that is in conflict with that interpretation.<sup>6</sup> Thus, one of the major components of the judicialization of politics can be found in the restrictions of government authority by the development of the international and supranational law, including the case-law of the international courts.

### TOWARD CONSTITUTIONAL REVIEW?

As we noted, the Dutch Constitution stems from a tradition in which there is no supremacy of the judiciary over the legislature. Since 1848 the Dutch constitution has included the principle that the judiciary is not allowed to review the compliance of any Act of Parliament with the constitution.<sup>7</sup> Any Act of Parliament supersedes the provisions of the Constitution and the principles that are incorporated in the Constitution: the decision of the Parliament's majority makes an Act inviolable. This rule has been restricted to Acts of Parliament explicitly. All the ordinances of lower legislative bodies, the provinces, the local government and so on, have to be in accordance with higher ones, Acts of Parliament and the Constitution. In that sense there is judicial review by judges in different layers of the judiciary that very often finds ordinances of lower bodies incompatible with an Act of Parliament or the Constitution.

An important argument for the inviolability of Acts of Parliament was that Parliament itself, as the representative of the people, was best equipped to judge whether a certain Act of Parliament was incompatible with the Constitution. This opinion had many strong adherents in the

first half of this century (Struycken 1910). Nevertheless, the discussion of the appropriateness of judicial review was revived from time to time. During the preparation of the 1983 revision of the Constitution, a draft to create a form of judicial review was even circulated. Eventually, no constitutional review was incorporated in the Constitution, but ever since the discussion has continued.

The discussion of judicial review was fed by the increasing influence of international law on the case law of the Supreme Court and the lower courts. Nowadays we find ourselves in a peculiar situation: an Act of Parliament can be declared incompatible with self-executing provisions of international treaties, but not with the Constitution. This holds even when in the treaty and in the Constitution essentially the same principle is included in about the same words.<sup>8</sup> This inconsistency is nearly impossible to explain to non-Dutch scholars (Kortmann 1990, 336).

Another argument in favor of the ban on judicial review, the argument that Parliament itself is able to maintain a certain degree of quality in its legislative function, has become less convincing in recent years. As we mentioned earlier, the decreasing dualism between government and Parliament and the speed and pressure under which some drafts have passed Parliament, have occasionally resulted in botched-up legislation.<sup>9</sup> A notorious example is the so-called Harmonization Act of 1988, in which the rights of students were curtailed in a retrospective way. Ultimately an appeal to the judiciary failed, because the principle that an Act of Parliament is inviolable was upheld by the Supreme Court. The Court, however, noted that some aspects of the Harmonization Act were in conflict with general, though unwritten, rules of law and announced that it would not exclude a kind of judicial review in the future (van Koppen 1992).

It is not our purpose to sum up all the pros and cons that arise in the discussion on the question of judicial or constitutional review.<sup>10</sup> What matters here is that there is an overall tendency toward advocating a form of judicial review or creating a constitutional court (Kortmann 1990, 336; Stroink 1990, 25; Cliteur 1989, 1375; Van Boven 1990, 149). At the annual meeting of the Dutch Lawyers Association in June 1992, a clear majority favored the abandoning of the prohibition on constitutional review. The fact that most West European countries have a constitutional court will inevitably play a role, especially now that these constitutional courts "are intervening in legislative processes at an increasing rate" (Stone 1990, 89).

## EPILOGUE

The growing complexity of modern society and the development of international law, especially in areas such as fundamental human rights, have resulted in a judicialization of politics in some fields. We may assume that this tendency has not yet stopped, given the ongoing discussion about judicial review and the relatively unique position of the Netherlands at this point. This increase in the judiciary's power may also have some less favorable aspects. For example, until now the appointments to the judiciary in the Netherlands have had a relatively unpolitical character, but it is not certain that this will last for long. So perhaps the benefits of the judicialization of politics may partially be overridden by the politicization of the judiciary.

## NOTES

1. We use the designation "judge" only when the decisive authority, as in this case, can be seen as impartial and independent.
2. The 1987 revision is not relevant here.
3. In about the same way the Court of the European Community had to decide in questions that presumably were within the competence of the Council of European Ministers because that Council had too often failed to reach a clear political decision (Kortmann, 1990: 159).
4. To be exact: the Second Chamber of the Parliament, comparable with the House of Commons in the UK or the Bundestag in Germany.
5. Now Article 94, Constitution.
6. The only way to evade this situation would be the denunciation of the treaty, which is not an easy way out.
7. Now Article 120, expressing the same principle in other words.
8. See, for instance, Article 1 of the Constitution and Article 26 of the International Treaty on Civil and Political Rights.
9. See, for example, Damen & Hoogenboom (1989) on the extremely hurried legislation on the internment of refugees, after the Supreme Court had held this practice to be unlawful detention.
10. For a recent survey of these arguments, see, for example, Cliteur (1989), Van Boven (1990), and Stroink (1990).

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