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FOREWORD

Every four years the Académie Internationale de Droit Comparé organises a World Congress of Comparative Law. The board of the Netherlands Comparative Law Association feels highly honoured by the Academy’s decision to hold the XVIIth World Congress of Comparative Law in the Netherlands, in the summer of 2006. The congress will be held in Utrecht.

In the past the world congresses have created an excellent forum for information exchange and discussion between legal experts worldwide. Information exchange is the starting point for any comparative legal analysis. The world congresses have also been rare occasions where comparative legal scholars from different disciplines could meet.

Traditionally, the role of comparative law has been extensive in the Netherlands. This can be seen when looking at, e.g., the parliamentary and scholarly debates concerning the new Civil Code. Furthermore there is growing awareness that economic integration, be it regional or global, has an undeniable and unavoidable impact on Dutch law. The international reputation of the Dutch legal order as being open towards solutions developed by other jurisdictions played an important role for the Academy when it had to decide in Brisbane, Australia, four years ago, where the next congress would be held.

Comparative legal analysis is undeniably of growing importance in the Netherlands. This applies to the legislative process, judicial deliberations as well as to the curricula of law faculties. It is more and more realised that law as a learning process has much to gain from foreign experience.

Giving this growing importance of comparative law, more and more Dutch national organisations of legal experts now discuss topics not only on a strictly national, but also on a comparative basis. This has led to a changing role of the Netherlands Comparative Law Association. The association is focussing more and more on interdisciplinary comparative research, bringing together scholars from various fields and backgrounds.

I would like to thank the authors who wrote the Dutch national reports. The reports will give foreign readers a solid and in-depth insight into developments in Dutch law. Frequently, the reports themselves already contain comparative analysis, aimed at clarifying the description of Dutch law.

Finally, I would like to thank my co-editor, dr. Lars van Vliet, associate-secretary and treasurer of the Netherlands Comparative Law Association and lecturer in private law at Maastricht University. I am grateful to him for his continuing efforts to find national reporters and for his editing work. Many thanks also to Marjo Mullers from Maastricht University for her assistance in editing and for making all the texts camera-ready. The Netherlands
Comparative Law Association is also indebted to Intersentia which was again prepared to publish these national reports.

Prof. dr. J.H.M. van Erp
President Netherlands Comparative Law Association
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THE DUTCH COMMON LAW TRADITION:
SOME REMARKS ON DUTCH PRIVATE LAW AND THE IUS
COMMUNE

F. Brandsma

1. Introduction

Tradition, like possession, is nine-tenths of the law. Law must be based on
tradition; otherwise it is not law. Law that is changing every day is arbitrary.
Certainty and predictability are important aspects of law. I could go on and
on giving you truths like this, but I trust you will not need this kind of
persuasion.

The invitation to contribute to the XVIIth International Congress of
Comparative Law on the topic of ‘National Legal Traditions and Historical
Backgrounds’ was for me a very welcome one. For it would provide me with
the opportunity to state that there is no independent Dutch Legal Tradition
as far as private law is concerned, but there is a common Dutch tradition,
which in turn is part of larger European common legal tradition.

Before enlarging upon this theme I have to confess myself to a few
limitations which I have taken the liberty to bring to the subject. I will be
writing only about private law, because that is the only field of law I pretend
to know anything about. But I will be doing so the more gladly, because
private law is the only field of law with a common tradition on the continent
of Europe – or just Europe as the British would say – that goes back beyond a
couple of centuries.

This last remark already gives a clue to my thesis of the last but one
paragraph. A common tradition there was and is for Dutch private law, but
one could hardly call it national. Perhaps one could call it a common national
tradition. What do I mean with all this juggling with adjectives and abstract
mumbo jumbo? A short survey of Dutch legal history will perhaps be
helpful.¹

¹ I have tried to confine myself to refer to literature in English as much as possible.
2. The Common Tradition

The modern Dutch state goes back to 1813. Perhaps I should say 1798, because with modern I mean a unified Dutch state. In 1798 the Batavian Republic became a unified state. It was followed by the Kingdom Holland of 1806 under Louis Napoleon – yes, the brother of. And finally in 1813 the still existing Kingdom of the Netherlands was founded after the French influence on Dutch constitutional affairs was ended.

Before 1798 there was no unified Dutch state. There was the Dutch Republic as it is usually called, which existed until 1795, when the Batavian Republic was founded. Unification took three years, and a kind of revolution, to come to the Batavian Republic. Under the Dutch Republic there were seven or eight sovereign powers, the Dutch Provinces, with each its own legal system, if one dares to use this term before the nineteenth century. The Utrecht Union of 1579 founded the Dutch Republic. Seven Provinces signed the Union at that time. The eighth, Drenthe, was late and always made to feel that.2

The Union was a treaty between the seven Provinces which made their defence and foreign affairs a common task. The States General were to be entrusted with these tasks and the daily affairs were run by the Council of State. All other government business remained within the competence of the States Provincial. Each one of them was sovereign and so the law was a Provincial matter. So there was no unified Dutch nation before 1798, no single Dutch law, and no single national Dutch legal tradition. But there was a common element in the law of the Dutch Provinces, an element common not only in the Dutch Republic but in the rest of Europe – in the British sense – as well. It was, of course, the *ius commune*, the Roman-canon law which was used as a subsidiary source of law.3

Everywhere on the continent of Europe there was a mix of primary local law and subsidiary law. This meant that the *ius commune* applied only to the extent that there was no local law. So there was no general *ius commune* in the sense that it applied everywhere to the same extent. But there was this common element in every legal system.

Roman-Dutch law for instance was the mixture of the local law of Holland and the Roman law as applied in Holland.4 The use of ‘Dutch’ here is a bit confusing, because it does not mean the Dutch Republic as a whole, but only Holland. Roman-Dutch law has become, however, so common a term, that I will continue to use it. Roman-Frisian law, to name another example, was the mixture of the local law of Friesland and the Roman law as applied in Friesland.5 Etcetera, etcetera. Local laws were of course diverse in

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2 Cf. on the history of the Dutch Republic e.g. Israel 1995.
3 Cf. e.g. Zimmermann 1990.
the various Dutch Provinces, but their common tradition came from the *ius commune*.

Legal unification came to the Netherlands in 1809. The Kingdom Holland as it was then called got its own private law code, entitled the Code Napoleon arranged for the Kingdom Holland. As its title suggests this was a version of the French Code Napoleon, with some adaptations importing Dutch law. This brought Dutch law into the French tradition of the *ius commune*, because this tradition was the main source of the Code Napoleon. In 1811 the Code Napoleon in its original form was introduced into what had become a Dutch part of the French Empire. After the departure of the French in 1813 the Code civil as it was now once again called remained in force as long as it was not replaced by a Dutch code.

The Kingdom of the Netherlands came into existence in 1813 and got its first constitution in 1814. King Willem I wanted to replace the Code civil with a national Dutch civil code. He gave instructions to Joan Melchior Kemper to prepare such a code which had to be based on the Dutch national tradition instead of the French. Kemper’s difficulty, however, was that no single Dutch legal tradition existed, as I explained above. Kemper chose to incorporate mainly the tradition of the Roman-Dutch law, the law of Holland. Kemper was professor at Leiden University. He was trained in the Roman-Dutch law, and, moreover, the Roman-Dutch law had always been the most important and influential law in the Dutch Republic, with the Roman-Frisian law coming in second place, if sports terms are allowed in this context. In 1816 his project was debated in the Dutch Parliament, but a majority of the members opposed. The main reason for the rejection of Kemper’s project was to be found in the incorporation of Belgium into the Kingdom as decided at the Congress of Vienna. The Belgian representatives were decidedly against Kemper’s project, because it was too Dutch to their taste. Moreover, they had been living under the French code since 1804 and were accustomed to it. But not only were the Belgian representatives opposed. Kemper’s project was much too scholarly and extensive to the taste of a lot of representatives. It tasted too much of the musty room of the law professor. The king, however, would not give in and so Kemper tried his luck once again. His second project of 1820 was blocked as well. So much for the attempt to create a national Dutch legal code.

After the failed attempts of Kemper the Dutch Parliament went on to create a civil code by itself. The Belgian representative Nicolai of Liège was one of the main inspirators of this code. His influence led to a code based on the French code with, once again, a few adaptations importing Dutch law. In 1830 the new code should have been brought into force, were it not for the Belgian Revolution which eventually led to the separation of both parts of the kingdom and the establishment of the Belgian Kingdom. The new code was not abandoned, however. It took a couple of years to make a few cosmetic changes to make it more ‘northern’, but in essence the code of Nicolai became the Dutch Civil Code in 1838.
So since 1809 the French tradition of the *ius commune* had become part of the Dutch law. The situation remained like that in essence until 1992. In 1992 the main part of the Dutch private law, the law of obligations and the law of property and inheritance, was renewed by the introduction of a new Civil Code. For nearly fifty years this code had been in preparation. Professor Meijers had been given the task of recodification in 1947. He and his successors took into account for their project other civil codes as well.

In the course of the nineteenth century the German Historical School and its scholarly teachings of the *ius commune* then still prevailing in Germany became influential also in the Netherlands. Some of the theses of the so-called Pandectists were discussed in the Dutch legal doctrine and so filtered through via the courts and their interpretation of the civil code into Dutch legal practice. Just to mention one very influential doctrine: the legal act. So the German tradition of the *ius commune* mingled with the French tradition and produced a Dutch version, eventually in the shape of the new code.

But what about the old Roman-Dutch law tradition? Did the country of Grotius, Van Bynkershoek, Voet, Vinnius and Huber, just to mention a few illustrious names of the seventeenth and eighteenth century, forget its own legal heritage? Not quite. The discussions in the Dutch legal doctrine almost always took into account this strand of the tradition of the *ius commune* as well. This did not always lead to the adoption of the Roman-Dutch doctrine to the subject under discussion. The code of course had a French background, and so, if the two traditions were too far apart, the French tradition prevailed.

3. **Roman-Dutch Law and Third-party Enrichment**

For instance in the famous case of *Quint v Te Poel* the question was whether in Dutch law an action existed in the case of unjust enrichment. The case was quite simple, but the question involved was a difficult one. Quint had built a house on the instructions of Hubertus te Poel. When the house was finished Quint discovered that the ground on which he had built the house was not the property of Hubertus, but of his brother Heinrich te Poel. So when Hubertus refused to pay the bill Quint decided to sue Heinrich. He claimed Heinrich was enriched at his cost without any justification. The old Civil code, however, did not contain a general action for unjust enrichment. Specific instances of unjust enrichment were dealt with, but a general action was lacking.

Quint referred to Grotius in order to establish such a general action. He claimed that this action was part of the Roman-Dutch law and had survived

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6 HR (Dutch Supreme Court) 30 January 1959, *NJ* (Nederlandse Jurisprudentie = Dutch Case Law) 1959, 548.
7 Grotius (transl. by R.W. Lee, Oxford 1926).
the old Civil code. The action would still be available, although the code did not mention it specifically. The Dutch Supreme Court did not deny categorically that such an action did exist. Instead it gave as its opinion that in the abstract there could be instances where an obligation did exist even though it was not to be found specifically in any article of the code. Such obligations could exist where they fitted into the system of the code and were in line with cases which were provided for. In this instance, however, the court had objections to grant an action. The first objection was that granting such an action in this case could allow people to sue for enrichments which they had forced upon another person. Quint could have checked who the property belonged to before he started building. The second objection was that such actions could circumvent the laws of bankruptcy and that such a course of action should be granted by the legislature instead of the judicial branch. 

What the court did not say, but what subsequent research showed, was that Roman-Dutch law was not as clearly in support of granting the action in this case as the sole reference to the general remarks of Grotius implied. The case was a specific one in that it was a case of third-party enrichment. Whereas most enrichment cases are about enrichment flowing directly from one party to another, here the enrichment was of someone other than the one to whom the party providing the enrichment was performing. Cases like this were called ‘the most notoriously difficult of all enrichment constellations’. They came from ‘the dreaded third-party enrichment jungle’. The question whether an action should be given in cases like this was already in the ius commune ‘a problem that haunted the doctors’.

In the Roman-Dutch law opinion differed as to the desirability of acknowledging an action in cases like this. Gerard Noodt for instance concluded that the party performing could sue the party with whom he had contracted. The last one had acted on behalf of the third party and should try to be reimbursed by him. The Frisian author Ulric Huber, on the other hand, was in favour of admitting the action called actio de in rem verso utilis. Apart from Grotius he cited contemporary customs, moribus hodiernis, which would allow a person to sue a third party who was enriched by a contract the first person had made with someone else. 

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9 For a detailed discussion of this and other questions involved in this case see Brandsma 1994, p. 251-271, which is, however, as you might have guessed, in Dutch. Cf. Feenstra 1995, p. 197 et seq.
11 Dawson 1951, p. 67, no. 119.
12 Opera omnia, t. II, Leiden 1724, ad D. 15,3.
13 Praelectiones juris romanii et hodierni II (Franeker 1700) ad D. 15,3 (p. 520-521) and Eunomia Romana (Franeker 1700) ad D. 15,3,1pr. (p. 571-572).
14 Whether the text he cited in support of his opinion, D. 12,1,32, could be the foundation of such an action is, however, questionable. See Brandsma 1994, p. 263 et seq. The text most commonly cited as founding the actio de in rem verso utilis is C.
So, one could argue that the Quint-Te Poel decision was in line with the Roman-Dutch tradition, which was suspicious of allowing third-party enrichment actions, whereas the general two-party enrichment action was part of the same law. In accordance with this tradition the new code now has a general enrichment action: art. 6:212 Civil code. Whether third-party enrichment actions are covered by article 6:212 is still a matter of debate. 15 This debate wavers between following the German tradition of disallowing such actions altogether, a tradition which has its roots in nineteenth century Pandectist doctrine, and following the more liberal French tradition, which despite the enrichment-lacuna in the Code civil has embraced the *actio de in rem verso* in a very generous way. 16

4. **Roman-Dutch Law and Mitigation of Penalties**

Another example of the contribution of the Roman-Dutch tradition to modern Dutch law is to be found in the law concerning penalty-clauses. 17 The English reader will of course immediately object to such a term. Penalty-clauses are not allowed in the common law, clauses containing liquidated damages are. 18 The law on the continent is different. Penalty-clauses are allowed in principle, but the question is whether the amount of the penalty can be reduced by a court if it exceeds the amount of damages which have been suffered in a clearly unreasonable way. There were two strands in the *ius commune* tradition. The one went back to Azo, who gave as his opinion that a penalty once agreed upon could be exacted no matter what the amount, according to Roman law. 19 The other one was taken from canon law. A decretal by Pope Innocent III annulled a penalty and a gloss specified the basis for this decision: the principle of preventing unjust enrichment, which was an application of *aequitas canonic*, canon law equity. 20

Canon law influenced secular law. Especially a treatise by Charles Dumoulin, the famous sixteenth century advocate at the Parlement of Paris,
was influential in doing so.\textsuperscript{21} Dumoulin emphasized the damage assessment character of such clauses. Pothier was influenced by Dumoulin,\textsuperscript{22} but nevertheless the Code civil chose Azo’s Roman law solution.\textsuperscript{23} Freedom of contract was the main reason to do so. The old Dutch Code of 1838 was entirely based on the French Civil Code in this respect.\textsuperscript{24}

Roman-Dutch law, however, allowed penalties to be mitigated.\textsuperscript{25} Voet, for instance, referred to moribus hodiernis, contemporary customs, which had given the courts the authority to mitigate penalties, although Roman law allowed unrestricted penalties.\textsuperscript{26} Van Bijnkershoek sought to base the restrictions on penalties on Justinian’s Code 7,47, which restricted damages in general to twice the value of the performance to be made.\textsuperscript{27} The Supreme Court of Holland, Zeeland and West-Friesland concurred.\textsuperscript{28} A French connection is to be found in Groenewegen who refers to decisions of the Parlement of Paris.\textsuperscript{29}

The New Dutch Civil Code returned to the tradition of Roman-Dutch law, which was the tradition of the French \textit{ius commune} as well.\textsuperscript{30} In the parliamentary history of article 6:94 reference is made to Pothier to motivate the authority of the courts to mitigate excessive penalties. The Dutch courts had already begun to anticipate the New Code in the eighties of the twentieth century and started to mitigate excessive penalties.\textsuperscript{31}

5. Roman-Guelders Law, Canon Law and Frustration

The canon law component of the \textit{ius commune} tradition was at work in the field of frustration as well. If a change of circumstances which was not contemplated by the parties made the discharge of a contract unreasonably burdensome for one of them Roman law did not provide him with a remedy. A gloss to Gratian’s \textit{Decretum}, however, introduced the implied condition ‘if the circumstances will remain the same’ into the law of oaths.\textsuperscript{32} This became

\begin{itemize}
\item \textsuperscript{21} Tractatus de eo quod interest, nrs 159-171 (Opera, Paris 1612, t. 2, col. 906ff.). Cf. Fliniaux 1929, p. 233-247.
\item \textsuperscript{22} Traité des Obligations, nr 346 (Œuvres, Paris 1805).
\item \textsuperscript{23} Cf. De Maleville 1807, ad s. 1152 and 1231.
\item \textsuperscript{24} S. 1285 and 1345.
\item \textsuperscript{25} De Wet 1979, p. 63 et seq and 206; Wessels 1951, § 3367 et seq.
\item \textsuperscript{26} Commentarius ad Pandectas, The Hague 1731, D. 45,1 nr 12f.
\item \textsuperscript{27} Quaestiones Juris Privati (in: Opera Omnia, Leiden 1767, t. II) 2,14. Van der Keessel 1961ff, 3,1,43.
\item \textsuperscript{28} Van Bijnkershoek 1926ff., nrs 2558 and 3230 (and his Quaestiones Juris Privati, l.c.).
\item \textsuperscript{29} Tractatus de legibus abrogatis et inusistant in Hollandia vicinisque regionibus, Amsterdam 1669, ad C. 7,47 nr 10.
\item \textsuperscript{30} Cf. Schelhaas 2004 (with a summary in English); Brandsma 2000 (Dutch only).
\item \textsuperscript{31} The Belgian courts had started to do so already. The Code civil was altered in this respect in France (Laws of 9 July 1975 and 11 October 1985) as well as in Belgium.
\item \textsuperscript{32} Gl. Furens ad C. 22,9,2,c. 14: \textit{ Ergo semper subintelligitur haec conditio si res in eodem statu manserit…} (Decretum Gratiani… cum glossis, ed. Turin 1620, col. 1258.) The gloss refers to D. 46,3,38pr. for the wording of the clause.
\end{itemize}
known as the implied condition *rebus sic stantibus*. The roots of this implied condition are to be found in Seneca and Cicero, who gave as their opinion that someone was sometimes not morally bound to fulfill his promise if a change of circumstances occurred. The civil law followed track through Bartolus and broadened its scope through Baldus and Jason de Mayno even beyond the boundaries of the law of contracts.

Roman-Dutch law, however, does not seem to have applied the *clausula rebus sic stantibus*. The only ones who write about it are Grotius, Van Bijnkershoek and a certain Mr Vink. Grotius and Van Bijnkershoek do so only in the context of international law. Mr Vink is the only one who favors application of the *clausula* to the law of contracts, but he did so in his thesis of 1803, six years before the abolition of Roman-Dutch law, so he cannot have had a lot of influence on the law of his days. No court decisions apply the doctrine in Holland.

A thread of the tradition here is to be found in the law of Guelders, which one could call Roman-Guelders law. A legal opinion of Hendrik Schrassert dated 19 December 1692 gives an application of the *clausula* to the case at hand. The opinion has not been noted so far. It is a very isolated instance of application of the doctrine. A thread, but still... Schrassert based himself on Elbertus Leoninus, a sixteenth century law professor in Louvain. Leoninus eventually became chancellor of Guelders in 1581, so that is your Guelders connection.

The Old Dutch Civil Code did not know an article on frustration. The courts, however, saw a possibility of applying the doctrine through the article which provided that contracts should be discharged *bona fide*. The new code eventually embraced the doctrine in article 6:258 and picked up the thread of tradition woven in Roman-Guelders law.

In the field of public law the tradition was stronger, as I already indicated. This tradition also remained influential as the Dutch Supreme Court seems to be inclined to apply the doctrine more readily if a government body is one of the contracting parties. A change of policy by such a body can be taken as a change of circumstances which triggers the doctrine of frustration, according to the court.

33 Cf. Feenstra 1974, p. 77 et seq., who doubts whether the glossator, Johannes Teutonicus was the first to formulate the doctrine like this (p. 82). See also Zimmermann 1990, p. 579 et seq.
34 Seneca, *De beneficiis*, 4,35,2-3; 4,39,4; Cicero, *De officis*, 1,10,31-32; 3,25,94-95.
35 Cf. e.g. Rummel 1991 (a German title, no doubt).
36 Grotius, *De iure belli ac pacis* 2,16,25,2; Van Bijnkershoek, *Quaestiones juris Publici*, lib. II, cap. X.
37 Vink 1803.
38 Schrassert 1740 ff., vol. 4, cons. 21. Cf. e.g. Roberts 1942, p. 281 et seq.
39 Schrassert 1584, cons. 21.
6. **Roman-Frisian Law and Compensation for Lawful Government Action**

An example of a tradition which has not yet been transformed into positive law, but which is influencing the current debate is to be found in the so-called Roman-Frisian law. It concerns the discussion about the right to be indemnified for government actions which are in itself lawful. In contemporary Dutch law the basis for indemnification is a rather peculiar one. Because this matter has not been dealt with by the legislature, the courts had to find a solution. They did so by applying the general tort action which Dutch law knows, as do the other continental civil law systems. The problem was of course how to make a tort action the basis of indemnification for lawful actions.

The reasoning ran as follows. The lawful action in itself did not provide the person who suffered the damages as a consequence of the government action with the general tort action. But if the authorities declined to indemnify the victim the government action turned into an illegal action. The result was that the victim could claim damages if the authorities did not pay for actions which were in itself lawful. This was a tort which existed only in not paying for lawful actions. A tort which may be committed if one pays. Circular reasoning at its best, I would say.

Dutch legal doctrine still debates this rather odd solution, but Dutch legal practice has coped with the problem in a practical way. The victim gets indemnification.

The Court of Friesland already solved this riddle in a much more elegant way in 1611. It was a case in which a farm had to be demolished for military purposes. Thanks to the demolition in part Friesland was saved of complete Spanish occupation in 1580, at the beginning of the Dutch Revolt. But the owner of the farm nevertheless liked to be compensated by the Frisian authorities. He finally got permission to sue the States Provincial in 1611, during the Twelve Years Truce. He based his claim on the Lex Aquilia, which provided the action for unlawful damage to property. The authorities, of course, defended themselves by claiming absolute necessity and public interest. Their actions were lawful on these grounds.

The court, however, took the opportunity to reward the plaintiff with compensation on the basis of the so-called Lex Rhodia de iactu, the Rhodian law on the throwing of goods overboard at sea. In the case of what is called general average loss is suffered, because the master of a ship finds himself forced by stormy weather to throw part of the cargo overboard to save the vessel and the rest of the cargo. Under the Lex Rhodia the owner of the cargo

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41 Lokin, Jansen & Brandsma 2003, p. 252 et seq.
42 Cf. e.g. Israel 1995, p. 169 et seq.
43 They relied on D. 9,2,45,4, Bartolus and a gloss by Accursius, Gl. De bent, on D. 39,2,31pr.
which has been sacrificed is awarded the right to spread his loss amongst all those concerned, i.e. the owner of the ship and the owners of the cargo which has been saved. Each one of them, including the owner suffering the loss should contribute to the damage suffered in the interest of all.\footnote{44}{D. 14,2,1-2. Cf. Zimmermann 1990, p. 406 et seq.}

In Roman law this law of general average was applied only to damage suffered lawfully at sea. The Gloss, however, commented on D. 14,2,2pr. as follows.

And it should be noted that, if I suffer something for the sake of the common good or in order to prevent another person from suffering loss, I must be able to obtain compensation.\footnote{45}{Gl. Aequissimum. Et not. quod si quid pro communi utilitate, vel alterius damni patior, quod mihi est restitutio facienda.}

Baldus inferred from this that in case of a fire a neighbour’s house could be pulled down to prevent the fire from spreading, but all the neighbours benefitting from this had to contribute in order to compensate the owner suffering the loss.\footnote{46}{Commentaria, Venice 1586, ad D. 14,2,2.} According to Accursius this could be done through an action based on taking care of the affairs of another person without mandate,\footnote{47}{Gl. Agere potest.}

This doctrine became the\footnote{48}{Gaill 1690, II, Obs. XXII, nos 4 and 5.}\textit{communis opinio doctorum} and was applied, for instance, by the Reichskammergericht, the Imperial Court of the Holy Roman Empire.\footnote{49}{Van den Sande 1635 etc., 5,7,3.} The Court of Friesland chose to follow this\footnote{50}{Voet 1723, ad D. 14,2 no. 18.}\textit{ius commune} tradition.\footnote{51}{Decisiones Frisicae, 5,7,4.}

Roman-Frisian law was bolder in this respect than Roman-Dutch law. Voet rejected the application of the Lex Rhodia to cases on land.\footnote{52}{Praelectiones juris civilis, Franeker 1678 etc., ad D. 9,2, no. 11f.} He stated that in the case of the house pulled down the circle of beneficiaries could not be drawn with any kind of certainty - next-door neighbours, the whole street, part of the city, the whole city? – as was possible on board a ship. So the circle of contributors could not be defined. But the case of lawful government action was different as the Court of Friesland decided. The loss was then suffered in the public interest. So the authorities should be liable. They in their turn, of course, paid with the tax payer’s money and so everyone concerned contributed, including the owner suffering the loss.

The significance of this decision was long in doubt. Van den Sande was to blame for this, because he reported a case which seemed to be similar, in which the Court did not grant the plea.\footnote{53}{This was a decision of 1623 and so it seemed the Court had changed its mind. Ulric Huber concluded that both cases were irreconcilable.} As the archives learned, however, Van den
Sande’s rendering of the facts of both cases was incomplete. The reason to reject the claim in the second case was that the orchard which had been demolished, had been placed under the city walls of Leeuwarden in contravention of a prohibition to construct buildings close to the city walls, a prohibition for obvious military reasons. What Van den Sande did not mention in his report of the first case was that the farm had already been in place before the fortress to prevent the Spaniards from advancing had been built. No blame on the owner in that case. So the ground-breaking decision of the Court of Friesland of 1611 was vindicated. The Dutch Supreme Court still has to follow track. According to one author it already did. Anyhow, this case is a fine example of the fruitful contribution the *ius commune* tradition in one of its emanations can make to contemporary Dutch law.

7. Conclusion

Other Roman-Frisian traditions could be summed up as well. But the message will be clear by now I think, so it is time to sum up. The tradition which still influences contemporary Dutch law is not national. Before the codifications there was no national law. There is, however, an interprovincial Dutch legal tradition, as I would like to call it. Of the various Provinces of which the Dutch Republic consisted the law of Holland was, of course, prominent. It has been known as Roman-Dutch law for centuries. Of the other Provinces Friesland came in a good second place. The Frisians even prided themselves in applying Roman law much more undiluted than anywhere else in the Christian world. The remaining Provinces had their own brand of Roman-local law as well.

The unifying element in all this was, of course, the Roman law element. This and the canon law element formed a *ius commune* tradition which influenced not only the Dutch traditions, but also the traditions of the other continental European countries. Starting with the glossators – culminating in the Gloss of Accursius -, followed by the commentators like Bartolus and Baldus, almost each and every possible solution to the legal problems which occur again and again had been tried and tested. Moderated by canon law equity these suggestions were put to practice by the courts, no matter whether the Parlement of Paris, the Imperial Court of the Holy Roman Empire, the Supreme Court of Holland, Zeeland and West-Friesland, or the Court of Friesland was involved.

So the tradition to be stressed is, I am happy to say, not predominantly national in character. It is on a wider scale international, but at least at the Dutch level interprovincial. Such traditions are of advantage to every legal

53 Lokin, Jansen & Brandsma 2003, p. 265 et seq.
system\textsuperscript{56} which is not preoccupied with navel-gazing. One can, of course, imitate an ostrich if one wants to, but a level-headed view may be preferable. Why invent the wheel every time all over again?

The reader will, I hope, not object that I have taken the examples I have given from my own research on the matter. For how could I have done otherwise? They are examples and so the overall picture is as yet incomplete. But the purpose of this contribution was not to be complete – the best way to bore is to say everything, as Voltaire said. The purpose was to show how legal traditions are still helpful in making contributions to contemporary Dutch law.

\textsuperscript{56} Brandsma 2001, p. 35 et seq.
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1. Introduction

Developments in genetics hold a strong promise for future possibilities in the cure of diseases and the prevention of health hazards. Research by Groningen University has e.g. brought to light that presently unknown mutations of alleles on the fifth chromosome make children susceptible to the adverse effects of passive smoking. Further research is done to identify the specific alleles and to find out how to influence the processes set in motion by the mutation. This kind of research and its results give rise to many legal and ethical questions. The example described above seems rather innocent in this respect but even here moral issues can rise. Should parents that smoke have their children tested on the presence of the mutation? Should they only test the children if there are more concrete indications for doing so? Should they stop smoking if their child carries the defect? Are these only ethical questions or can they also become legal questions and if so, under what conditions? These are difficult questions that are not always easy to answer, drawing from existing laws and regulation.

This report deals with the legal limitations to genetic research. The emphasis in this report is mainly on human genetics. Within this subject, three themes will be addressed. The first theme addressed is transparency. More than with any other technology, in biotechnology it is difficult to imagine what the positive or negative effects of research will be. Also the choices in what to research are very great. In such circumstances, transparency with respect to (intended) research requires explicit attention. Transparency can take away unnecessary fears and renders decision-making more democratic. Transparency does, however, not come by automatically. It may be burdensome and might place research in a less favourable light than would have been the case if other choices with respect to transparency had been made. In short, there is ample reason to address transparency in this report. As a second theme, this report will address the limits to freedom of research. Freedom of research finds its limits in other values and interests at stake in genetics. We will see that the Dutch government has devised a framework for describing the relevant values, interests and norms in genetics. This framework will prove useable in dealing with the limits to
freedom of research. Finally, in order to influence (research) behaviour regulation is necessary. The existing regulatory instruments are however not always as effective as may be desired. Genetic research does not neatly fit in regulatory pigeon holes. Genetic research does also not stop at the state frontier. Regulation of genetic research at the national level has therefore definite shortcomings. At the international level, a national government is only one of many players. It is difficult to influence international regulation in such a way that it sufficiently reflects an individual country’s moral preferences. In short, the relation to international regulation and shortcomings of traditional regulatory means is the last theme addressed.

2. **Transparency**

The promise of the undiscovered and unexploited potential inspires researchers to move the frontier of the state-of-knowledge and the state-of-art further towards the presently unknown. The progress of genetic research has many and profound societal implications. In the (near) future important decisions have to be taken. Modern biotechnology is, however, not a technology as any other. On the one hand, the technical aspects are complicated. Without explanation by experts it is easy to misunderstand modern biotechnology or its applications. On the other hand, biotechnology has potentially far reaching effects upon society and touches upon controversial moral issues. The combination of both characteristics makes that the understanding of biotechnology and its societal implications are vulnerable to misconceptions and biased views.

In view of the foregoing, the Dutch government recognises the relevance of a public debate on societal aspects of biotechnology. It is therefore not surprising that the Dutch government tries to stimulate the public debate on modern biotechnology by taking the initiative to debate.\(^1\) Transparency – brought on by a debate – has many beneficial effects, e.g.: taking away fears and prejudices, enabling members of the public to specify their objections to developments, enabling them to exercise their democratic rights in an informed way, gaining support from the several fractions of the public for new scientific developments, etc. A debate bringing by these advantages has however not yet materialised. The debate is confined to limited fractions within the public and has not been picked up in wide circles. The debate is furthermore complicated by the fact that different stakeholders may want to adjust the public image of aspects of biotechnology in a way that is favourable to their own purposes.

With respect to transparency, a special responsibility rests on the shoulders of scientists. They have the knowledge of the newest developments and are best suited to inform the ‘public’ in an objective way, but even for scientists, this is not an easy task. It requires an extra effort to

\(^1\) *Kamerstukken II* 2000/01, 27 428, nr. 2 (Nota biotechnologie), p. 21-23.
visualise biotechnological developments for a layman. To communicate with
the public about biotechnological research is still a formidable challenge. In
the research program ‘The Societal Component of Genomics’ (which is
funded by the Dutch government) funding is explicitly made available for
the imagination of ‘hard’ biotechnological research and its results. In fact, it
is one of only three legs of the research program. Since the first projects
within this program only got the green light at the end of 2004, it is too early
to report about any findings.

Transparency concerns not just the core technology itself but also the
applications with which the public is confronted. In 2003, the Rathenau
Institute – a prominent Dutch research institute of the social sciences –
formulated recommendations on food genomics, amongst which was a
recommendation on transparency:

‘The government must, via institutes or the flow of money, etc., ensure the
scientific independence and provision of information in the public domain
with regard to the track records of producers and products, healthy nutrition
patterns and the role of functional foods therein, and the risks that are
associated with it’.

The existing structures for the understanding of food safety are no longer
adequate for dealing with functional foods. There is a practical need to
educate the public – functional food that is good for me may not be so for
you. There is also a need to enable the public to decide in an informed way
on the acceptability of the products of food genomics. Researchers play in
this respect an ever increasing role as a source of – hopefully – objective
information.

3. Limitations to the Freedom of Research

Freedom of research does not bestow researchers with an unlimited freedom
to pursue their research interests. There are other values and interests that
may conflict with the exercise of research freedom and set limits to objects
and methods of research.

The Dutch government devised a general framework for the assessment
of biotechnological developments. This framework provides a neat structure
for describing regulation governing (or limiting) genetics and genetics
research.

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2 See <http://www.society-genomics.nl/>.
3 Gremmen et al. 2003, p. 148.
3.1. The Framework for the Regulation of Biotechnological Developments

For a basic understanding of the framework, it is necessary to recognise that in argumentation with respect to biotechnology two types of ethics can be discerned. On the one hand, there are the ethics of consequences. Here, the consequences of an act are considered and on the basis of the consequences it is decided whether the act leading up to the consequences is desirable or not. This type of argumentation often amounts to the result that the most luck for the greatest share of the people is the best. On the other hand, argumentations may build on the ethics of principles. The ethics of principles assume that there are principles that may not be violated, independent of what the consequences of an act are. The difference between the two types of ethics has a high explanatory value in modern biotechnology. This can be easily demonstrated with the help of the four main values involved in biotechnology, which the Dutch government distinguishes. Biotechnology research has to respect the following four types of values:

- Sustainability: the processes that are decided upon now must not shift costs to the future. We do not want to leave the world to later generations in worse state than it is now. Decisions in this field often involve ethics of consequences.

- Welfare, health and safety: these are basic values. They are a precondition to materialise other values. Issues involving these values are decided on the basis of ethics of consequences.

- Human dignity and the intrinsic value of the animal: humans and animals have a value in themselves and are worthy of protection, irrespective of any conditions. An animal deserves e.g. protection irrespective of whether it is useful to man. Decisions in this field are governed by ethics of principles.

- Freedom: humans are able to reflect upon their own lives and make choices that affect their lives. Such choices presuppose the freedom to choose. For the exercise of such freedom, information is essential. These values are governed by ethics of principles.

The government considers these four values to be the core values that are at issue in the application of biotechnology. Apart from those values, there are many interests involved in biotechnology. The government mentions e.g. the freedom of science and economic interests as specific interests. For the purpose of this report, the core values can be viewed as the principal limitations to the freedom of research.
The discerned values and conflicts between them are governed by norms. The norms may take a type of organism as their object, e.g. a micro-organism, plants, animals or humans. With micro-organisms and plants often ethics of consequences will govern decisions. With animals and even more so humans ethics of principles will enter the equation as well. Alternately, the norms can take an act as their object, e.g. research with human subjects.

Norms can also be categorised according to their source and the way in which they operate.

With respect to the source, self-regulation and government regulation can be distinguished. Although this straightforward distinction is valuable for analytical purposes, in practice many intermediate forms of regulation exist, such as self-regulation that is instigated by the government or self-regulation where the government specifically channels or sanctions regulation by the actors involved. With respect to the way in which rules operate, substantive norms and process norms can be distinguished. Hereinafter, I will shortly touch upon pure self-regulatory norms concerning research. Subsequently, I will address government and intermediate regulation governing research. With respect to these forms of regulation, I will address substantive and process norms separately.

3.2. **Self-regulation of Research**

The values and interests involved in genetic research do often warrant government regulation. Since government regulation cannot cover all aspects of the field, specially where technical developments take place at great pace, there is a role for self-regulation. The Dutch biotechnology association (*Nederlandse Biotechnologische Vereniging*) has devised a professional code for biotechnologists. Some twenty prominent biotechnology firms have acceded to the code. The code has been the basis on which the European Federation of Biotechnology has set up the EFB Code of Conduct for Biotechnologists.4

The Dutch medical sector of course has its own code of professional conduct. The Dutch government sees only a limited role for self-regulation in biotechnology, because of the fundamental values involved. One could question whether this is justified. However, the Dutch government has defined self-regulation in a restrictive way. In the section about process norms, we will see that governmental process norms give the scientists and important role in the decision making process with respect to research.

3.3. **Substantive Norms and Research**

According to the Dutch government, a government should only establish substantive norms if they embody the undisputed way to deal with undisputed values. In the field of human genetics, the Dutch Embryo Act of

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provides a few examples. Certain acts are forbidden because they go against well established fundamental values. The Embryo Act forbids e.g. reproductive cloning (Art. 24 sub f DEA). It also bans the intentional modification of the genetic material of human germ cells, with which a pregnancy is to be brought about, or as it is often termed: change the genetic identity of humans (Art. 24 sub g. DEA). Both considerations of safety and of protection of the human dignity have inspired this ban.

The Embryo Act also forbids gender selection on non-medical grounds (Art. 26 DEA). The argument of the government for the prohibition is that gender selection must not become purely an object of the wishes and desires of the parents. Procreation would thus become instrumental in character. Strangely the Embryo Act is silent on other eugenic interventions. Of course, the prohibition of modifying human germ cells comes some way, since such modification could conceivably be used for eugenic purposes. However, eugenic interventions, such as selection of embryos on characteristics such as the colour of the hair, body length etc., are not dealt with. Apparently, the government chooses to await technical developments and to act when more clarity exists with respect to the future technical possibilities.

The Embryo Act forbids creating embryos specially for scientific research or for other purposes than bringing about a pregnancy (Art. 24 sub a. DEA). ‘Specially created’ embryos may also not be used for non-pregnancy purposes (Art. 24 sub a. DEA). With the latter ban, the Embryo Act makes the use of embryos imported from abroad illegal, at least for the indicated purposes. The implication of the ban is that scientific research into the development of therapeutic cloning is illegal. Therapeutic cloning is the creation of an embryo that is genetically identical to a patient, in order to breed tissue from the stem cells of that embryo for the therapy of the patient.

The Embryo Act does however not foreclose all research with embryos. Under certain conditions, the Embryo Act allows scientific research with embryos left over after IVF treatment. This is further governed by process norms and will be dealt with below.

Furthermore, it is noteworthy that there is a statutory provision (Art. 33.2 DEA) for the lapse concerning the ban of Article 24 sub a DEA. The government can determine by decree the moment at which the ban lapses. The provision guarantees parliamentary involvement in the proceedings leading up to the decree causing the lapse of the ban (Art. 33.2 DEA). The parliament can even require that the ban be lifted by a ‘normal’ statute, and not merely by a decree. If the government wants to lift the ban, it must however come forward with its plan before 1 September 2007. The present government has already indicated that it has no intention to do so. If this government finishes its term, the ban will certainly not be lifted using the expedited procedure of Article 33.2 DEA.

The decision to include the possibility to terminate the ban in the - at that time - Embryo Bill was taken by the - then - government after it weighed several values and interests involved in assessing the admissibility
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...of the special creation of embryos. In short, the government considered the human dignity, the progress of medical science, the support within society and the legal situation in other European countries. It found that there was no broad support in society for the creation of embryos for scientific research and that most European countries disallowed it. Given these facts and the value of human dignity, it decided to forbid special creation, but it did not want to close the door completely. It did not rule out that support in society might grow as time passes and the discussion about the subject progresses. It did also not rule out that foreign legislation may become more liberal. The government has therefore designed a framework which allows quick reaction without unnecessarily hampering medical research.

A question is how to evaluate this legislative technique? In my view, the government – with this technique – found a smart way to channel the discussion about the subject. Would no statutory ban have existed, embryos might have been created for scientific purposes. If public discussion would have risen as a result of a public outcry about such incident, discussion would have been much more polarised. Such discussion – if at all – takes place in parliament before any embryos are created. At the same time, a strong signal is given that biotechnology and discussion about the implications of its application is in constant flux and that the statutory ban may not be the final word on the matter. Such signal is important, because a normal statutory ban has, to some extent, the effect of fixing the status quo. That does not do justice to the constantly changing biotechnological reality and the discussion of its societal implications. Nonetheless, it is questionable, whether a lift by the expedited procedure would have done justice to the issue. Would the parliament not anyway have chosen for a real statute for dealing with the issue?

It is striking that human dignity is playing a smaller role than might be expected on the basis of the framework described above. It seems that the weight accorded to human dignity is indirectly determined by such issues as public opinion and other countries’ laws.

The government creatively deals with its own starting point that a substantive norm should only be brought about if discussion about the way to deal with the interests and values involved has led to a less or more stable conclusion. Here, the rule is used to channel the discussion process and not so much as a codification of the results of discussion. In the end the views on the issues involved proved more stable than the government anticipated. The division between substantive norms and process norms is less straight forward than the theory of the framework may imply.

That reality is always more complicated than theory is also illustrated by the implementation of a Biotechnology patents directive into Dutch law.  

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On instigation of the Dutch parliament, the government has appealed to the European Court of Justice with the aim of annulling the directive. The proceedings before the Court took a long time and in the end, the Court rejected the Dutch appeal. The government had, in meantime, set the process of implementing the directive into Dutch law in motion. The Dutch parliament had not laid its opposition against the directive to rest after the Court's ruling had been handed down. It is said that some members of parliament perceived the implementation trajectory as a second chance to water down the effect of the Directive. During the parliamentary proceedings of the implementation bill, many amendments to the bill were introduced. A number of these amendments cast doubt about the correctness of the Dutch implementation. One such amendment – introduced by Mrs. Witteveen-Hovinga e.a. – declared the commercial exploitation of patents relating to animals or plants contrary to *ordre public* or morality. The directive does not exclude patentability of animals and plants in such a general way. Based on Article 4 Directive only plant and animal *varieties* are not patentable, nor are essentially biological processes for the production of plants and animals. Subject to certain qualifications, Article 6 of the Directive only declares the process of modifying the genetic identity of animals contrary to *ordre public* or morality. The Amendment did not make it in the end, but this was only after the government exerted much pressure. With respect to other amendments the government was less successful. There is e.g. the amendment by Member of Parliament Stellingwerf. He introduced an amendment declaring processes endangering the life or health of humans, animals or plants or that cause serious prejudice to the environment contrary to *ordre public* or morality. According to Stellingwerf, the text closely resembles the text of Article 27.2 of the TRIPs Agreement. He failed to acknowledge that the TRIPs Agreement excludes such processes from patentability only where they are at all times contrary to *ordre public* or morality. A patent on such a process may not be excluded merely because its exploitation is prohibited by law. Nevertheless, the amendment has been maintained. As a consequence, an overbroad exclusion for dangerous processes is now enacted by and part of the Dutch Patent Act of 1995. A second amendment that made it into law but that was not the fruit of careful reflection was the amendment by Poppe concerning the delicate relation between patents and biodiversity. The amendment declares unpatentable inventions by which Article 3, Article 8 sub j, Article 15 section 5 and 16

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8 Van der Kooij 2003, p. 215-228.
9 *Kamerstukken II* 1999/00, 26538 (R 1638), nr. 11 (Amendment).
10 *Kamerstukken II* 1999/00, 26538 (R 1638), nrs. 16 and 37 (Amendment).
11 See art. 3 section 2 sub. e DPA 1995.
12 *Kamerstukken II* 1999/00, 26538 (R 1638), nr. 23 (Amendment).
section 5 of the Convention on Biodiversity are being infringed upon. The directive does not contain an obligation to include such restrictions in national law. According to recital 55, Member States must merely give ‘particular weight’ to the provisions of the Convention when implementing the directive, but they are certainly not obliged to codify them explicitly. On the contrary, recital 56 of the directive indicates that ‘further work is required to help develop a common appreciation of the relationship between intellectual property rights ... and the Convention on ‘Biological Diversity’...’. This relation between patent and biological diversity is still subject to discussion. It is therefore undesirable to foreclose discussion by enacting explicit legislation on this subject. Here again, it is doubtful whether substantive norms only come about as the result of finished discussion.

Patents on genes and gene sequences are a continuing source of discussion. According to proponents they are nothing new under the sun. They are patentable just like other compositions of matter are patentable. According to opponents they give too wide a protection to the patentee. The Dutch government defends the patentability of genes and gene sequences on practical grounds. In the first place, the abolition of their patentability as compositions of matter would immediately generate questions about the patentability of many other chemical compounds, such as proteins and protein derivatives that can be conceived as products from metabolic processes that are governed by gene sequences. Secondly, a limitation to process patents would burden patentees with problems of evidence. If a subject matter is found in the possession of a third party, the holder of a process patent can only substantiate a claim of infringement if he can prove that the subject matter was produced using a patented invention. That may not be so simple.

Here you see that substantive norms can become less rooted in *communis opinio* through technical developments.

The Netherlands does not have a national biobank. The Dutch Forum Biotechnology and Genetics has made a first exploration of the opportunities and possible pitfalls of setting up a national biobank. The Forum defines a biobank as a collection of body tissues for diagnostics or research, often also

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13 Article 3 of the Convention on Biodiversity concerns States’ responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Article 8 sub j concerns States’ ‘obligation’ to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Article 15 section 5 provides that access to genetic resources shall be subject to prior informed consent of the State providing such resources. Article 16 section 5 requires states to cooperate in order to ensure that patents and other intellectual property rights are supportive of and do not run counter to the objectives of the Convention on Biodiversity.

containing related data. A national biobank contains a large collection of materials of all citizens, or a representative fraction of the population (ill and healthy persons) that may be used both for prospective and retrospective scientific research. The government takes the viewpoint that it is up to researchers in the field to take the initiative to create a (national) biobank. The government merely provides suitable framework conditions. In this respect, it is worth mentioning that the government is preparing a bill on control over body tissues. A first draft is expected to be ready in 2006. The bill will also contain provisions on biobanks.

This section shows that there are many situations in which substantive norms are less rooted in *communis opinio* than would theoretically be desirable. Sometimes this is intentional, as we saw on the ban on the special creation of embryos. In other situations this comes about through forces from outside. Substantive norms can be overtaken by the reality of autonomous technical development. Also, holders of contrary views may just be a little bit more successful in influencing the lawmaking process.

### 3.4. Process Norms and Research

Research projects in genetics are subject to preventive oversight. Concentrating on the field of human genetics, the oversight is subdivided along the lines of values involved: environmental protection, health, and human dignity. A relatively recent development in Dutch legislation is the coming about of the Embryo Act of 2002 (hereinafter: DEA or Embryo Act). It specifically deals with sex cells, embryos and foetuses (which are defined as embryos inside women’s bodies). The Embryo Act mainly concentrates on the values human dignity and freedom.

Scientific research involving sex cells and embryos which are outside the human body is subject to review by the Central Committee on Research Involving Human Subjects (hereinafter indicated by its Dutch abbreviation: CCMO). As we have seen above, for scientific research, no use may be made of an embryo that has been created through transplantation of a cell nucleus specifically for scientific research (Art. 24 sub a DEA). Under certain conditions the Embryo Act allows scientific research with embryos left over after IVF treatment. These conditions concern both the way in which the embryos became available for research and the research itself.

The embryos must have been made available for the purpose of scientific research (Art. 12 DEA). When making the sex cells or embryos available, the donor may indicate that his or her cells may only be used for scientific research after he or she has been informed about the goal of the research and after he or she has given his or her explicit consent (Art. 6 DEA).

The research itself is judged on the basis of a research protocol that describes the intended research in its entirety. This protocol requires a

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15 Articles 10-18 Embryo Act.
positive judgement by the CCMO (Art. 3 DEA). The CCMO may only approve of a protocol if it meets five criteria (Art. 10 DEA): 1. it is plausible that the research will yield new insights in the domain of medical science, 2. it is plausible that the same results cannot be reached through other forms of scientific research than research with embryos and that they cannot be reached through research of a less far reaching nature, 3. the research conforms to the requirements of an adequate methodology of scientific research, 4. the research is being executed by or under the supervision of persons that are experts in the applicable domain of scientific research, and 5. the research conforms to other requirements that it should reasonably meet. If the embryos involved in the research are destined to be used for bringing about a pregnancy, stricter rules with respect to the consent and the approval of the research protocol apply (Arts. 16-17 DEA).

In 2003, CCMO allowed a research group to generate embryonic stem cell lines from embryos that were left over after IVF-treatment. This was a first for the Netherlands.

Medical trials involving humans are governed by the Act on medical-scientific research involving humans (hereinafter: AMR; in Dutch: WMO). Research protocols must be reviewed by a medical-ethical review committee (hereinafter: MERC; in Dutch: METC). From the decisions of a MERC, appeals can be lodged with the Central Committee on Research involving Human Subjects (known by its Dutch abbreviation as: CCMO). Certain research proposals must however in the first instance be reviewed by the CCMO. This is the case with scientific research in which the genetic material of human body cells is intentionally being modified and with scientific research involving sex cells.16

The CCMO can only approve of a protocol if it meets eight criteria. Five of these criteria closely resemble the five criteria mentioned in the Embryo Act (see above). There are three additional criteria: 1. the plausibility of a reasonable relation between the interest served by the research and the risks involved for the subject, 2. the plausibility that compensation to be paid to the subject has not influenced the consent for participation in the research in an undue manner, and 3. it is indicated in the protocol to what extent the scientific research may be beneficial to the subject. Apart from the approval of the protocol, the AMR contains elaborate rules on the subject’s consent and the researcher’s of his principal’s liability and obligatory insurance. The CCMO is competent to review proposals for gene therapy. In 2004, a proposal about gene therapy with respect to prostate cancer received approval. No new proposals for gene therapy were submitted to the CCMO in 2004. In the same year, 9 incidents involving gene therapy were reported.

16 Article 4 WMO and Article 1 Besluit centrale beoordeling medisch-wetenschappelijk onderzoek met mensen (Decree on central review of medical-scientific research involving humans).
to the CCMO, but none of these have led to the withdrawal of CCMO’s approval.

If modified organisms are being used in human genetics there can be a risk that the organisms find their way into the environment. If such risk exists, the pertinent research is governed by the ‘Decree genetically modified organisms Act environmentally hazardous substances’. Subject to some exceptions, research requires a permit from the Minister of Housing, Country Planning and Environmental Control. When deciding on an application for such a permit, the Minister can request the Commission on genetic modification (in Dutch: Cogem) to provide advice on the matter. The decision is governed by ethics of consequences. The decision on the application mainly hinges on a as precise as possible assessment of potential consequences.

Also in the sphere of the exploitation of research results, process norms apply. An example is the compulsory license in patent law. If the public interest requires such, the Minister of Economic Affairs can grant a compulsory license for the application of an invention. At the request of the Dutch parliament, the government has surveyed the use of compulsory licenses in patent law. In her letter of August 18, 2005, the Secretary of State for Economic Affairs indicated that the use that is currently made of the instrument is limited, but that she expected its use to increase in the future, not in the least, because of the decision of the WTO to allow compulsory licenses for the production and export of pharmaceutical products to (developing) countries that have insufficient production capacity to cover their internal needs. The effect of substantive norms (of patent law) is thus being reduced because process type norms gain importance.

4. Relation to International Regulation and Shortcomings of Traditional Regulatory Means

In the previous section, legal rules with respect to biotechnology were discussed and sometimes found lacking. The suitability of legal rules as an instrument of regulation was questioned. This section contains some observations in this respect.

A shortcoming of regulation is that it is (or seems?) to be lagging behind the development of technology. Regulation is always to a certain extent predetermined by the current state of technology. In the context of research in human genetics this is all too apparent. In the Netherlands, the oversight over research is e.g. fragmented, as we have seen above. Several bodies are each responsible for oversight with respect to partial aspects of research projects. This does not only burden researchers, it may also give rise to unclarity with respect to final responsibility. In the Netherlands, the first tentative steps are being set to a streamlining of oversight of research in

17 Kamerstukken II 2004/05, 27 428 & 27 543, nr. 65.
human genetics. The governmental bodies involved in the assessment of gene therapy research formed a working group. The aim of the working group was to devise a common working method in which the different assessment procedures are better attuned to each other and overlap is avoided. The efforts of the working group have led to the creation of a single counter system for all involved bodies. At this counter a single common application form is used for requests for the assessment of clinical research involving gene therapy.

The single counter does, however, not take away that the statutory competencies and responsibilities of the bodies have remained unaltered. A situation in which it may be unclear what governmental body bears what responsibility for the approval of research is thus continued. The Central Committee on Research Involving Human Subjects (hereinafter indicated by its Dutch abbreviation: CCMO) has indicated that it is a proponent of statutory reform, so that one body will carry the final responsibility for the assessment of research projects.18

The autonomous development of biotechnology creates its own challenges. Research and its results do not always fit in with existing regulation. This is e.g. the case with food genomics. Food genomics cannot be dealt with adequately under both regulation of food and medicine. The Rathenau Institute – an independent research institute – has called upon the government to create a suitable regulation framework for approval and testing of health claims for food.19

New developments are at the forefront of science. Often only a few experts exist that can assess the contents and implications of intended research. This enhances the suspicion of scientific incrowds. The persons deciding on the admissibility of intended research have excessively close ties with the research or researchers they have to judge. This situation is enhanced by the often close ties that exist between university research groups or professors and biotech companies. The Rathenau Institute has e.g. called for greater distance between the two in the context of genetically tailored foods.

The international character of developments calls for a suitable regulatory framework. Three expert committees on biotechnology have drawn up a trend analysis of biotechnology.20 In their analysis, they find that globalisation diminishes the national discretion to stop ‘undesirable’...

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developments at the border. Biotechnological developments that are not in accordance with ‘the’ Dutch vision will materialise elsewhere.

A self-evident reaction to that would be to escalate to regulation on an international level. Indeed, the three expert committees on biotechnology that drew up the trend analysis propose that as a reaction, a proactive strategy could be developed in order to influence international developments in a direction favourable to the Netherlands. An example could be to start negotiations in an early stage with *inter alia* national governments in order to come to common viewpoints that can also be sustained in the WTO-context.

The government is on the same track. Where national regulation seems little useful, unless it is embedded in international regulations, the Netherlands strive for the creation of international norms through the various organs in which the Netherlands participate. This is e.g. the case with the research exception in patent law. According to the Dutch government, clinical genetic research is not inhibited by the patent system, in so far as the research does not involve commercial acts that take place in the exercise of a profession or trade. The government admits that the border between scientific research and commercial exploitation of an invention is not always clear-cut and that the issue needs further clarification, but is does not take action on a national level. Since the European Commission is active on this subject, the government participates in the relevant European committees and awaits developments. Another example is the grace period in patent law. Dutch patent law does not allow for a grace period. According to the Dutch government a grace period should only be introduced as part of global harmonisation agreements.21

Although regulation on an international level seems an adequate answer to the globalisation of biotechnology, the national level has not lost its relevance. On the contrary, to some extent the national level has gained in relevance. An important asset of national law is the speed with which it can be brought about. It allows gaining experience with regulation in a relative short run. Early national regulation can confer upon a state the role of a guide-state. The Dutch regulation of genetic modification of animals is in a number of respects further reaching then the relevant EU-regulation. The prohibition in the Dutch Animal’s Health and Welfare Act of performing biotechnological acts with animals without permit is for the time being unique in Europe. The Danish parliament has ordered that specific legislation on genetic modification of animals should be created. The Danish government, faced with the task of drawing up a bill, has requested information from the Dutch government about the way in which genetic modification of animals has been regulated in the Netherlands.

The forum biotechnology and genetics mentions in its exploration of biobanks three reasons why a policy should be formulated on a national level:

- without significant national initiatives and a national best practice the voice of a smaller member state is simply not heard;
- if on a European level regulation must be formulated for a young branch of activities that are relevant to the communities and that have a strong potential, the tendency is to suppress possible excesses through the instrument of stringent regulation.
- the national implementation of European directives yields better results if a well developed national practice exists. In the implementation process, the national practice can be spared.

In conclusion, international regulation is often preferable, but it is by no means a panacea. There are very good reasons to regulate nationally, even though the problem that is regulated is international in character.

5. Conclusion

The Dutch government has grappled with the question of how to regulate genetics. It has devised a framework that gives some basic indications of how to deal with genetics. There are, however, no easy answers to the societal issues raised by genetics. It is too simple to think that cross border effects of genetics research merely require a strengthening of international regulation. It is too simple to think that regulation of substantive issues by statute could be confined to situations where *communis opinio* exists on the values and on the way to solve conflicts of interests and values. The government recognises this itself; it stresses the fluidity of the framework and necessity of constant change and awareness of changing circumstances.

As concerns developments that are just around the corner, early 2006, the Dutch government will present a bill on authority over body materials. Genetic research is a field that will remain interesting, for the near future and later.
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Van der Kooij 2003
1. Introduction

This report addresses the Rule of Precedent or *stare decisis*, the extent to which it finds recognition in the Netherlands, the approach to precedent by the Supreme Court (*Hoge Raad*) and other Dutch courts, and the theoretical underpinnings of that approach. Professor Hondius’ comments provide an excellent starting point for such analysis.

I salute the International Academy of Comparative Law’s decision to address this topic now. Although much – perhaps too much – has been written about precedent, I actually believe that some great comparative lessons can be drawn from the approach of the courts in the Netherlands and the theory of precedent they have developed. (See below, in particular § 9). I also believe that a thorough, worldwide, comparative study of this issue is desirable because the Civil Law and Common Law still lack a proper understanding of each other’s systems, and stubborn misconceptions linger in this area. To clear up a few:

- the importance of precedent is not measured by the sheer number of reported cases, or the frequency of citation to decided cases (see below § 4);
- binding force is an on/off category; it is not a matter of degree (at least not under traditional legal theory) (see § 6);
- *stare decisis*, the binding force of precedent, is not to be confused with accepting precedents as a source of law. Indeed, based on one strand of English legal thought, it is the exact opposite (see § 7).

I do not believe there is any sort of convergence among the various legal systems, notably the Common Law and the Civil Law, even if we consider that the highest courts in England, Australia, Canada and the United States ultimately do not consider themselves bound by their own decisions. Convergence implies a trend or some type of movement toward a position in the center, which is not what is happening at this point in time. England, for example, threw off its shackles in 1966, which is 40 years ago, hardly a reason to now all of a sudden speak of a ‘trend’. To the extent courts at the intermediate level remain bound by precedents of their own making, such a
rule is not being followed in the Netherlands and, by common agreement, deserves no following whatsoever.

This report describes a philosophy of adjudication that is not what the Common Law has traditionally used to justify *stare decisis*. But it fits better to explain when precedent should or should not be followed than the Common Law’s own theories, which are ultimately inadequate. The philosophy more or less prevails in the *Hoge Raad’s* jurisprudence. It is a flexible methodology that accounts for the *Hoge Raad’s* evolving case law without the ‘childish fiction’ that every new decision represents how the law should always have been understood. It is a conservative approach in the true sense of the word, but not *ultra*-conservative like strict adherence to precedent is.

In the spirit of this conference, however, I address first what I believe may fairly be called the ‘common core’ when it comes to the treatment of precedents in different legal systems.

2. **The ‘Common Core’: a Minimalist take on Precedent**

There are at least three benefits to adhering to precedent, each of which provide a good policy reason why courts should generally follow precedents. They may represent a ‘common core’ among a variety of approaches to precedent in the sense that lawyers from different jurisdictions would agree that these policies are sensible. But even when each of these three rationales are combined in support of adherence to precedent they present no more than a minimalist view of precedent. This minimalist view of precedent is based on expedience:

*Efficient use of judicial resources.* The first benefit or rationale, I believe, is judicial efficiency. Similar issues and questions of law come up all the time. Once a competent court has struggled with a legal problem and resolved it intelligently, other courts can, and should, reap the benefits of that mental exercise. Courts must not engage in reinventing the wheel; it is too time-consuming and – assuming the previous court is just as competent as the next – not productive. Avoiding duplication of efforts saves everyone’s time, including that of legal counsel. By adopting another court’s solution, or sticking with its own decision reached in an earlier case, the court is basically telling the advocates:

‘Look, you don’t have to keep pressing the same argument. We, and our colleagues on the bench, have already considered them, weighed them against other arguments, and rejected (or accepted) them’.

Thus if no substantially different arguments are offered, the presumption must be that the next case will be decided the same way. This rationale does not invoke the notion that the law should apply equally to all. It is efficiency, plain and simple.

*Setting the parameters of the debate.* A second rationale is also practical. In a world where ‘everything has to do with everything’ adherence to precedent
serves as an indispensable tool to focus (i.e., limit) the debate between the parties and the judge. Counsel may advance whatever argument they want; but it better be tied, even if only loosely, to existing law. If something similar has been done by another court an advocate’s claim that this court should act likewise is not outlandish or frivolous. It is at least a good faith argument. You cannot be ridiculed by your opponent. You will not be laughed out of court. You are within the bounds of zealous advocacy.

Predictability. Third, adherence to precedent serves as the necessary link between knowing the law as applied and the ability to predict how it is likely to be applied next time on a similar set of facts. That is important because specific facts test the scope and limits of general rules. Without adherence to precedent judicial decisions would merely be drops of history. The legal community would have nothing but a few general statements of the law. And general propositions, in the famous words of Oliver Wendell Holmes, do not decide concrete cases.1

3. **Consistency is not Stare Decisis**

The above rationales are, I suspect, unproblematic. There may be other good reasons to follow precedent, and they too may be part of the ‘common core’. But we need not elaborate on these or any additional rationales for one simple reason. They may explain why adherence to precedent is practical or expedient, how it saves time and effort, and how it allows practitioners to predict how current issues will be adjudicated. But they do not explain what is known as the rule of precedent or stare decisis. They do not constitute the rule of precedent, nor do they justify it. All they argue for is consistency.

But consistency in adjudication, with or without citation to precedent, is not the proper measure for the existence of the rule of precedent. There is a difference between adherence to precedent and adherence to the rule of precedent. The rule of precedent declares that precedents must be followed. The mere adherence to precedent (i.e., consistency) may be explained by any number of reasons other than that adherence is mandatory. Judicial laziness could be one of them; a preference for old rules reflecting traditional values may be another. Consistency may also be more benevolently explained by an honest belief that the existing rule is the better one. None of these potential explanations imply that a legal system recognizes the rule of precedent as part of the law. None justify the sweeping conclusion that the rule of precedent is on the rise in jurisdictions like the Civil Law, where courts more or less consistently follow the same rule or even cite precedent in their opinions, much less the vastly overstated proposition that legal systems are ‘converging’.

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4. **Quantitative Analysis cannot establish that Stare Decisis is on the Rise**

Various studies have made quantitative analyses of the role of precedents in Dutch law. They support a number of important observations that touch on the treatment of precedent in the Netherlands.

First, the *Hoge Raad* frequently cites to its own case law or makes general references to ‘settled law’ and also frequently incorporates by reference the advice given by the Advocate-General, which in turn tends to be based on a thorough analysis of the *Hoge Raad’s* case law and doctrinal writing. Second, explicit overrulings occur a few times (once or twice) per year and are thus very rare.³

Third, lower courts pay little attention to – or at least they do not cite – other lower court’s decisions with the exception of *Kantonrechters* who have jurisdiction in employment, landlord-tenant disputes and small claims, and whose decisions are often not subject to appeal.⁴ Lower courts cite to other lower court decisions both in support and to deviate from them. They sometimes cite to their own case law.⁵

The most noticeable finding is that the *Hoge Raad* cites its own case law both as a reason to decide likewise and to distinguish or deviate from them.⁶ Such case citations were rare in the early 1980s and have become fairly common practice today; their frequency went up from 1% in 1981-83 to 12% in 1992, and has risen since.⁷

None of these studies show that *stare decisis* is finding general acceptance in the Netherlands or that it is on the rise. The binding force of precedent cannot be measured by the sheer number of decided cases, or the frequency of the *Hoge Raad’s* citation to its own case law. In the Netherlands, the number of reported cases has steadily decreased in the last 15 years. And even if the total volume of reported and unreported cases went up and this were some sort of sign that case law has gained importance that would still do little to show a trend toward acceptance of the rule of precedent. A large volume more likely shows that the population has grown and with it the number of controversies, and perhaps also the number of judges on active duty. Or it is a sign that society has become increasingly complex and litigious, and that parties insist more and more on prosecuting their cases all the way up to the *Hoge Raad*, as has frequently been observed.⁸ It is true, we

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² See, e.g., Snijders 1978; Kottenhagen 1986; Struycken & Haazen 1993, p. 91 et seq.
⁴ Struycken & Haazen 1986, p. 125 (describing D’Oliveira’s and Kottenhagen’s results).
⁷ Struycken & Haazen 1986, p. 117-18, 130.
hope, that the more issues the Hoge Raad addresses, the fewer issues it leaves unresolved, and the more predictable the law becomes. But that does not show that the Hoge Raad feels obliged to follow precedents – just that it is making lots of them.

A court can increase its production of decisions by working more efficiently. As far as the Hoge Raad is concerned, part of that efficiency is due to technological improvements and the Court’s internal organization; another part has to do with its practice to summarily dispose of matters without opinion (or rather a very brief one) where the matter does not require reversal and raises no questions in the interests of clarity or the law’s development. See Article 81 RO (Judicature Act). Without addressing these alternative explanations one cannot possibly conclude that there is any change in the importance attached to precedents.

Even when the Hoge Raad cites its own cases that practice does not show it was bound to follow precedent. The Hoge Raad cites its case law both when it continues and when it overrules precedent. There is nothing in that practice that makes the cases cited in any way binding. Case citations are better explained by the ‘second rationale’ (see above): the implied message that litigants should stop bogging the overloaded court with more of the same. There certainly are cases that tend to show that the Hoge Raad supports this minimalist view of precedent. In HR 20 April 1990, NJ 1990, 525, for example, the Hoge Raad held that petitioner’s argument failed ‘on grounds set forth in paragraph 3.3 of HR 14 April 1989’. And in HR 15 June 1990, NJ 1990, 678, it summarily rejected the petitioner’s arguments ‘because the Court of Appeal’s decision is correct (cf. paragraph 3.2.2 of HR 16 March 1990, RvdW 1990, 68’.

Similarly, when summary disposition pursuant to Article 81 was introduced in the 1980s the legislature had the second rationale in mind: it would allow the Hoge Raad to speedily reject weak or frivolous arguments ‘which for whatever reason raise issues that have been repeatedly addressed and settled by the Hoge Raad’.

Even if one accepts minimalist precedent, as the Dutch courts undoubtedly do, one is still miles away from accepting stare decisis as a rule of law. To turn good policy into a broad and absolute rule that would apply even when the underlying policy does not, would amount to unwarranted formalism. Accepting strict adherence just because in 30, 40, 50 or even 90% of cases there are good reasons not to re-examine precedent in no way justifies summarily rejecting a good legal argument in the remaining percentage of cases merely because the issue has once been dealt with. If there is no continuity there is no law. But continuity alone does not justify the rule of precedent.

Quantitative analysis is nevertheless useful because the rule of precedent may be adequately disproved by a large incidence of non-

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9 Memorie van Antwoord Wijziging Wet RO no. 199953, at 11 (my translation).
adherence. If the Hoge Raad regularly fails to adhere to precedent (whether through express overruling or by simply not following (or ignoring) precedent, or indeed by narrowly limiting a prior decision to the precise facts on which it was decided, or otherwise), such failure serves as evidence that the rule of precedent does not exist in any meaningful sense. While explicit departures are rare in the Netherlands, their number is at the same time large enough from year to year to conclude that there is no rule of precedent in the Netherlands.10

5. The Lower Courts are not bound by any Precedent

Up to this point, we have assumed the rule of precedent is all about the horizontal relationship of precedents. Vertical stare decisis – the rule that a lower court must abide by the decisions of a higher court that has appellate jurisdiction over its decisions – is interesting from a comparative perspective because the Netherlands and the Common Law stand diametrically opposed. As far as I am aware, the lower courts in England (and Wales and Scotland) must follow their superior courts’ decisions.11 The same is generally true in the United States. English and U.S. courts have gone as far as rejecting ‘anticipatory overruling’ – departing from precedent ‘in anticipation of’ (and therefore prior to) the House of Lords’ or the U.S. Supreme Court’s actual overruling of its precedents, at a time when such overruling is perceived as imminent.12


See, e.g., Davis v Johnson (1979) A.C. 264; Cassell v Broome [1972] A.C. 1027; Young v Bristol Aeroplane Co. Ltd. [1944] 1 K.B. 718.

In Rodriguez de Quijas v Shearson, 490 U.S. 477 (1989), the United States Supreme Court held that a certain arbitration clause did not violate a provision of the Securities Act of 1933. The year before, the Court of Appeals had held the same, following the Supreme Court’s 1987 decision overruling Wilko v Swan, 346 U.S. 427 (1953) that such arbitration clauses were not contrary to the identical provision in the Securities Exchange Act of 1934. Although the Supreme Court agreed, with the Court of Appeals and again overruled itself with respect to the provision in the 1934 Act, as it had done with respect to the 1933 Act, it nevertheless criticized the appellate court, which it held ‘should follow the case which directly controls, leaving to the [Supreme] Court the prerogative of overruling its own decision’. Idem at 484; see also Hoffman v Jones, 280 So.2d 431, 440 (Fla. 1973); cf. Miliangos v George Frank (Textiles) Ltd. (1976) A.C. 443.
Again, there is no such rule in the Netherlands. There are rare cases that have suggested otherwise, but the predominant view is that the lower courts are not obligated to follow the case law of appellate courts or the Hoge Raad, and that the courts of appeal need not follow the Hoge Raad. For example, in Hof Amsterdam 19 December 1991, NJ 1993, 36, the Amsterdam Court of Appeals referred to the Hoge Raad's case law but declined to follow it because the cases were old, criticized in the literature, and there had been an increasing practice among lower courts not to follow these decisions.

Nor can the Hoge Raad’s practice of citing its own decisions be construed as implying that a lower court is being reversed because it failed to treat those decisions as binding. The Hoge Raad cites its case law even when the cited opinions issued that same day or a week earlier and have remained unpublished. For example, in HR 19 June 1992, NJ 1992, 590, the Hoge Raad held the trial court should have decided in accordance with the Hoge Raad’s decision of 21 June 1991. But that decision had not yet been published at the time of the trial court’s decision on July 4, 1991, which was only two weeks later. Clearly, references such as these serve only to indicate what the Hoge Raad believes to be the correct view that should have been applied below; they do not suggest that there is a rule of vertical stare decisis.

Obviously, the ‘sanction’ for a failure to follow precedent is likely a reversal (assuming there is a right of appeal), and that is, like in England and the U.S., the only sanction. Since reversal threatens a Dutch court the same way it threatens its Common Law counterparts, one may wonder why the rules are nevertheless so different between them. The explanation, I believe, lies in a few rules whose collective function is to strike a balance between uniformity of domestic law and judicial experimentation. Generally speaking, Dutch law perceives diversity of opinion (or judicial experiment if you like) among the lower courts as relatively unproblematic or even helpful to the development of the law – a view that distinguished scholars such as

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13 E.g., HR 4 November 1988, NJ 1989, 854 (stating that the appellate court reasoned ‘in accordance with HR 7 May 1982 . . . and therefore correctly’). Lower courts’ citations to the Hoge Raad’s case law are no sign that those cases are treated as binding authority: lower courts equally cite to various decisions of administrative or even foreign courts, which could never be precedential even if there were a rule of precedent; Struycken & Haazen 1986, p. 126.
14 Asser-Scholten 1974, p. 86; Van Dunné1990, p. 626 (in developing the law, the lower court does not need the Supreme Court’s imprimatur); Haazen 2001), p. 319-23. But see Abas 1985, p. 20 (suggesting an appellate court has an obligation to follow the latest Hoge Raad decisions).
15 In Rb Groningen 27 June 1990, NJ 1991, 196, the trial court openly questioned and examined the Hoge Raad’s case law, which it decided to give, for lack of a better alternative, the benefit of the doubt.
16 See also HR 8 November 1991, NJ 1991, 277 (citing its own decision of even date) and HR 25 September 1987, NJ 1988, 940 (same).
17 Struycken & Haazen 1986, p. 120-21.
18 E.g., HR 6 April 1990, NJ 1991, 689 (HR sticks with settled law despite different views held by trial court, appellate court and Advocate-General).
Jan Vranken and Jan van Dunne have expressly endorsed. Vertical *stare decisis*, on the other hand, serves the uniform application of the law, and is therefore, as such, less conducive to experiment. It thus counterbalances other factors at play within the Common Law that may have an opposite effect, such as the fact that there is no appeal as of right to the House of Lords or the U.S. Supreme Court, a factor that would otherwise foster almost uninhibited experimentation.

In the Netherlands, by contrast, litigants have a broad entitlement to judicial review by the *Hoge Raad* (Art. 81.RO). Thus, whatever diversity the absence of a rule of vertical *stare decisis* invites, it is severely curtailed by the lower courts’ desire to keep their reversal rates down.

Although each legal system will have to strike its own balance its own way, the Common Law experience with anticipatory overruling shows that vertical *stare decisis* goes too far in either system. Once it is clear, or at least likely, that obsolete precedents are ready to be buried and an appellate court knows it faces little risk of reversal if it did just that, it should not be forced to apply it one last time – just for the sake of it. That is wasteful and serves no purpose but pointless formalism. It does not even serve the minimalist reasons for consistency in adjudication (efficient use of judicial resources, setting the parameters of the debate, or predictability). It forces another round of litigation upon the parties, does not limit the range of relevant arguments which will inevitably expand before the Supreme Court, and it does specifically not set forth how the case will be decided next time.

It is pretty clear that the *Hoge Raad* would not play the vertical *stare decisis* game. Indeed, in HR 16 October 1992, *NJ* 1993, 167 it was willing to overrule its own 1960 decision precisely because it had been criticized and frequently not followed by the lower courts – quite the opposite of vertical *stare decisis* and an implicit endorsement of anticipatory overruling by a noble court whose willingness to listen to criticism is quite admirable.

For similar reasons I must admit to having a hard time understanding a rule that binds a court of intermediate jurisdiction to its own precedents. There is no such rule in the Netherlands but it apparently prevails in the English Court of Appeal in criminal cases. Maybe one could understand if a court would promulgate such rule for itself (but see below § 6-8). But for the highest court to reverse a court of intermediate jurisdiction on the ground that it failed to follow its own precedent simply makes no sense. If the highest court disagrees with the new decision it should say so and reverse on that ground (it should not cite to the old appellate decision in support of that reversal because a lower court decision is obviously not binding on the highest court). If it agrees, however, it should affirm. The court would have to come from Mars to agree with the appellate court in substance and yet

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20 Questions involving the liberty of the subject exempted, see R. v Taylor (1950) 2 K.B. 368; see also Cross & Harris 1991, p. 117-118, 163.
reverse because the appellate court failed to follow a precedent that both courts now reject. Rather it should take the opportunity to state its own view of the law\textsuperscript{21} and be grateful that the appellate court paved its path rather than complain that the appellate court beat it to the punch.

6. **There is no Rule of Precedent in the Netherlands – nor should there be**

The heart of *stare decisis* lies in the horizontal relationship: the binding force that precedents have on the court from which it emanated. The question presented is what a court may or must do if it finds itself disagreeing on substantive grounds with a precedent. Will it be free to hold what it believes to be correct, or must it follow the earlier decision believed to be wrong (either wrongly decided at the time or no longer correct)? Put differently: is a court bound to eternally continue a previous mistake? If one asks the question this way – and that is the core issue at this conference – the answer is not complicated: *no one wants precedents to be binding*. '[W]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it'.\textsuperscript{22}

At first blush it appears that there is a wide specter of opinion in Dutch legal doctrine as to the authority accorded to precedent (in the horizontal sense). The views range from ‘in principle, judges are bound’,\textsuperscript{23} ‘de facto binding effect’,\textsuperscript{24} ‘an informally restricted *stare decisis* principle’,\textsuperscript{25} ‘conditional binding force’,\textsuperscript{26} to no more than ‘a certain precedential effect’,\textsuperscript{27} or the view that a court is ‘in principle free to alter its policies’\textsuperscript{28} or ‘in principle not bound by its own decisions’.\textsuperscript{29} Another view is that precedents are only binding in the sense that they require the court to provide additional grounds in its opinion if it declines to follow them.\textsuperscript{30} As Professor Hondius

\textsuperscript{21} Unless the highest court’s standard of review is not that the law was erroneously applied but only whether the court abused its discretion; when reviewed under an abuse of discretion standard, a lower court’s shift in the exercise of its discretion is also likely to be sustained.


\textsuperscript{23} *Pitlo-Gerver 1988*, p. 42 (emphasis added); see also *Abas 1985*, p. 20.

\textsuperscript{24} *Brunner 1994*, p. 2-4. See also *Olzen 1985*, p. 157-163.

\textsuperscript{25} *Brunner 1973*, p. 4, n. 7.


\textsuperscript{27} *Van Schilfgaarde 1982*, p. 669; *Polak 1989*, at 60 (precedent has ‘authority’); *Jessurun D'Oliveira 1973*, p. 237 (precedents are ‘a reason, not the sole reason, and not the strongest’ to continue to decide likewise).

\textsuperscript{28} *Koeman 1982*, p. 981 and 984.

\textsuperscript{29} Opinion of the Advocate-General Mok, HR 28 May 1999, *NJ 1999*, 816 (*Nassy-Tseng v Curacao*), 2.4.3.

correctly notes, the more common view in the Netherlands appears to be that precedents are at least ‘sort of binding’.31

While these views reflect differences of degree, they have two elements in common: they all seek some compromise between the binding force of precedent and judicial freedom, and none (literally: none) actually accepts precedents as truly binding. For what does it mean to claim that in the Netherlands precedents are ‘sort of binding’ (as opposed to ‘strictly binding’)? Really not that precedent are ‘sort of binding’. Rather it means that people are confused as to the meaning of ‘binding’. Binding force is not a matter of degree. A court is either bound or not bound by precedent. If there is a way out, the court is not bound. If precedent is only ‘presumptively’ binding, or ‘de facto’ (but not ‘legally’) binding, or ‘in principle’ binding, it is not binding. Arguing that a precedent is ‘binding’ in the sense that it is not binding as long as a court provides sufficient grounds for its decision not to follow it, is close to being pointless. Similarly, forcing judges to follow an earlier decision unless it was ‘wrongly decided’ or unless the judges believe it to be no longer correct has nothing to do with the rule of precedent.32

‘[S]tare decisis, if it is to mean anything in this context, obliges a court to apply a case even though it is wrong’.33

If a judge is bound depending on whether he agrees or disagrees with the precedent, the case derives its force from its substance, not from its formal status as a precedent.

Thus there can be no doubt that stare decisis, properly understood, is entirely foreign to Dutch law, and I am aware of no scholars that would propagate pure petrification of precedent, even where the earlier decision is no longer correct or desirable, or never was. The point is perfectly illustrated by former Chief Justice Martens who once commented that ‘in principle, the Hoge Raad considers itself bound by its own decisions’, to which he hastens to add: ‘but it is undeniable that it will not hesitate to overrule’ an earlier decision ‘if it is persuaded that it is incorrect and legal certainty does not justify clinging to it’.34

32 Barendrecht 1992, p. 198 (there is no point in claiming that precedents are binding if they need only be followed if and to the extent they are considered substantively correct); Haazen 2001, p. 324.
33 Wesley-Smith 1987, p. 79; see Cross & Harris 1991, p. 4 (‘the judge in the instant case [is] obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so’).
34 Martens 1988, p. 155.
7. **Stare Decisis is Theoretically Impossible**

We have thus far applied two standards to measure the rule of precedent in the Netherlands: (i) the simple fact that the Supreme Court does not always follow precedent and shows no signs that it feels obliged to, and (ii) the fact that no scholar is willing to argue in its favour without distorting the meaning of *stare decisis*.

It also helps that the *Hoge Raad* has unequivocally rejected such rule. In *Farzoo v Upjohn*, it stated that ‘there is no reason at all why the Court of Appeal would be obligated to follow the *Hoge Raad’s* decision reversing and remanding [an appellate court’s decision] in another case’. It’s a firm rejection of *stare decisis* in the vertical (and *a fortiori* in the horizontal) sense: if the *Hoge Raad* does not bind the Court of Appeal it certainly does not bind itself.

As a matter of pure logic, however, the holding in *Farzoo v Upjohn*, cannot be conclusive: if a court holds that it is not bound by its own decisions, that decision (i.e., the decision not to be bound) cannot be considered binding authority. It does not necessarily follow that precedents are non-binding either because that would presuppose that the Court is bound by its decision that precedents are not binding. This leads to a fourth ground to conclude the rule of precedent does not exist in the Netherlands: it is theoretically impossible.

There are a number of theoretical issues that both Civil and Common lawyers inevitably have to face when addressing the issue of *stare decisis*. The question of case law as a source of law is one of them (see below § 9). There is a striking resemblance between the Common Law and the Civil Law in that the traditional view is Blackstone’s ‘declaratory’ theory: the view that judges cannot, and do not, create new law. In the Netherlands the view was widely accepted in the past, and in the eyes of some still is.

The Common Law and Civil Law systems draw completely opposite conclusions from the very same theory. In the Common Law, the binding force of precedent is seen as a necessary corollary of this view. Because judges are forbidden to change the law, they must be forbidden to change precedent:


36 In other words, one cannot justify the rule of precedent with precedent. See Wesley-Smith 1987, p. 77 et seq.; Blackshield 1987, p. 110; Williams 1957, p. 186-187. One cannot deny the rule of precedent with precedent either. See below.

37 Blackstone 1836, p. 69-71. See, e.g., *Kleinwort Benson Ltd. v Lincoln City Council* [1998] 4 All E.R. 513, 534-37 (Lord Goff); *Choice Investments Ltd. v Jeronimon* [1981] 1 All E.R. 225, 226 (Lord Denning MR) (‘Every decision of the House . . . declares what the law is and always has been’); *Mineo v Port Auth. of New York and New Jersey*, 779 F.2d 939, 943 (3d Cir. 1985) (citing Blackstone’s view that judges do not make but merely discover law); *Cash v Califano*, 621 F.2d 626, 628 (4th Cir. 1980) (‘the Blackstonian view, that judges do not make law, they find law’).

'It is my duty to say that your Lordships are bound by this decision. ... If it were not considered equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.'

'The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature.'

This Blackstonian view of stare decisis, however, is inconsistent on its face. It holds that judges cannot make law, i.e. that their decisions do not constitute law but are merely 'evidence' of the law found elsewhere, and yet feels compelled to ban any chance in judicial decision-making because a change of precedent would change the law. But if court decisions do not create new law why would they have the effect of changing the law when neither the overruled precedent nor the new decision constitutes the law? Any decision that fails to reflect pre-existing law is simply a mistake under the declaratory theory. If a precedent does not create law, as the declaratory theory proclaims, there is no reason why a successor court would be bound by the mistake rather than pre-existing law. 'A judge is bound to apply the law, not another judge’s determination of it.'

In the Netherlands, the declaratory view has been used to justify retroactive application when a court breaks with precedent. It has never been used to prohibit a modification of precedent. Many Civil lawyers are in fact quite surprised to find out that the declaratory view ever prevailed in England, or that it was meant to justify stare decisis. Typical Civil Law thinking has long overlooked that the view that courts do not make and cannot alter the law and that that is why courts are not free to depart from precedent is also dominant in England. Dutch scholars, for example, have traditionally reasoned that stare decisis cannot exist in a Civil Law system because treating judicial decisions as binding would be to recognize their force of law; and in codified systems, unlike in the Common Law (so goes the Civil lawyer’s understanding of the Common Law) judges do not make law.

In light of the above, the Civil Law’s ‘misunderstanding’ of the Common Law is quite understandable. Indeed, it seems to have actually understood the Common Law better than the Common Law understood

39 (1861) 9 H.L.C. 274, 338 (Lord Campbell).
41 Wesley-Smith 1987, p. 79.
itself: denying that the courts have the capacity to create new law, or that their decisions have the force of law (or that case law is a source of law) is incompatible with stare decisis. The more intuitive view would be the opposite: that novel court decisions are binding on subsequent courts precisely because such decisions do create law; if precedents create law, they are binding as any other rule of law is.43

But this ‘constitutary theory of precedent’ is equally problematic. Again Wesley-Smith has said most of what needs to be said about this issue: ‘A court’s authority to make law must be a continuing authority, which would be denied if a court were bound by its own decisions’.44 Why recognize a court’s creative power, and then mandate that it can only be exercised once? I can think of no societal concern (that is not already addressed by the minimalist view of precedent) that requires turning a judge into his predecessor’s servant or a slave to himself.45

8. Equal Justice does not Necessitate Stare Decisis

What about the principle that the law should apply equally to all? The principle finds strong support in the Netherlands. It is laid down in Article 1 of the Constitution, permeates all areas of the law, and has been invoked to support minimalist precedent.46 Is it not a principle of law so fundamental that it requires us to acknowledge a much stronger rule of precedent? Does it not require that like cases be treated alike?

Sure it does, but that begs the question when cases are alike. Clearly, it matters whether there has been a change in the law. If that were not a valid reason for different treatment no change in the law – whether by overruling precedent or by legislative enactment – could ever be effective. If all cases had to be treated alike at all costs Europeans would still be governed by tribal law. At most, treating like cases alike could require that the new decision not be applied retroactively to the case at hand or to cases from the same era. But it is in itself insufficient ground to extend outdated law even further into the future.

43 A trace of this reasoning is found in HR 10 May 1996, NJ 1996, 643 (Cijntje v Protestants Nijverheidsonderwijs) (stating that when the highest court ‘concludes’ a legal development its decision may be treated as a new rule of law). The court’s wording suggests that no further development is anticipated but stops short of prohibiting it, or accepting any decision that was a building block in that development as binding. See Haazen 2001, p. 325.

44 Wesley-Smith 1987, p. 82.

45 See Lord Denning’s unsuccessful argument in Gallie v Lee [1969] 2 Ch. 17 (Lord Denning, dissenting) (‘I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. . . . It was a self-imposed limitation; and we who imposed it can also remove it’).

There is another reason why treating like cases alike is problematic as a justification for making precedents binding. It is of course a truism that cases are never identical because the facts are never truly the same. The point here goes beyond this truism, which would be of little relevance if all we were interested in is the broadly worded general proposition of law – sufficiently broad to reach a variety of facts, the details of which one need not be concerned with. But under standard theory of precedent we are not. Under standard theory only the *ratio decidendi* is binding, not those statements of the law that are merely *obiter dictum*. The *ratio decidendi* (or ‘holding’ as it is referred to in the U.S.) is the ‘principle of the case’, the legal principle upon which the case was decided (upon which the outcome of case rests). An *obiter dictum* (or ‘dictum’ in American parlance) is a statement of law in the opinion which could not logically be a major premise of the selected facts of the decision, and was therefore not determinative of the outcome.

As an initial matter, I should mention that there is such a thing as *obiter dictum* (*overweging ten overvloede*) in Dutch law. But labelling a portion of the Court’s opinion as such has no significance; it says no more than that the point is not strictly necessary to support the outcome of the case, and no legal consequences are attached to categorizing a statement one way or another. Indeed, if anything, one might consider an *obiter dictum* of more value than any other portion of a Dutch Court’s opinion. In the Netherlands, the judges on the panel that hears a case do not write individual opinions. The opinion of the collective court is largely devoid of redundant language, more formal in style, and considerably shorter than opinions usually are in the Common Law. If the Court adds an *obiter dictum* there is all the more, not less, reason to believe it is trying to say something of particular importance.

From a principled perspective, one may wonder why anyone would even care about the *ratio-dictum* distinction. If an *obiter dictum* states the law, it states the law. Why would it matter that the statement was not indispensable to come to the conclusion the Court reached? While there is some truth to the view that a court’s statement of the law should be authoritative even if it did not function as a necessary premise of the outcome in a case, the distinction is nevertheless important. As many have observed (in England, for example, Goodhart), the true meaning of an earlier decision does not lie in the general proposition of law, which was likely pronounced in a case where all its consequences and its potential reach could not be foreseen; instead, it lies in the particularized rule of the case, embedded in the rich factual context of that case, which shows why the pronounced rule is fitting and what that general statement means in a concrete situation. An *obiter dictum* is not tied to particular facts of the case and therefore not as useful in understanding particularized rules.

If anything turns on the *ratio-dictum* distinction, it becomes a problem that there is not necessarily one right answer to the question precisely what

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‘the’ principle of a particular case is. It may well require a determination by
the very court that also decides whether or not it wants to be ‘bound’ by ‘the’
principle of an earlier case or would rather prefer to go a different direction.
It can be hard to find ‘the distinction between the ratio decidendi, the court’s
own version of the rule of the case, and the true rule of the case, to wit, what
it will be made to stand for by another later court’.48

Identifying the precise facts which in a given case were determinative
for the outcome not only separates the ratio decidendi from obiter dictum but
may also enable a subsequent court to distinguish the matter before it from
the ‘crucial’ facts upon which the earlier case was decided. By the same
token, extending the particularized rule of the case to a different set of facts
implies that those facts of the earlier case that were different are being
considered not to be part of the ratio decidendi. Thus ‘[i]t is by his choice of
material facts that the judge creates law’.49

While Goodhart’s theory may not be generally accepted in the Common
Law and appears to miss application altogether in a jurisdiction like the
Netherlands, where the ratio-dictum distinction plays virtually no role, it still
represents a highly valuable insight in the process of adjudication. The view
is in many ways very close to what is now commonplace among European
legal methodologists inspired by legal hermeneutics, topica, ‘problem-
thinking’, and the like, each of whom focuses on contextualized, fact-specific,
fact-dependent, particularized legal norms. Nowadays, these views (or
variations of them) find wide acceptance among scholars in the
Netherlands,50 which is why the binding force of precedent becomes hard to
accept if its rationale is that like cases must be treated alike. If the
particularized rule of the case is what is binding, the facts of the case – not
some general proposition of law – are determinative. Once that is accepted,
the observation that facts are never the same cannot be dismissed as
sophistry, and few such particularized, context-specific rules will actually
lend themselves to repeated application.

48 Llewellyn 1996, p. 53; see also idem, p. 79 (‘every precedent, according to what may be
the attitude of future judges, is ambiguous’); Frank 1949, p. 279 (‘For precedential
purposes, a case, then, means only what a judge in any later case says it means’).
49 Idem, p. 10.
50 E.g., Asser-Vranken 1995, no. 103; Vranken 1990, p. 198; Smits 1995, p. 48-80;
Schoorl 1972, p. 9 et seq. (facts give legal norms their substance and concrete
meaning); Nieuwenhuis 1997, p. 109-21; Asser-Scholten 1974, p. 8, 46-48, 76, 121, 133-
34; Van Maarseveen 1965, p. 909 (the case law further defines particularized norms,
which is how the courts create law); Hesselink 1999, p. 407-410 (every court opinion
gives some particularized meaning, correction, extension or modification to ‘the’
rule); Leijten 1981.
9. Community-based Legal Reasoning: Understanding the Hoge Raad’s Approach to Precedent

What then is the attitude towards precedent, and what should it properly be? It is two things: first, it is the minimalist view, which is sufficient to generally give favorable treatment to precedents, even if a court is not obligated to do so; and beyond that, it is a matter of a court’s substantive agreement or disagreement with the earlier decision. In other words, whether the court believes that a different view has emerged that should now be formally recognized or rather that the old formulation still represents the law.

The approach to precedent that the Hoge Raad has developed in the 1980s and 1990s is largely a response to the age-old argument that legal change is the exclusive domain of the legislature, and that judges who have not been democratically elected and therefore lack the ability to make law with sufficient democratic legitimacy should refrain from doing so. That argument overlooks that democracy is more than an election mechanism and formal procedures, and that a court that legislates with popular support is quite capable of rule-making in a manner that is democratic and legitimate.

On the other hand, a legislature which is more or less democratically elected but then uses its legislative powers to make laws contrary to popular will is certainly not doing any better in terms of grounding law in popular will. The same is true for legislation that has lost all legitimacy through desuetude, even though it came about through proper parliamentary procedures and originally reflected popular will when it was enacted.

Reflected in the Hoge Raad’s approach then is the view that law (or rather: legitimate, democratic law) has both a formal and a substantive component. The Hoge Raad has developed a democratic or ‘community-based’ approach to precedents to determine whether they should be followed or replaced. The view echoes Justice Marshall’s statement in Flood v Kuhn that:

‘[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.’

Under this approach to adjudication, a rule of law is properly part of the law when it is formally recognized as such or finds such strong support in the community that it effectively guides people’s actions and is considered as part of the law even before it finds official recognition. A decade ago, the community-based approach was well formulated by two Law Lords in Kleinwort Benson:

'The English common law is not confined to decided cases. In the field of commercial law, for example, the custom of merchants has always been a fruitful source of law. . . . [I]t does not need a court of law to establish a custom'.52

'There are areas of the law which are sparsely covered by judicial decision . . . In such areas the commercial world acts, and has to act, on the generally held view of lawyers skilled in the field'.53

In sharp contrast to simply jumping from precedent to precedent (with retroactive application) this community-based approach actually tries to trace what changed in society that could deserve to be recognized by the law. It also avoids a situation where everything in society changes except for precedent. The community-based approach thus presents a welcome alternative to an impossible choice between shock therapy and sclerosis.

For example, in Gielen v Assuradeuren,54 the Hoge Raad overruled an earlier case known as Tilkema’s duim.55 In Tilkema’s duim, the Hoge Raad had held that an insurance contract is void for fraud under (the now superseded) Article 251 of the Netherlands Code of Commerce where the insured failed to disclose past criminal convictions to the insurer, even where the insurer did not specifically ask for that type of information. That view was abandoned in Gielen v Assuradeuren which held that Article 251 does not create an obligation to voluntarily and spontaneously disclose such information if it had not been specifically requested, so that no cause for fraud would lie on the ground of an insured’s non-disclosure of a material fact.

The background of this change was a shift in thinking about privacy and the importance society has come to attach to its protection, as has been correctly observed by Verkade:

'The question of protecting people’s personal information did not become an issue until around 1970. In the Netherlands, the 1970 census combined with the advent of electronic databases triggered opposition both in Parliament and in Dutch society against the practice of collecting, storing and distributing personal information in increasing amounts which had thus far remained unregulated'.56

The privacy issue drew considerable attention in the early 1970s when legal periodicals published special privacy issues and the government established the Koopmans Commission which published its report and drafted new

52 Kleinwort Benson Ltd. v Lincoln City Council [1998] 4 All E.R. 513, 549 (Lord Lloyd).
56 Verkade 1982, p. 532 (my translation).
legislative proposals in 1976. Wachter, an influential scholar, wrote in 1978 that:

'It is common knowledge that Article 251 can no longer be considered as striking the balance between the duties [of the insurer and insured] when contracting for insurance in a way that comports with the prevailing views in society.'

In 1981, a year before *Gielen v Assuradeuren*, the insurance industry’s trade association had circulated a letter to its members advising them to incorporate specific questions regarding past criminal convictions in their questionnaires. All these indications showed that the law had in fact changed between 1962 and 1982, and that the insurance industry did in fact have knowledge of such change.

While the *Hoge Raad* applied its new view retroactively, it followed neither the declaratory theory nor did it truly make new law. It made no claim that its new view represented the law as it should always have been understood, and merely recognized what had in practice been widely accepted.

Similarly, in *Verhoeven v Peters*, the *Hoge Raad* departed from its case law dating back to 1861 and 1881 holding that disposing of personal property by will creates only an obligation to transfer the property and that title is not automatically transferred upon death by operation of law. In practice, that view had been abandoned for decades and the decedent’s death was treated as *ipso facto* transfer of title under the will. The *Hoge Raad* followed this generally accepted view without either ‘making’ new law or ‘declaring’ what it had always been.

In *Plataforma v Curaçao*, the *Hoge Raad* overruled three appellate court decisions, approximately 20 years old, which had held that trial counsel must specifically notify the court that they have been appointed by their clients to represent them in court, and that absent such statement, their court papers are deficient. Following the Advocate-General’s advice that the ‘contemporary view of due process’ rejects such formalism, and that a trend away from such formalities had begun in the 1970s, the court adopted the opposite view.
In a 1980 case that became known as the *Stierkalf* case, the *Hoge Raad* completely reversed settled law which it had followed since 1915 and lastly reiterated three years earlier in 1977. In *Stierkalf*, the *Hoge Raad* turned an animal owner’s liability based on ‘presumptive fault’ (subject to the defendant’s proof that he had not been negligent in the care and supervision of the animal) into a strict liability. It discarded all historical arguments and simply stated that ‘the development of views about who should bear the risk of damage done by animals is more important’ and followed the emerging rule that had been laid down in the draft revision of the Civil Code (which did not come into effect until twelve years later) – a technique the *Hoge Raad* has frequently followed since.

Perhaps the clearest example of the community-based, democratic approach that recognizes dominant opinion and the prevailing attitudes in society as law is *De Schelde v Cijsouw*, which involves asbestos-induced illnesses like mesothelioma. Mr. Cijsouw had died of mesothelioma in 1989 after being exposed to asbestos during most of his working life from 1949 to 1967. In a survival action, De Schelde was accused of having been negligent in taking precautionary measures necessary and proper in light of the known dangers of asbestos, which creates a liability pursuant to Article 1638x of the (former) Netherlands Civil Code under an increased risk theory. The *Hoge Raad* held that De Schelde’s negligence ‘must be judged by the standards prevailing at the time’; where, as here, conduct was not regulated by statute, those standards ‘are determined in part by the then-prevailing views in society’ regarding the appropriate level of precautionary measures.

It is thus clear that the *Hoge Raad* has developed a philosophy that adds a substantive component to positivist thinking or if you like a formal component to views normally associated with the Historical School. A rule is allowing such interest in light of the ‘development of prevailing opinion which cannot be ignored’.

64 See HR 15 October 1915, NJ 1915, 1071; HR 1 July 1977, NJ 1978, 73 (*Van Doorn v Van Blokland*).
65 See, e.g., HR 13 March 1987, NJ 1988, 190 (allowing emancipation of an 18-year old minor ‘in light of the views prevailing in today’s society’ and in anticipation of legislative change lowering the legal age of majority from 21 to 18 years); HR 21 March 1986, NJ 1986, 585 (allowing both unmarried parents to have legal custody over children).
67 *Idem* at 3.3.2. See also HR 30 September 1994, NJ 1996, 196 (*Staat v Shell*), 30 September 1994, NJ 1996, 197 (*Staat v Duphar*), HR 20 September 1994, NJ 1996, 198 (*Staat v Fasson*), HR 24 April 1992, NJ 1993, 643, and HR 9 February 1990, NJ 1991, 462 (*Staat v Van Amersfoort*), establishing that polluters are liable to pay for the clean-up costs incurred by the government since the mid-1970s when societal views had taken such a turn that the government became a foreseeable plaintiff even with respect to a clean-up of defendants’ own properties, which the law of property had previously allowed a property owner to use or destroy at will. The tipping point was around January 1, 1975, which the *Hoge Raad* chose as the cut-off date for retroactive liability.
imperfect as a legitimate rule of law when it has been pronounced but lacks popular support or support from the relevant community. Similarly, it is imperfect when it has that support but has yet to be actually recognized by the legislature or a court of law. When one version of a given rule of law has the support, while another version of it is on the books, a court can follow either version because both are equally imperfect rules of law. The court will, however, eventually follow the rule that upon its recognition will be both formally recognized and substantially supported.68

The Hoge Raad's approach may be considered a conservative one in the sense that it (i) is disinclined to change until new ideas gained such acceptance that they can be said to have come to dominate, (ii) follows the minimalist view of precedent when no such evolution in societal opinion has occurred, and (iii) does not allow a court to be ahead of its time or lead the development of the law by countermajoritarian rulemaking. However, it is also flexible because it in no way requires strict adherence to precedent. And it seeks democratic legitimation for the court's formal acceptance of legal propositions into law.

68 See, e.g., HR 16 October 1992, NJ 1993, 167 (declining to follow its own case law and instead adopting the view that it believed ‘in line with contemporary views prevailing in society’); see also Asser-Vranken 1995, no. 104 (‘an essential element of the court’s submission to the Rule of Law is the manner in which its decision is in tune with the views that prevail in the legal profession and society’) (my translation); Van Gerven & Leijten 1981, p. 22; Van Gerven 1973, p. 111, 119, 147; Barendrecht 1992, p. 224; Schoordijk 1972, p. 10-11, 19, 30.
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RECENT CHANGES IN THE LAW OF SUCCESSION IN THE NETHERLANDS: ON THE ROAD TOWARDS A EUROPEAN LAW OF SUCCESSION?

B.E. Reinhartz

1. Reasons for a Change in the Law of Succession in the Netherlands

In the Netherlands, the rules of intestate succession were seen as inadequately protecting the rights of the surviving spouse. This led to a situation where in a large number of cases the surviving spouse was given as complete a right to the deceased’s estate as possible by deviating from these intestate rules under a last will. The recent changes in Dutch succession law were in part aimed at creating a law of intestate succession that was in accordance with the existing legal practice, thus obviating the need to make a last will. As we will see below, during the development process some other issues were solved as well, for example the protection of the unmarried partner of the deceased.

2. Sociological Context: the ‘1½-Earners-family’

The regular pattern for a family of husband and wife and children in the Netherlands is that the man works fulltime and the women works part-time to supplement the family income. In Dutch we call this anderhalfverdieners gezinnen (1½-earners families).\(^1\) This means that after the birth of children most women need protection to be able to continue their living standards if

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\(^1\) Bos & Hooghiemstra 2004, p. 61-67. Although after the birth of the first child, 22 of the women that did not have a job before, started earning an income afterwards to keep up the family income, the tendency is different: of those who worked part-time before but did not earn much less than their partner, 35% earned considerably less after the first child was born. Of those who earned about as much as their partner before, only 9% continued to do so after the birth of their first child. Most of them would earn less, although not less than 1/3 of the income of the partner. That means that a large majority of families with children has one substantial income from the man who usually works full-time, and a smaller or very small supplementary income from the woman. This tendency was already described CBS 1998, and Keuzenkamp et al. 2000, p. 10. They stated that already in 1998 about 2/3 of the families with children chose for this model.
the husband dies:² his income no longer supports the family whilst her income is usually much smaller than what he used to earn. Other sources of income are not able to supplement her income enough in order to enable her to pay the shares of the estate of the deceased father to the children. In that way she will usually not gain enough capital to provide for herself if the income of the spouse ends as a result of his death.

3. The new Law of Succession

On January 1st 2003 the new Book 4 of the Dutch Civil Code entered into force, containing the new law of succession. It consists of 233 articles.³

4. Objective of the new Law of Succession – Problems in the Legislative Process

The legislative process concerning the new law of succession started in 1947 when professor Meijers from Leiden University accepted the task to revise the Dutch Civil Code that stemmed from 1838. He managed to produce a draft for the Civil Code, including a text for Book 4 containing the law of succession.

Before his text had passed through Parliament, Meijers died and his work was continued by several groups of people because it was clear that it would take too long before the whole draft could become law. It was decided to give certain parts more priority and handle them with more speed than others. The first book that entered into force was Book 1 of the Dutch Civil code in 1970, followed by Book 2 on legal persons in 1976 and Book 8 on transport law in 1991. The general part of the Dutch Civil Code, Book 3, combined with the law on obligations (Book 6) and property law (Book 5) and some special contracts (part of Book 7 BW) entered into force in 1992. Books 1, 2 and 8 of the Dutch Civil Code have been adapted at that point. Since then Book 7 BW has been filled in with many other contracts. Book 4 finally entered into force in 2003. In the next part I will give an outline of the problems that had to be solved in the new law and which solutions were chosen to reach the desired effects.

² In this report I will assume that the husband dies first. That means that the wife is considered to be the surviving spouse. Of course the rules apply the same way if the female partner dies first. Since 1998 the rules for married couples also apply to partners who have registered their partnership. They do not apply to partners who live together without registration. If they have a cohabitation agreement, then some special protection measures can be taken, see Article 4:82 BW.

³ A translation into English can be found in Curry-Sumner & Warendorf 2005.
5. **Situation under the Law before 2003 – Main Problems**

The law of succession that was valid until 2003 stemmed from 1838, although some important changes had been made in the meantime. In 1923 for example the rule was introduced that the surviving spouse inherits a share of the estate that equals the share of each of the children of the deceased if the testator has not stated otherwise in his will. Before that the surviving spouse only inherited if there were no family members of the deceased until the 12th degree, who could inherit according to the law.

Therefore the parents in many families with children felt the need to make a will to protect the interests of the surviving spouse as the estate usually was not large enough to be divided into several shares and still support her after her husband passed away.

Why had it been constructed that way in 1838? When the old law was passed, the law of succession was de facto not a law for the ordinary people as there was no estate that could be left to the survivors. The rich families, who had enough means to pass something on after death, often consisted of spouses who had their own means of support. Therefore it was no problem that in case of a family with many children most of the estate would be divided between the children. The surviving spouse didn’t need the estate of the deceased for her own support.\(^4\)

In the Netherlands the idea of the support of the surviving spouse became popular after the decision of the Dutch Supreme Court, HR\(^5\) 30 November 1945, NJ 1946, 62 (De Visser/Harms) where it was decided that the support of the spouse prevails over the rights of the children as forced heirs.\(^6\)

In a popular version of the will that married parents with children used to make since the beginning of the 1960s, the surviving spouse was given the whole estate while the children only got a financial claim against the surviving spouse. That claim could be invoked at the moments that were mentioned in the will, usually time of her death, bankruptcy etc. Because of developments in legal decisions the children couldn’t do anything against this will, even if this meant that they – as forced heirs – could not receive their statutory share in goods right after the death of their parent as the law used to provide for. Only when the surviving spouse could provide for herself (which was to be judged at the moment that her husband passed away), then the protection of the surviving spouse was not deemed necessary.

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\(^4\) Van Mourik 2002, p. 87.
\(^5\) HR is the abbreviation for Hoge Raad, the Dutch Supreme Court. In the last instance, called cassatie, only questions of law may be raised before the court; factual matters have to be decided in the first two instances.
\(^6\) Luijten 2002, p. 47-49. See also the deliberations in the process of legislation, *Parlementaire Geschiedenis* InvW. 4, p. 1668 which were based on two long articles written by Van Oven 1958/1959.
which meant that the children could enforce their rights as forced heirs as far as this didn’t interfere with the right of protection of the surviving spouse.7

This kind of will is called ouderlijke boedelverdeling. If the obligation to provide for the surviving spouse8 did in fact not exist, then there was no legal reason to block the rights of the children effectively.

Aside from this main reason for the change (it was not deemed right that mainstream families with no special wishes or circumstances were obliged to make a will) there were some other parts of the old law that needed changes. For example:
- the position of the executor or personal representative of the testator (executeur) needed to be modernized;
- the rudimentary regulations on testamentary administration (bewind) did not provide enough possibilities to protect heirs and third parties;
- the rules on fideï-commissaire substitution which were quite restrictive and complicated, which is not very pleasant for estate planners nowadays;
- the fact that a certificate of inheritance was often given by notaries but the legal basis for this was very thin, especially concerning the position of third parties that acted on these declarations in good faith;
- the impossibility for partners living together without marriage or registration of their partnership to provide for the other partner in case of one’s death if the deceased had one or more children (forced heirs) when one considers the high percentage of children that are born out of wedlock, in 2000 already 1 of 3 children and the number is rising to 40% in 2005.9

6. Solutions in the new Law

First I will describe certain solutions to the problems mentioned above in the new law on intestate succession. After that I will mention certain solutions that are found in the part on the Dutch inheritance law concerning wills.

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7 In HR 17 January 1964, NJ 1965, 126 (Schellens/Schellens) and HR 29 September 1969, NJ 1969, 402 (Makkumer Boedelverdeling) the Hoge Raad decided that in the case of an ouderlijke boedelverdeling the rights of the forced heirs are reduced to claims in value rather than in goods. In most cases the surviving spouse is protected against the claims of the children, but in some cases she had enough capital or income to support herself. In those cases the children could claim their rights before she died, see for instance Hof ’s-Hertogenbosch 14 December 1989, NJ 2001, 113; Rb. Rotterdam 25 February 1991, NJ 1995, 702; Hof Amsterdam 15 August 2002, nr. 0774/01, Notumail 2002, nr. 221.

8 This obligation is based on a natuurlijke verhouding, a natural obligation in the sense of Article 6:3 BW.

9 Alders & De Graaf 200; Latten 2005, p. 32.
6.1. The new Rules of Intestate Succession

6.1.1. Protection of the Surviving Spouse

In the new law the legislator choose to favour the surviving spouse and partner; the descendants of the deceased, who had a strong position under the old law, have to wait in many cases until the surviving spouse or partner has also passed away. The solution which was found for this dilemma lies in the legal division of the estate, *wettelijke verdeling*.

If a husband with a wife and children dies without making any arrangements concerning his estate and the Dutch inheritance law is applicable, the *wettelijke verdeling* takes place. In that case the widow inherits the normal share of the estate (Art. 4:10 BW) of the estate but receives his whole estate (Art. 4:13 BW). The children have to wait until her death (or bankruptcy and suchlike events) until they receive the value of their share from their father’s estate. If he desires, the testator can make a special provision in his will concerning the circumstances under which the children can claim the value of their share. He is also free to declare that apart from his surviving spouse and his children, also his stepchildren will be involved in the legal division as if they were his children as well.

The widow and the children can make an arrangement on the interest on those claims. Because of tax reasons, they will have to decide within 8 months after the day of the death. If they make no arrangement, the interest is equal to the legal interest minus 6%, but never less than zero unless stated otherwise in the will.

It is also possible that the widow decides within 3 months after the death that she abstains from the legal division. In that case she can denounce the legal division (ongedaanmaking van de wettelijke verdeling, Art. 4:18 BW) which has the effect that she and the children are equally entitled to the estate. It is advisable they decide before the decision is taken, how to divide the estate amongst each other in such a way that each heir receives a share that complies with the portion that person should get according to the law or the will. They can also decide that the bare ownership of the estate is to be given to the children and that the usufruct of the estate goes to the widow. If one part is bigger than the share that person is entitled to, he or she has to

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10 The *wettelijke verdeling* only works if the spouses are not legally separated.
11 A testator can change the share in his will; he can also disinherit one or more of his children, but the legal division will only take place if at least one child and the surviving spouse inherit from him.
12 Each child and the surviving spouse inherit the same portion of the estate. In the case of two children and a surviving spouse, each inherits one third.
13 Stepchildren are defined in Article 4:8 Para 3 BW as: ‘a child of a spouse or registered partner of the deceased where the latter is not a parent of the child. Such a child shall remain a stepchild if the marriage or registered partnership has ended’.
pay compensation to those who have not received enough. They can also decide that the payment can be made in installments.

The transferal of the rights has to be made by the three co-owners together. During the period that the division is not effectuated, the three co-owners have to take most of the legal steps together (Art. 3:170 BW), unless it is for example absolutely necessary to act at once.

If they have not made the pre-agreement, then the widow loses the protection of the legal division and cannot be sure to get what she wants if the children play foul play afterwards.

6.1.2. Protection of the Children

Transferal of goods
Dutch law has special rules concerning the right of the children to ask their mother to transfer goods from their father’s estate when she announces a new marriage or a registered partnership to a new partner in order to:
- be certain that they will receive their part of their father’s estate;
- be certain that certain family goods will not go to the family of their stepparent when their mother dies.

The same right applies against the stepfather or -mother concerning the estate of their mother when their mother dies or the stepparent dies. These optional rights (wilsrechten) are laid down in the Article 4:19-4:22 BW. In some cases the goods have to be transferred in full ownership; in others the mother (in case of the claims in their father’s estate) or stepfather (in case of the claims in their mother’s estate) can transfer the bare ownership and keep the right of usufruct to be able to continue the use of the goods.

The children can demand the transference of the goods with a maximum of the value of their claims. If more is transferred, for example because of the fact that one valuable item is transferred the value of which exceeds the entitlement of that child, it will be treated as a gift for the exceeding part. For that part the child will have to pay gift tax.

Payment of a lump sum
In certain cases children of the deceased have a claim to a lump sum that is required for the child’s care and upbringing until his or her 18th birthday, and for his or her maintenance until the child is 21 years of age, Article 4:35 BW. This claim only exists if for example if the spouse of the deceased or an heir of the deceased is not legally or contractually obliged to provide for these costs. The child’s claim will be smaller or non-existent if it has received a bequest from the deceased or a capital sum insurance policy. In those cases

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14 This also applies to children to whom the deceased is not a father in the legal sense but he is a person named in Article 1:394 BW, a man who fathered the child in the natural way (verwekker) or gave his consent to an act that made the conception of the child happen, e.g. artificial insemination with the sperm of a donor (instemmend levensgezel).
the amount that it has received will be subtracted from the claim that the child has against the estate.

In the law before 2003 a similar claim could be made, but the article on which this claim was based, was part of Book 1 of the Dutch Civil Code on family law, Article 1:406b BW.

Article 4:36 BW also gives a claim to certain children of the deceased who used to work for him in his household or business but were not duly paid, either directly or by a bequest of a capital sum insurance policy (salaire différé).

Transferal of the business or the shares in the business of the deceased

The children can ask to have the shares of a business of the deceased transferred to them but they have to pay a reasonable price, Article 4:38 BW. To qualify for that arrangement the father had to be on the board of each company and have ownership of the majority of the shares of the company alone or together with the other board members. The child that buys the shares has to be on the board of the company as per the day the father died or has to take over his place in the board that becomes vacant because of the demise of the father.15

The children can ask the court to arrange payment in instalments or after a certain period (Art. 4:5 BW).

Even if the deceased does not make any provisions for the transferral of the business shares to his children, they have legal rights to take over the shares against a payment of the value of the shares (if necessary in instalments, Art. 4:5 BW) because they are already running the business at the moment he dies, Article 4:38 BW.

Conclusion

We see that major changes have been introduced into the rules of intestate succession. The goal was that it would not have to be necessary to make a will in the case of a mainstream family while leaving the surviving spouse protected against the claims of the children during her life. In my opinion that goal has been achieved. In the notarial practice we now see that less mainstream wills are made. Nowadays often wills are made by people who want to make special arrangements in the context of their estate planning.

One possible problem under the new rules of intestate succession is the short period of three months in which the surviving spouse has to decide whether to keep the legal division intact or not. Compared to the wills under the old law where a similar decision was to be made within a period of eight months, the three month period is indeed much shorter. In modern wills who aim to copy the possibilities under the old law, one sees that often the notaries and other financial and fiscal advisors are looking for special provisions that enable the surviving spouse to postpone this choice.

See about this issue Stille 2002.
But if you consider that under the old law most surviving spouses didn’t use the opportunity to denounce the *ouderlijke boedelverdeling* for the whole or a part of the estate even while they had eight months to consider that choice, there is no reason to assume that great numbers of surviving spouses will seriously consider making use of that opportunity under the new law.

### 6.2. Dutch Inheritance Law concerning Wills

In this paragraph I will look into changes that are introduced in the new rules concerning wills.

#### Provisions in a Will

In Dutch inheritance law the testator can make a will. Usually wills are made in the form of notarial deeds. The testator can make provisions on the following points amongst others:

- Who inherits his estate and how big their portions of the inheritance are. The heir or heirs are liable for the debts of the estate pro rata.
- Who is entitled to a legacy (*legaat*). The legatee(s) have the right to claim the legacy from the heirs. It can be a legacy of goods or money but also of a right to certain actions. If the testator does not provide protection for his surviving spouse via the legal division, often the surviving spouse gets a legacy of the usufruct of the whole estate or of the assets that she chooses. This kind of testamentary provision is very popular in the northern parts of the country, in order to keep the agricultural business of the testator ‘in the family’.

A legacy can be given subject to the obligation of paying the value of the legacy back to the estate. Often that claim only has to be fulfilled at the time of her death.

- Who must perform a testamentary obligation (last). That is an obligation to do something but the other party is not a creditor that is entitled to the payment in such a way that it can claim the payment before a court. It may concern the payment of a certain amount of money but also other actions, for example to have a prayer service held for the deceased each year on the date he died. This testamentary obligation may also be used to give something to a person that is not born or conceived on the day the testator dies. Those future persons can not be heir or legatee (Art. 4:56 Para 1 BW, with special exceptions in Para 2-4).

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16 The testator must stay within the kind of provisions that the law allows him to make. In a Dutch will it is not possible to make provisions concerning a trust. It is also not possible for spouses to make a joint will or a mutual contract concerning their estates (*Erbvertrag*).
If the obligation is not met, the inheritance or legacy that the debtor has received can be denounced by a court in favour of those who would then benefit.

In order to ensure that his will is carried out after his death, the testator often appoints an executor or personal representative (*executeur*) in his will. A standard executor is the representative of the heirs and has to pay the debts of the estate. His task ends when the estate is ready for division amongst the heirs.

The appointment of an executor is especially important when the will contains the right to the usufruct of the estate for the surviving spouse. Amongst those debts are also those from legacies, as they are listed in Article 4:7 BW. Often it is a good idea to appoint the surviving spouse as the executor: the right of usufruct can then be established by making a notarial deed without having problems with the children who – without an executor – would also have to appear before the *notaris*.17 This may lead to a smooth realization of the provisions of the will, especially in cases where the relationship between the children and their (step)mother are not good.

**Provisions of Forced Heirship**

The Dutch inheritance law contains rules of forced heirship which will be triggered if the children of the deceased18 don’t receive their statutory share (*legitieme portie*). That share roughly amounts to half of the fraction a child is entitled to according to Article 4:10 BW (an equal share with the other children and the surviving spouse of the value of the estate as it is to be reckoned with for the statutory share, the so called *legitimaire massa*). To the value of the estate gifts to third parties during the last five years before his death are to be added, as are all the substantial gifts that the children have received from him (in principle).

If the forced heirs receive less than their statutory share, for example because of the usufruct of their mother, they can ask her to pay them the rest unless the testator has implemented the clause of Article 4:82 BW: then the children have to wait to get the remaining value until she is dead also. In the meantime, they can demand payment from others that have received something through the will, which unlawfully diminishes their portion.

If only one child has received too little but the other has received enough (because of extra gifts of legacies) then the other child can also ask

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17 In the Netherlands a *notaris*, a civil law notary, plays important roles in the process of making a will and executing the will after the testator passed away. Usually the heirs also consult a *notaris* if the deceased died intestate in order to have a certificate of inheritance drawn up. The *notaris* also usually also is involved by the heirs to help with and complete the partitioning of the estate. If an unmovable property has to be assigned to one of the heirs, the *notaris* will draw up the deed that is necessary for the transferral of the property to the new owner.

18 Or other descendants according to Article 4:63 Para 2 BW.
his brother or sister to pay the remaining part that he/she has not received enough. This payment can never lead to the effect that the ‘rich child’ would not get enough himself, considering his own statutory share, but it is possible that they have to wait until the death of their mother until they get their full statutory portion.

If the portion of the children becomes too small because of provisions in the will, they do not have the right to claim payment from people that have received gifts from the deceased during his lifetime.

Forced heirs will have to accept the appointment of an executor, but this is not the case if an administrator has been appointed: in general the forced heir may claim his statutory share without having the value of the share, which he or she might have received under the administration, deducted from his statutory share. This is different if the testator has stated that the administration is placed on the share of this heir because he or she is not able to provide these assets properly himself or have them administered properly by somebody else, or that these assets would immediately be claimed by creditors of the heir, Article 4:75 BW. In that case the share that the heir could have received under administration is deducted from the statutory share. Usually there will be nothing left to be claimed by the forced heir.

An heir may ask the sub-district court to end the administration if five years have passed after the death of the testator.

If the testator however has appointed an administrator over the share of a minor, Article 1:253i Para 4 sub c BW, the child has to accept this administrator until the end of his minority.

The forced heirs may also decide that they do not contest the will and accept the testamentary provisions and the gifts that the deceased has made.

Protection of the Surviving Spouse against the Testator

The surviving spouse has the right to remain in the house where she and her husband had their habitual residence before he died for six months after his death, Article 4:28 BW. If she gets the right of usufruct of the house, then she is well provided for in that aspect. If not, she can claim the right of usufruct on that house, Article 4:29 BW, provided that this problem is the effect of a provision in the will. If the provisions for the surviving spouse are not enough to provide her with a standard of living that is comparable to the standard after a divorce, she could also claim the right of usufruct on the rest of the estate, Article 4:30 BW.

The children have to tolerate this and the values of these legal rights of usufruct are not deducted from the legitiimaire massa, Article 4:76 BW.

Protection of a Partner against the Children of the Testator

Under the old law of succession only the surviving spouses (and registered partners since 1998) could be protected by an ouderlijke boedelverdeling against the forced heirs of the testator. It seems that this even was a reason in many cases of homosexual couples to register their partnership if one or both
partners had children from previous heterosexual marriages or cohabitations. Until 1996 also the parents of the deceased were forced heirs, which sometimes led to very unpleasant situations when for example their sons died of AIDS and they suddenly claimed a part of the estate against the homosexual partner of their sons whom they never accepted. Although he was the only heir appointed in the will of the deceased, he could do nothing against these claims which led to a co-ownership between the heir and the forced heirs.

In the new law people in these conditions are no longer forced to marry or register their relationship. In Article 4:82 we find a provision which makes it possible for the testator to make a will in favour of his surviving partner (married, registered or living together with the testator with a cohabitation contract) while his forced heirs have to wait to receive their claims until the surviving partner has died, falls into bankruptcy etc.

This protection of the unmarried partner, who was living together with the deceased, is new under Dutch succession law. It answers to the tendency in Dutch society to marry less and live together without marriage or registration more often.

Conclusion: A system of Forced Solidarity between the Spouses and the Generations
The system outlined above shows that the new legislation is based on the thought of forced solidarity between the generations. This intent lay behind several earlier versions of the law in the long process that preceded the law that actually entered into force. In that process also other solutions were found that were designed to protect the surviving spouse, i.e. a forced heirship for the surviving spouse or the legal usufruct as it was considered in the beginning of the 1980’ies.

In the end the legal division was chosen as the most favorite solution. That is understandable because it resembles the notarial practice of the will containing an ouderlijke boedelverdeling. But because it was introduced rather late in the legislative process (in 1992), it does not fit well into the system of the law on several points, but this is mostly a problem for academics. It does not hinder the practitioners much.

In an international context it is quite amazing to what extent the rules that inhibit the testator are of a mandatory nature. The effect is that - although the testator is left rather free to arrange the content of his will in any way he likes - after his death it is possible that several claims are made which disturb the handling of the estate as he provided in his will. This is especially the case when one considers the provision of Article 4:38 BW, the transfeerral of the business of the deceased or the shares thereof. Although the testator may have made different provisions concerning the business, the children and others named in the article may exercise their rights.

The protection of the spouse in Articles 4:28-30 BW is not so extraordinary when one considers that under the Dutch law the testator may totally disinherit his surviving spouse. The protection is also valid against claims of other heirs than the children. It seems that this protection can be
seen as a continuation of the duty to care that applies between the spouses during marriage, Article 1:81 BW.

7. Comparative Legal Analysis

Meijers, as the initiator of the new codification, has a lively interest in foreign legal systems, as the dissertation of Sütő shows. He was very much interested in several European and Non-European countries and it seems that he left for a trip to Switzerland to study the new Swiss law the day after he was appointed to recodify Dutch civil law. He was very much interested in states which had adopted a new civil code recently (Switzerland and Italy), but he is also interested in many others, as show his contacts with Belgian and South-African colleagues. French law is also considered but he didn’t find it as interesting as some other legal systems as the old Dutch law of succession resembled the French Code Civil in many ways. Differences could be found for example in the articles on forced heirship which didn’t favour the strict rules on the reserve of the French Code Civil which were taken over in Belgian law. The reason for these differences was the fact that after the separation of Belgium from the Netherlands in 1830, some particularities of Roman-Dutch law were incorporated in the Dutch Civil Code.

When the new Dutch Civil Code was discussed in the Netherlands, obviously some aspects have been influenced by foreign law. We know that Meijers and his assistant, Jan Drion, had a great interest in foreign law. Also the committee for the law of succession (Commissie Erfrecht), that mainly consisted of notaries and university professors, that published several reports as answers to the work in progress, referred to foreign law in many instances. For example in the second report we find references to the law of France, Germany, England and the United States.

In the beginning of the parliamentary discussions, Meijers asked a number of Vraagpunten in a questionnaire. Vraagpunten 36-42 were relevant for the law of succession. When one looks at the whole of the parliamentary history of the new law of succession, there are for instance 84 references to German law, 34 to Swiss law, 42 to French law, and 6 to Greek law. It is not possible within this article to list all references in detail but one can note that only a few members of parliament themselves referred to foreign legal systems. In most cases they used the references that were given by Meijers and later by the groups that proposed the other parts of the new law.

See for details on differences Greuter-Vreeburg 1987.
Completed in the years 1963-1966.
Sütő 2004, p. 40-43 and p. 61-63; Parlementaire Geschiedenis Boek 4, p. XII- XXXIX.
Sütő states in her dissertation on p. 90-91 that after the death of Meijers, who had a wide interest in foreign legal systems, his successors neither had the time nor the means nor the interest in consulting ‘surprising’ legal systems, as she qualifies the
I will list some of these fields where foreign law, and often German law in particular, has influenced the legislation in the Netherlands:

The position of the surviving spouse: The discussion about the protection of the surviving spouse has been influenced by foreign systems quite thoroughly. Meijers asked in *Vraagpunt* 37 whether the share of the surviving spouse should be increased because the changes in the Dutch Civil Code in 1923 didn’t help much if the deceased left behind a great number of children, as the spouse was only entitled to a share that was equal to that of the children, unless the deceased had provided otherwise in his last will. He also asked if she should be entitled to a forced heirship like in other countries and if the forced heirship for the descendants had to imply that they become proper heirs if they invoke their rights as forced heirs. In the end a very different solution was chosen, but it was not until many years later that the Dutch invention, the *wettelijke verdeling*, was inserted in Book 4 of the Dutch Civil Code.

The position of the forced heir: should he be a proper heir and therefore entitled to a share of the estate in property or should he only have a claim in value? It was decided that it is not politically feasible to abolish forced heirship completely, but it was seen as necessary to reduce the claim of the forced heirs to a claim in value like in Germany. That meant that the new law made the switch from basically the system of the Code Napoleon with a position in which the forced heir can claim goods of the estate to the German system of the claim in value, § 2303 BGB.

legal systems of Siam (Burma) Israel or Mexico. One exception is Jan Drion, see Sütő 2004, p. 40-43, 211-213, who filled many notebooks and library cards with information on foreign law, as stated by his widow and brother. Drion died in 1964. See Sütő 2004, p. 226-228 about critical notes in the literature about the use of the foreign legal systems. Was the knowledge as thorough as it might seem or was it some kind of window dressing? See Van Dunné 1982, p. 37-68.

25 *Parlementaire Geschiedenis* Boek 4, p. XV.
26 *Parlementaire Geschiedenis* Boek 4, p. XXI.
27 *Parlementaire Geschiedenis* Boek 4, p. XXVIII.
28 The idea was raised in 1992 after a serious crisis in the development of the draft for Book 4 BW because no consensus could be reached about the position of the surviving spouse. Later the original idea was supplemented with the optional rights for the children, which had earlier been presented in 1984 by Heuff and Heyman, see Van Mourik *et al.* 2002, p. 6-7. In 1997 a new draft was presented to the parliament containing the new system, *Kamerstukken II 1996/97, 17* 141, nr. 21.
29 Schols 2002, p. 75.
30 But as it is mentioned before, under the old law the forced heir had no right to a reserved portion of the estate (réservé héréditaire).
31 See Pitlo & Kisch 1954, who wrote a thorough analysis of the rules of forced heirship, also comparing the Dutch system to foreign legal systems.
The position of the executor and the testamentary administrator: how far should they be entitled to make decisions about the estate without the consent of the heirs. This is a difficult matter because of the differences in the Dutch and German law concerning the period after the death of the deceased. In Dutch law the notaris leads the necessary measures which the heirs or the executor have to take. In German law the Nachlassgericht is involved, even if there is no real problem with the estate. In that context it is not easy to compare the position of the executor and the testamentary administrator as they function in quite different contexts. In Dutch law it is therefore a question how far the executor and testamentary administrator (if supplied by the testator with as much power as possible) may go in exercising their rights. One special question concerns the ability to divide the estate between the heirs without their consent after all debts have been paid.

The position of the notaris vs. a judge in the period after the death of the deceased and the question if the resolution of the estate should be undertaken by a liquidator (vereffenaar) in the cases where serious problems arise. In the new law one sees that the liquidation is usually settled out of court amongst the heirs. Only when the balance of the estate is negative or the heirs are not able or willing to pay the debts, the court appoints a liquidator. If the situation is very complicated, this liquidator can get special powers, comparable to the liquidation in a bankruptcy procedure.

In many cases the German law was looked at closely, for example concerning the position of the forced heirs, but we find some interesting differences in the way the protection of the surviving spouse works out if there is no will and no marriage contract: the surviving spouse is entitled to half of the community of property, irrespective her share in the goods that are part of that community, and then she is entitled to the estate of her deceased husband while the children will have to wait until her death to claim their shares if they can’t or do not want to claim their optional rights (wilsrechten) in between. If one compares this position to the position of the surviving spouse in other countries, her position in the Netherlands is very good, even if she is disinherited. In that case she can claim the usufruct of the house and its contents or even the whole estate if necessary. In the constitution of the protection of the spouse in Dutch law, the legislators looked closely at the solutions found in other countries as well, such as Belgium, France, England and Austria but it was acknowledged that the Dutch rules gave a greater amount of protection than most other countries. The reason for that was the testamentary practice in the Netherlands as it had developed in the last decennia.

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33 Schols 2002, p. 73-78.
35 Parlementaire Geschiedenis InvW. 4, p. 1675.
When we summarize the facts stated above, the conclusion is that especially in the beginning of the legislative process the influence of foreign law is clearly visible. In later stages mainly national arguments were used to decide conflicts on the further progress of the work.

One must not forget that some changes already had taken place before 2003 that were inspired by the decisions of the former European Commission and the European Court of Human Rights. One very important change was the fact that the rights of children who were born in and outside a marriage became equal in 1979 because of the decision in the Marckx-case concerning Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.\(^{36}\) Since 1998 we do not speak about legitimate and illegitimate children anymore. The only distinction we still make is between children who have legal ties to a mother or a father and another parent\(^{37}\) and those who only have a mother. The child always has legal ties to the mother who gave birth to it, unless it is adopted.\(^{38}\)

In the changes in 2003 for example the right to make a will was extended to people over whom a guardian is appointed in account of a mental disorder (curatele wegen geestelijke stoornis). They are now able to make a will with the consent of the sub-district court. It was found necessary to give the right to make a will to these people as well because of the right to make a disposition over their estates after death, based on the criticism in the doctrine in the line of the Marckx-case of the European Court of Human Rights. The Minister of Justice stated that he would like to wait for the outcome of the work of a commission within the Council of Europe concerning the position of incapable persons, but we do not find evidence that it had any influence later.\(^{39}\) We there find the influence of the English law, where these people have the right to make a will since the beginning of the 1980s.\(^{40}\)

Also the legislator was concerned whether the rights of the surviving spouse of the Articles 28-30 of the Dutch Civil Code are in compliance with Article 1 Para 1 and 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as they are mandatory rules which constitute an infringement of the freedom of the testator to dispose of his estate any way he likes (as part of the peaceful enjoyment of his possessions). These articles – together with the rights of the


\(^{37}\) In the Netherlands it is possible to have two mothers or two fathers by adoption.

\(^{38}\) This rule was introduced in 1947. It marked the return to the Germanic principle (mother makes no bastard) as opposed to the French principle that was valid from the introduction of the 1838 Dutch Civil Code where children born out of wedlock had to be recognized in order to create legal ties between the child and its parents. See Vlaardingerbroek et al. 2004, p. 180, and Smits 1998, p. 50-54.

\(^{39}\) Parlementaire Geschiedenis InvW. 4, p. 1790.

\(^{40}\) Mental Health Act 1983, s 96, 1, e, mentioned in Parlementaire Geschiedenis InvW. 4, p. 1790.
children stated in the Articles 4:35, 36 and 38 BW – constitute an infringement of the freedom of the testator to dispose of his estate but it was felt that these infringements are within the boundaries as they are defined in the Marckx-decision.\textsuperscript{41} Another possible infringement of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms is constituted by forced heirship. On several occasions lengthy discussions have taken place on this issue.\textsuperscript{42} The general feeling was that also this infringement is found in the laws in most of the other states of the Council of Europe.\textsuperscript{43}

The outcome of these discussions was that the position of the forced heir was cut back considerably: he no longer has any rights to goods of the estate like a real heir and the testator has the possibility to postpone his claims until the surviving spouse or partner dies. But it was not possible in the current political setting to abolish the statutory share all together without incurring a mayor delay in the introduction of the new law of succession.\textsuperscript{44}

Apart from the legal division of the estate, which can be characterized as ‘typical Dutch’, we find several other specialties in the new law of succession, for example:

- the position of stepchildren (Arts. 4:27 and 4:91 BW);
- the right of transferal of the assets of a profession or a business to the surviving spouse, a child or a step-child of the deceased (Art. 4:38 BW);
- the protection of the surviving unmarried partner.

In the parliamentary discussions about these provisions we do not encounter any references to foreign legal systems.

8. **Movement towards Drafting Principles of Succession Law or even Creating a Supra-national Law of Succession?**

The outline of the parliamentary history as stated above and the various books and articles in legal journals concerning the new law of succession very rarely mention a solution in foreign legal systems as a basis for the development of certain legal solutions in the new Dutch law. On some occasions we find that foreign law is used to understand the new legal concepts in our code.\textsuperscript{45}

It is remarkable that European developments were included in the legislative process in a neighbouring field, matrimonial property law where a thorough report on several European legal systems was commissioned by the

\textsuperscript{41} Parlementaire Geschiedenis InvW. 4, p. 1674, 1808.
\textsuperscript{42} Parlementaire Geschiedenis InvW. 4, p. 1808.
\textsuperscript{43} Parlementaire Geschiedenis InvW. 4, p. 1808. See also the doctoral thesis on this issue by Mellema-Kranenburg 1988, p. 142 e.v.
\textsuperscript{44} Parlementaire Geschiedenis InvW. 4, p. 1432.
\textsuperscript{45} For example Schols 2004 and Schols 2001.
The idea was that the changes in the community property rules should bring Dutch law closer to the European common denominator, but unfortunately that common denominator did not really exist. The reason why this European focus can be found in the process of revising the matrimonial property law and much less in the process of the renewal of the law of succession can in my view be explained by the factors I mentioned before:

- Meijers had a great interest in foreign legal systems but after his death and the death of Jan Drion his successors had nor the time nor the means or the interest in foreign legal systems in order to pursue his path of legal comparison;
- it took a very long time to implement the law of succession, about 50 years. It would have meant further delay if the legislator had made a thorough study of the international aspects of the changes to the original draft. Especially these changes, the legal division and the protection of the unmarried partner were answers to changes in society that took place after Meijers’ death;
- in the beginning of the work on the new law of succession it was very difficult to find the information on foreign legal systems. In the years after the war everything had to be noted, mostly by hand, because computers and the internet did not exist.

Is there a movement in the Netherlands towards drafting principles of succession law or even creating a supra-national law of succession? As the law of succession is quite new, practitioners are mainly interested in understanding the new law and finding solutions for gaps or inconsistencies in the new legislation. The books and articles about the new law are mainly aimed at helping the practitioners and the students who learn the content of the new Book 4 of the Dutch Civil Code. As mentioned before, we sometimes find references to foreign legal systems on succession but that is not used to draw up international principles of succession law. In the Netherlands, one is more concerned about the developments that were initiated to fight the violation of human rights, for example the question whether same-sex couples or unmarried couples in general should or could benefit from the same advantages as married couples (of different sexes or same-sex married or registered couples), but as the developments in family law in the Netherlands are much faster than in many other countries, there was no reason to wait for the other countries in these issues.


Take for example all the notebooks that Jan Drion used to fill with notes about foreign law. Jan Drion used to be the most important assistant of Meijers. He used to do research in the Vredespaleis (peace palace) in The Hague. After Meijers died, he was part of a threesome who took over the work on the new civil code.
When the European Commission was asking for answers to the questions in the Green Paper on Succession and Wills, we saw that several different groups started to work on those issues, adhering to the idea that common rules of private international law will be sufficient to solve problems arising from international succession cases. The problems now partly have their origin in the fact that the Hague Convention on Convention on the Law Applicable to Succession to the Estates of Deceased Persons, concluded on 1 August 1989, is already used as the source of the rules of private international law of succession in the Netherlands, but this convention is not very popular. There are not enough ratifications to have it enter into force. It is therefore a good thing that the European Commission is now working on the harmonization of the private international law rules on succession, at least for the European countries. If that leads to results, there will be even less reason for the harmonization of the substantive rules on succession, many will think.

There is however a general tendency to make Dutch civil law in general and Dutch law of succession in particular, more available to scholars and practitioners who do not read Dutch texts. In 2002 an introduction to the new Dutch succession law was published, followed by a translation of Book 4 Dutch Civil Code by Ian Sumner and Hans Warendorf in 2005. In 2006 a description of the Dutch law of succession will be published as a chapter to: An Introduction to Dutch Law.

The introduction to this translation by Walter Pintens confirms that in the Netherlands the new code is in accordance with the tendencies in the rest of Europe where also the strong position of the surviving spouse to the detriment of the position of the children of the deceased, equality of all children, whether born inside or outside a marriage, the reduction of the rights of the forced heirs away from a substantive share in goods to a less substantive share in value and the protection of the rights of a surviving partner who was not married or registered to the deceased. In the Dutch view it seems more important that these goals were reached in a way that fitted in the Dutch system. The work on a European Code of succession law is not high on the priority list. The basis of the different codifications

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51 Nuytinck 2002.
52 Curry-Sumner & Warendorf 2005.
53 Chorus et al. 2006. Chapter 11 by Gerver will deal with the law of succession.
54 Pintens 2005, p. VIII.
55 Although the practitioners might dream of this because of practical reasons, Handelmann 2004, p. 311-313.
concerning the law of succession are very different from each other and closely related to several matters of family law, for example the affiliation of children, the different forms of relationships which have different effects in each country,\textsuperscript{56} and the need for protection of surviving spouses, especially women, which is closely linked to their participation in the workforce as was mentioned before.

\textsuperscript{56} See Waaldijk \textit{et al}. 2005.
References

Alders & De Graaf 2001

Boele-Woelki et al. 2000

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Van Mourik 2002

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Pitlo & Kisch 1954

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Smits 1998

Stille 2002

Sütő 2004

Vlaardingerbroek et al. 2004

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1. Introduction

The law regarding parents and children has been amended rather frequently over the past decade where issues such as parentage, adoption and custody are concerned. A major revision with regard to the law of parentage and adoption took place in 1998, which among other things created the possibility for the legal establishment of paternity and the possibility of adoption by a single person. Changes in the law regarding custody in that same year introduced the possibility for a parent and a person other than a parent to obtain joint parental responsibility. That same year the rule that joint parental responsibility will in principle continue after divorce was introduced.

Another major development in Dutch family law was the introduction of registered partnership in 1998, which is open to both same-sex and different-sex couples. Further changes in custody law followed in 2002 with the introduction of parental responsibility for couples in a registered partnership. One year later in 2003, marriage was opened up to same-sex couples; that same year it became possible for same-sex couples to adopt each other’s children and unrelated Dutch children. At present the only differences between marriage and registered partnership can be found in the field of child law and the law relating to the dissolution of the relationship.

It is obvious that Dutch parent-child law has changed very rapidly over the past few years. However, it seems that more changes are to come. A number of bills regarding parental responsibility, parentage and adoption are

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1 Dutch family law is to be found in Book 1 of the Dutch Civil Code. In this article extensive use has been made of the translation of Book 1 of the Dutch Civil Code: Sumner & Warendorf 2003.
3 Act of 30 October 1997 to amend, inter alia, Book 1 of the Civil Code in connection with the introduction of shared custody for a parent and his partner and shared guardianship, Staatsblad 1997, 506.
5 Curry-Sumner 2005.
before parliament or are under preparation to be filed before parliament. These concern the following issues:

- joint parental responsibility at the request of one of the parents;  
- parenting after divorce; 
- lesbian motherhood by adoption or by operation of law; 
- lifting the ban on international adoption for same-sex couples and a number of other issues with regard to adoption.

Where relevant these legislative efforts will be discussed.

2. Parentage

2.1. General Issues

The starting point of Dutch parentage law, as formulated during the 1998 revision of adoption and parentage law, is that a child always has a mother and may have a father. In principle a connection with biological reality is sought, but there are a number of exceptions made to accommodate social reality regardless of biological facts. This duality in combination with a number of other issues listed below make Dutch parentage law intransparent and at times incoherent:

- there are two kinds of biological fathers: those who beget a child through sexual intercourse (begetters) and those who beget a child without sexual intercourse (donors);
- there is a distinction between fathers who are in a different-sex marriage and fathers who are either in a different-sex registered partnership or who are cohabitating; this may create problems in the case of assisted reproduction;
- the consequences of a marriage are not the same for different-sex couples and same-sex couples with regard to parentage law.

These issues will be discussed where they are relevant.

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7 Bill Luchtenveld: Terminating marriage without judicial intervention and continued parenting after divorce, Kamerstukken II 2003/04, 29 676 nrs. 1-14; Government Bill: Amendments of the Dutch Civil Code and the Dutch Code of Civil Procedure with regard to the stimulation of continued parenting after divorce and the abolition of the possibility to convert a marriage into a registered partnership (not yet numbered).
8 A number of members of parliament are preparing a bill on this topic.
9 The Minister of Justice has promised to introduce a bill on these issues.
10 Kamerstukken II 1999/00, 26 673, nr. 5, p. 20.
2.1.1. Presumptions

Under Dutch law there is no rebuttable presumption of motherhood: the woman who gives birth to a child is its mother regardless of her civil status and regardless of the fact that she may not be the child’s genetic mother. The mother’s civil status only plays a part in determining whether the child has a legal father by operation of law. If the mother is married to a man, her husband is presumed to be the child’s father by operation of law. If the mother is not married, the father has to undertake action in order to become a legal parent to the child. If the mother is married to a woman, the mother’s partner can, at present, only acquire legal parenthood through adoption.

2.1.2. Assisted Reproduction

In the Netherlands a number of forms of medically assisted reproduction are allowed. For some of these techniques (such as IVF) a licence system has been put into place by the government. Hospitals have a certain amount of freedom with regard to the couples they treat. This may not, however, lead to discrimination. In principle all heterosexual or lesbian couples, and single women have access to assisted reproduction techniques on medical grounds. However, a number of hospitals refuse to treat lesbian couples and/or single women. The Dutch Equal Treatment Committee11 reviewed this matter and decided that the hospitals concerned were in breach of Article 1 of the Dutch Constitution,12 which, among others, forbids discrimination on the basis of sex, marital status and on any other ground.13 However, as a decision by the Dutch Equal Treatment Committee is not legally binding, the status quo continues to exist.

The donation of semen, eggs and embryos is regulated by the Embryo Act.14 Donation of semen, eggs and embryos (if they have come into being with the purpose of establishing pregnancy for the donors themselves – so-called rest embryos) is allowed with the consent of the donors provided they are over 18 and able to appraise their own interests. An important issue with regard to the donation of gametes is the fact that since 1 June 2004, under the Assisted Reproduction (Donor Information) Act, children born with the help of donated gametes have a right to information about the donor thereof.

11 Equal Treatment Commission, publication 2000-4.
12 Article 1 of the Dutch Constitution: All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.
13 Article 1 of the Dutch constitution does not contain an explicit reference to sexual orientation, this is covered by the phrase on any other ground.
14 Act of 20 June 2002, regarding conditions for and restrictions on the use of gametes and embryos (Embryo Act), Staatsblad 2002, 338. Articles 5 (semen and eggs) and 8 (embryos).
Surrogacy agreements are not enforceable, though there may be a ground for compensation if the parties to the contract do not meet the terms.\textsuperscript{15} The surrogate mother cannot be forced to give up the child, nor can the commissioning parents be forced to accept the child. In cases of surrogacy, the commissioning parents have to make use of the existing adoption procedure to acquire parental status.

### 2.2. Establishment of Motherhood

The woman who gives birth to a child or has adopted a child is its legal mother (Art. 1:198 DCC).\textsuperscript{16} Since the starting point of Dutch parentage law is that a child always has a mother, anonymous childbirth is not possible. If the mother of the child is unknown the birth certificate will be drawn up pursuant to the instructions and in accordance with the directions of the Public Prosecution Service (Art. 1:19b DCC).

There is no presumption akin to the presumption of paternity of the married father in a lesbian marriage. If the spouse of a co-mother gives birth to a child, the co-mother has to adopt the child in order to become the second legal parent.

Legal motherhood established by giving birth cannot be challenged, regardless of whether the birth mother is the child’s genetic mother. Legal motherhood established by adoption can be revoked by the court at the request of the child. The court will only grant such an application if the revocation of the adoption is manifestly in the best interests of the adopted child and if the court is convinced, in all conscience, that such a revocation is reasonable and the application is lodged two years or more but no later than five years from the date on which the adopted child reaches the age of majority (Art. 1:231 DCC).

Where a woman fraudulently registers a child as her own, this may be rectified. In a recent surrogacy case the commissioning parents, wishing to avoid a lengthy and costly adoption procedure, fraudulently registered the child as their own. The birth parents, however, reclaimed their child after 5 months and asked the court to register them as the child’s parents in the register of births, deaths and marriages. The court complied and ordered the register to be changed and the child to be handed back to the biological parents.\textsuperscript{17}

Motherhood can only be terminated by death, adoption or the revocation of an adoption.

\textsuperscript{15} See Vlaardingerbroek 2003, p. 171-178 for a discussion of various views on this problem.

\textsuperscript{16} The abbreviation DCC will be used in this article to refer to the Dutch Civil Code.

\textsuperscript{17} Court of Appeal Leeuwarden, 6 October 2004, LJN AR3391.
2.3. Establishment of Fatherhood

Fatherhood may be established in a number of ways under Dutch law, either voluntarily or involuntarily. Article 1:199 DCC states that the father of a child is:

a. the man who is married to its mother at the time of its birth (exception under b);
b. the husband who died within 306 days before the birth of the child unless the mother at that time was living apart from the husband;
c. the man who has recognised the child;
d. the man whose paternity has been established; or
e. the man who has adopted the child.

The presumption of paternity that exists within marriage has not been extended to different-sex registered partnerships or those involved in an informal cohabitating relationship. In these cases the man (who need not be the child’s genetic father) can recognise his partner’s child with the mother’s consent. If the mother refuses to consent to the recognition, the man can ask the court to substitute the mother’s consent to recognition, provided that he is the child’s genetic father and has begotten the child through sexual intercourse (Art. 1:204(3) DCC).

If the registered or cohabiting father is a genetic parent but has had to resort to assisted reproduction with his partner, his status is akin to that of a sperm donor where his rights are concerned and akin to a begetter where his duties are concerned. For instance, if the mother refuses to consent to his recognition of the child, he does not have the right to ask the court to replace her consent because he did not beget the child by sexual intercourse and is not married to the mother. It is likely, however, that a court would consider such a case and decide that the mother has misused her right to refuse consent.

If the unmarried father is unwilling to establish legal familial ties with the child, the child’s mother or the child can ask the court to establish the father’s paternity. This does not only apply to the man who is the child’s genetic father, but also to the man who consented to an act that may have resulted in the conception of the child. The legal establishment of paternity is a relatively new feature in Dutch family law and was introduced only as recently as 1998.18

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18 See Sevenhuijsen for an interesting discussion on attempts to introduce such an option almost a century earlier. Sevenhuijsen 1987.
2.4. **Challenging Fatherhood**

The mother, the father and the child may challenge the father’s paternity as a result of marriage on the ground that he is not the biological father of the child (Art. 1:200(1) DCC). The mother and father cannot deny the man’s paternity if both parties consented to an act that may have resulted in the conception of the child (for instance in the case of artificial insemination with the use of donor semen). Furthermore, the father cannot deny his paternity if he knew of the mother’s pregnancy before the marriage, even if he is not the child’s biological father. Only if the mother deceived him with regard to the child’s origin, may he deny his paternity. There are different time-limits for the three interested parties: the mother must file her application to declare the denial well founded with the court within one year after the child’s birth. The father must file his application within one year after he became aware of the fact that he is presumably not the biological father of the child (Art. 1:200(5) DCC). The child must file its application within three years after it became aware of the fact that the man is presumably not its biological father. However, if the child became aware of this fact during its minority, the application may be filed within three years after the child has reached the age of majority (Art. 1:200(6) DCC). When the father or mother dies prior to the expiry of the period laid down in Article 1:200(5) DCC, a descendant of such a spouse in the first degree, or in the absence of a descendant, a parent of such a spouse may apply to the district court to declare the denial of paternity well founded. The application must be made within one year after the date of death or after the applicant had become aware of the death (Art. 1:201 DCC).

The presumption of fatherhood in marriage still has a reasonably strong hold on Dutch parentage law. If a married woman gives birth to a child not fathered by her husband, the biological father of the child does not have the right to challenge the husband’s paternity. Only the mother, the husband and the child have this right – the latter two can of course only exercise this right if they are aware of or suspect the truth.

Fatherhood established by recognition can be challenged on the ground that the person who made the recognition is not the biological father of the child. An application to nullify a recognition may be lodged with the court by:

a. the child itself, unless the recognition took place during his or her majority;

b. the person who made the recognition if he had been induced to do this by threats, mistake, deceit or, during his minority, by duress;

c. the mother if she was induced to give consent for the recognition by threats, mistake, deceit or, during her minority, by duress (Art. 205(1) DCC).
Furthermore, the Public Prosecution Service may apply for the nullification of the recognition on account of a breach of Dutch public policy, if the person who made the recognition is not the biological father of the child (Art. 205(2) DCC). In the case of threats or duress the application must be filed by the person who made the recognition or by the mother within one year after such duress has ceased to operate and, in the case of deceit or mistake, within one year after the applicant discovered the deceit or mistake (Art. 205(3) DCC). The child must file its application within three years after it became aware of the fact that the man who was presumed to be his or her biological father, is not his or her biological father. However, if the child became aware of this fact during its minority, the application may be filed at the latest within three years after the child has reached the age of majority (Art. 205(4) DCC). In the case where either the person who made the recognition or the mother dies prior to expiry of the period laid down in paragraph (3), Article 201(1) shall apply mutatis mutandis. In the case where the child dies prior to expiry of the period laid down in paragraph 4, Article 201(2) shall apply mutatis mutandis (Art. 205(5) DCC).

Fatherhood once established, either by presumption, recognition, and adoption or by legal establishment of paternity, can only be terminated by a court order or death. If paternity is challenged successfully, the paternity stemming from the marriage or recognition shall be deemed never to have had effect (Arts 1:202 and 1:206 DCC). This means that parental responsibility will automatically come to an end. If there is family life between the ex-father and the child and if, although this may be unlikely, either party wishes to remain in contact, it may be possible to apply for a contact arrangement under Article 1:377t DCC. The court will not allow such an arrangement if it is against the best interests of the child to allow it or if the child objects.

3. **Parental Responsibility**

3.1. **General**

Title 14 of the Dutch Civil Code concerning custody over minor children is one of the most complex Titles relating to parents and children. Dutch custody law makes a distinction between parental responsibility, which may be exercised by one parent alone, by two parents jointly or by a parent and a person other than a parent, and guardianship, which may be exercised by one or two persons who are not the child’s parents. Both parental responsibility and guardianship are covered by the central concept of custody (Art. 1:245(2) and (3) DCC). Provisions specific to parental responsibility are not applicable to guardianship and vice versa.

Parental responsibility can either be acquired by operation of law or on request. For the manner in which joint parental responsibility is acquired two factors are of importance: the status of the relationship of the ‘parents’ (marriage/registered partnership/no formalised relationship) and the status
of the parenthood of the ‘parents’ (legal or social parent). Whether the ‘parents’ are of different sex or of the same sex is not taken into account, which does not mean that this has no consequences in practice. It is important to bear in mind that under Dutch law a biological father who is not married to the mother is not a legal father by operation of law and will be regarded as a person other than a parent.

3.2. Attribution of Parental Responsibility

3.2.1. Married Couples or Couples in a Registered Partnership

From the complex structure of the provisions relating to parental responsibility the following basic rule can be distilled: married couples and couples in a registered partnership will have joint parental responsibility over the children born into their relationship, unless legal familial ties exist between the child and another parent. In order to look at the attribution of parental responsibility in formalised relationships in more detail, it is useful to distinguish between the following 4 situations:

1. different-sex marriage (Art. 1:251 (1));
2. same-sex marriage (Art. 1:253sa);
3. different-sex registered partnership (Arts 1:253aa or 1:253sa; depending on whether the child has been recognised before its birth);
4. same-sex registered partnership (Art. 1:253sa).

(1) Different-sex married couples will have joint parental responsibility over their children. This also applies to children who were born and recognised by the father before the marriage. (2) Same-sex married couples will have joint parental responsibility over the children born into their relationship, unless there are legal familial ties between the child and another parent. This may for instance be the case in a lesbian marriage where the biological father recognised the child with the mother’s consent before its birth. If the co-mothers and the biological father want to share some form of legal parenthood, the obvious way is to have the biological father recognise the child after its birth. In that case the mothers will have joint parental responsibility pursuant to Article 1:253sa and the biological father will become the child’s legal father. Male couples will not have shared parental responsibility over children born to one of them during their marriage, because the child will always have legal familial ties with its mother. (3) Different-sex couples in a registered partnership will have parental responsibility over a child born into their relationship. If the man in the relationship has recognised the child before its birth, the couple will have joint parental responsibility on the basis of Article 1:253aa, which only applies to legal parents. If the man in the partnership has not recognised the child, the couples will have joint parental responsibility on the basis of
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Article 1:253sa, which applies to a legal parent and a person other than a legal parent. Clearly the distinction whether the father has recognised the child or not is not relevant in practice, as he will have joint parental responsibility with the mother either way. (4) The situation for same-sex couples in a registered partnership is the same as that for same-sex partners in a marriage (see above under (2) for more details).

3.2.2. Parents who are not in a Formalised Relationship

If parents are not married or in a registered partnership, only the mother will be attributed with parental responsibility by operation of law. The legal father – the man who has recognised the child – and the mother can jointly request the clerk of the court to record in the parental responsibility register that they will exercise joint parental responsibility. Until recently an unmarried legal father could not obtain joint parental responsibility without the mother’s consent. His only option was to ask for a change of sole parental responsibility to the detriment of the mother on the basis of Article 1:253c DCC. The court would grant such a request if it considered this to be in the best interest of the child. However, recently the Supreme Court decided that an unmarried father may ask the court to attribute him with joint parental responsibility together with the mother against the mother’s wishes.19 With this judgement the Supreme Court anticipated a bill that is currently before Parliament, which introduces the possibility for the unmarried legal father without parental responsibility to file an application with the court to attribute joint parental responsibility to him and the child’s mother (against the mother’s wishes).20 The bill also introduces the possibility for the mother to request joint parental responsibility with the father. The Court will grant such a request if it is convinced that this would be in the best interest of the child.

3.2.3. Joint Parental Responsibility of a Parent and a Person other than a Parent

A parent and a person other than a parent who are not eligible for joint parental responsibility under the provisions described above can, under certain circumstances, obtain joint parental responsibility at their joint request (Art. 1:253t DCC). This may for instance concern the new partner of the parent after divorce or separation or a cohabiting lesbian couple who raise a child born into their relationship. It is important to point out that under Dutch law only two persons can be attributed with parental

19 HR (Dutch Supreme Court) 27 May 2005, LJN AS7054.
responsibility. Whether the partner can be attributed with parental responsibility depends on a number of issues. First and foremost, the person other than a parent can only obtain parental responsibility if the parent with whom he has requested joint parental responsibility is the only holder of parental responsibility at that point. Furthermore, the person who is not a parent has to be in a close personal relationship with the child. The person other than a parent need not necessarily be the parent’s partner, he/she may also be a family member, such as a brother or sister of the parent.  

If the child has legal familial ties with another parent, there are a number of other criteria to be met. On the date of the application the parent must have had sole parental responsibility for at least three years and the applicants need to have cared for the child together for at least one year on the date or the application (Art. 1: 253t(2) DCC). Moreover, the court will have to reject the application if, also in the light of the interests of the other parent, there is a well-founded fear that the best interests of the child would be neglected if it were granted (Art. 1:253t(3) DCC). The consent of the other parent is not required; however, given the fact that he may apply for the (re-)establishment of joint parental responsibility, his objections may carry some weight. Moreover, given the fact that since 1998 joint parental responsibility is not terminated by divorce or the ending of a relationship, the chances of a new partner obtaining joint parental responsibility are rather thin.  

3.2.4. Guardianship

Guardianship is reserved for persons who are not the child’s legal parents. It can be exercised by one person alone, by two persons together or by an institution for family guardianship. Guardianship may come about in two ways: a parent may determine by last will and testament which person or which two persons will exercise custody over his or her children as guardian or joint guardians after the parent’s death (Art. 1:292 DCC). If no guardian has been appointed by will or if the parent(s) has/have been divested of parental responsibility, the court will appoint a guardian for minor children (Art. 1:295 DCC). During such a procedure, each person capable of exercising guardianship can request the court to grant them guardianship (Art. 1:275(2) DCC). In the case of consensual discharge, the court will preferably appoint a person or persons who has/have cared for the child for one year or more (Art. 1:275(3) DCC). This subsection implies that foster parents will be the preferred choice as guardians. A person who has cared for and raised a minor as a member of the family for one year or more with the consent of the guardian, other than under a supervision order or under an interim

21 See District Court of Dordrecht 13 January 1999, FJR 1999, no. 50, p. 107, in which case a father and his brother were vested with joint parental responsibility since the child had lived with the brother and his wife since the death of its mother.

22 Court of Appeal Arnhem 8 June 2004, LJN AQS059.

23 See also Vonk 2005, p. 34-39.
guardianship, may apply to the court to appoint him/her as a guardian (Art. 1:299a Dutch CC).

3.3. Change of Parental Responsibility

3.3.1. Death or Impairment of Holders of Parental Responsibility

Where there are two holders of parental responsibility at the death of a holder of parental responsibility, the other holder of parental responsibility will have sole parental responsibility, or if this person is a non-parent he will have guardianship. If there is no other person with parental responsibility, and the deceased has not appointed a guardian in his will, the court will appoint a guardian for the child.

The impairment of a parent does not have to lead to a change in parental responsibility. A holder of parental responsibility can only be divested of his responsibility through a court order. If the parent’s impairment is such that it constitutes a serious threat to the child’s moral or mental interests or his or her health and other means for the aversion of such threats have failed, or if it is foreseeable that these will fail, the juvenile court judge may put a care and supervision order into place (Art. 1:254 DCC). This means that the parent will continue to exercise parental responsibility but has to follow the directions of the institution for family guardianship (Art. 1:257 DCC).

If a parent is unfit or is unable to fulfil the duty of caring for or raising the child, the district court may consensually divest a parent of parental authority over one or more of his or her children, provided this is not contrary to the best interests of the children (Art. 1:266 DCC).

Furthermore, if the court considers this necessary in the best interests of the children, it may non-consensually divest a parent of parental authority over one or more of his/her children on the grounds of:

a. abuse of parental authority, or gross neglect of the care or raising of one or more children;

b. irresponsible behaviour;

c. an irrevocable conviction:
   1. on account of wilful participation in a criminal offence with a minor under his or her authority;
   2. on account of the commission of a criminal offence vis-à-vis the minor described in Titles XIII-XV and XVIII-XX of Book 2 of the Dutch Penal Code;
   3. resulting in a custodial sentence of two years or more;

d. the serious disregard of the directions of the institution for family guardianship or obstruction of a care and protection order pursuant to the provision of Article 261;
e. the existence of a well-founded fear of neglecting the best interests of the child because of the parent reclaiming or taking back the child from others who had assumed the care and upbringing of the child.

3.3.2. Conflicts between Holders of Parental Responsibility

Since 1998 divorce no longer brings an end to the parents’ joint parental responsibility. It is possible for a parent to request sole parental responsibility; however, the criteria for granting such a request are so strict that more than 90 percent of parents continue to have shared parental responsibility after divorce. Only if the child is threatened with suffering serious harm because of continued conflicts between its parents, will the court attribute sole parental responsibility to one of the former partners. This rule applies also to joint parental responsibility outside marriage.

If the parents cannot come to an agreement about issues concerning their parental responsibility they may submit their dispute to the court pursuant to Article 1:253a DCC. If the court has convinced itself that an agreement cannot indeed be reached, it will decide to issue such an order as it shall consider desirable in the best interest of the child.

The law does not contain preferences as to which parent should have parental responsibility. Before the introduction of continued shared parental responsibility after divorce in 1998 it was usually the mother who was attributed with parental responsibility. This is no longer the case; however, most children (80%) will continue to reside with their mother after divorce and the father is given a right to contact with the children. About 10% of children will reside with their father after divorce. Only about 4% of divorced parents are actually co-parenting. It is disputable whether in the daily lives of people after divorce continued shared parental responsibility makes all that much of a difference. The idea that the current system of the law with regard to children after divorce still favours the mother as the primary carer has led to the formation of action groups by angry fathers and the introduction of a bill by members of parliament which is aimed at the introduction of an obligatory parenting plan to be drawn up before a divorce can be granted in order to establish a notion of equal parenting. Once such a

25 HR 10 September 1999, NJ 2000, 20: ‘The communication problems between the man and the woman were of such a serious nature that there was an unacceptable risk that the children would be damaged if joint parental responsibility would continue to exist and it was not to be expected that the situation would change sufficiently in the foreseeable future’.
27 Fokkema et al. 2002, no. 18.
plan is drawn up the agreement made is to be enforced by a number of measures including police intervention.

3.4. **Stepfamilies and Parental Responsibility**

Dutch family law does not contain a straightforward definition of a step-parent. However, from DDC Article 1:395, concerning the maintenance of stepchildren during the relationship, it can be deduced that in a legal sense a person is a step-parent if he is married or has entered into a registered partnership with a person who has a minor child. Hence, a stepfamily may be defined as a family in which the partners are either married or registered and raise one or more minor children from the previous relationships of the partners. However, the term step-parent as such is not often used in Dutch Law and is absent in provisions with regard to parentage, parental responsibility and adoption. Being a step-parent does not give a person rights with regard to the stepchild by operation of law - a step-parent does, however, have duties with regard to his stepchild by operation of law. In order to acquire rights with regard to the stepchild he needs to file a request either for shared parental responsibility or adoption with the court. Persons other than parents can acquire parental responsibility over their partner’s child pursuant to Article 1:253t DCC as described under the heading ‘Shared parental responsibility of a parent and a person other than a parent’ in this article.

If the step-parent has joint parental responsibility, he will become the child’s guardian at the death of the parent (Art. 1:253x DCC). If the child still has another parent, the court may, on the application of this parent, at any time provide that he will be charged with parental responsibility if he has the capacity for this (Art. 1:253(2) DCC).

After divorce, joint parental responsibility will continue unless one of the partners asks the court to award him sole parental responsibility on the basis of Article 1:253v(3) and 253n DCC. The ground on which the court can attribute sole parental responsibility to one of the holders of joint parental responsibility – this can be either the parent or the person other than a parent, whatever is in the best interest of the child – is a change of circumstances. The courts have determined that the ending of the relationship in itself is not a change of circumstances pursuant to Article 1:253n DCC. Moreover, they have determined that the strict criteria that apply to the attribution of sole parental responsibility to one of the parents after divorce, also apply to the attribution of sole parental responsibility on the basis of Article 1:253n DCC. However, the court shall not issue an order

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29 Draaisma 2001. See for example p. 22 concerning the duty to maintain a stepchild.
30 HR 28 March 2003, NJ 2003, 359, and District Court in The Hague, 8 December 2004, LJN AR 7471. The first case concerned a cohabiting couple who were both parents and the second a lesbian couple of whom one was not a parent.
for the termination of joint parental responsibility referred to in Article 1:253t without first having given the parent not charged with parental responsibility or both parents jointly the opportunity to apply, in the best interest of the child, for joint or sole parental responsibility over the child.

3.5. Foster Families and Custody

The recent Juvenile Care Act\(^{31}\) (in force since 1 January 2005) in Article 1(u) defines a foster parent as follows: a person who in the light of youth care raises and cares for a minor who is not his own child or stepchild as belonging to his family. In principle parents have the right and the duty to raise their own children (Art. 1:247 (1) DCC). For whatever reason, parents may find that they cannot take care of their child(ren) for an (in)determinate period of time. Parents can of their own accord place their children with relatives or friends for a period of time, or they can apply to the Juvenile Care Institution for help on a voluntary basis. However, if parents do not take care of their children in a responsible way and the children grow up in a manner that constitutes a serious threat to their moral or mental interests or their health, and other means for the aversion of such threats have failed (Art. 1:253(1) DCC) the court can order a child care and supervision order. As a consequence of such an order, a child may be placed with a foster family for a period ranging from a brief period of time to indefinitely. The least severe of these orders leaves parental responsibility with the parents (in a limited form). The most severe of these measures discharges the parents from their parental responsibility.

In most cases, foster parents will not have guardianship over their foster children. If the court has ordered a child care and protection order to be put into place, such as a supervision order, the legal parents of the child will retain their parental responsibility, even if the child is living with foster parents. Under these circumstances, foster parents have no access to court to ask for guardianship. Only the Child Care and Protection Board or the Public Prosecution Service can request the court to discharge the parents of their parental responsibility (1:267 DCC).\(^{32}\) If parents are divested of their parental responsibility this will usually be transferred by a court to an institution for family guardianship (Arts 1:275 and 1:295). Foster parents may acquire guardianship if the parents no longer have parental responsibility, but this happens very rarely. In about 90% of cases where the court has discharged parents of their parental responsibility, guardianship over the child remains.

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\(^{31}\) Act of 22 April 2004, containing provisions regarding the eligibility, the accessibility and the financing of juvenile care, Staatsblad 2004, 306.

\(^{32}\) There is one exception in the case of non-consensual discharge in the case of the existence of a well-founded fear of neglecting the best interests of the child because of the parent reclaiming or taking back the child from others who had assumed the care and upbringing of the child (1:270(2) and 1:269(1)(e) DCC.)
with the institution for family guardianship until the child turns eighteen.\textsuperscript{33}
In a letter to parliament dated 30 June 2004 the Minister of Justice stated that in his view it would be better for children whose parents have been divested of parental responsibility if their foster parents are attributed with parental responsibility at an earlier stage than is the case at present without disregarding the interest of the parents.

If the child, with the consent of its parents who exercise parental authority, has been cared for and raised for at least one year by one or more other persons as a member of the family, the parents may only change the abode of the child with the consent of the persons who have assumed the responsibility for its care and upbringing. (Art. 1:253s (1)).

4. Contact

4.1. General

Title 15 of Book 1 of the Dutch Civil Code (Right to contact and information) regulates contact, information and consultation between parents and children. The term contact as it is used in Title 15 refers to both contact between a child and a parent as well as contact between a child and other adults or minors with whom the child does not habitually reside.\textsuperscript{34} The aim of contact is to enable the child and the other person (an adult or child) to keep their family life intact.

The earlier mentioned proposals with regard to parenting after divorce seek to give parents a more equal role with regard to their children. If these proposals become law, the term contact will no longer be used for parents and children after divorce or separation because this would not be in line with the notion of continued parenting. The term contact will continue to be used in the context of other persons.

4.2. Persons and Conditions

The child and the parent who has no parental responsibility have the right to contact with each other (Art. 1:377a(1) DCC). There is no specific regulation with regard to the right to contact between a child and a parent with parental responsibility with whom the child is not residing. It was not deemed necessary by the legislator to include such a regulation since parental responsibility presupposes a right to contact. The Dutch Civil Code does, however, include an Article, which gives a court the right to make contact arrangements between a child and a parent with parental responsibility at the request of the parents or either of them (Art. 1:377h DCC).

\textsuperscript{33} Vlaardingerbroek \textit{et al.} 2004, p. 335.
\textsuperscript{34} Boele-Woelki \textit{et al.} 2005.
The right to contact is reserved for children and legal parents; others who have a close personal relationship with the child can file a request with the court for contact with the child which the court may grant if it deems such contact not to be against the best interest of the child or if the child does not object thereto (Art. 1:377f DCC). It is questioned in the Netherlands whether pursuant to the Hoffman decision by the European Court of Human Rights, it is still possible to regard an application for contact filed by a biological parent with family life or a non-parent with parental responsibility as an application under Article 1:377f rather than as an application by a parent pursuant to Article 1:377a.36 This is important because in the latter case there is a right to contact, which can only be disallowed if one of the criteria for disallowance is met:

a. contact would cause serious detriment to the mental or physical development of the child;
b. the parent is manifestly unfit or clearly must be considered not to be in a position to have contact;
c. a child aged twelve or older has demonstrated, upon being heard in court, that he/she seriously objects to contact with the parent; or
d. contact is otherwise contrary to the very substantial interests of the child.

Children do not have direct access to the court to ask for a contact arrangement to be made with a parent, or another adult or minor, but the court may issue a decree ex officio, if it appears to the court that a minor aged twelve or older would appreciate this (Art. 377g). This rule also applies to a minor who has not yet reached the age of twelve but may be considered to be able to reasonably appraise his own interests.

There are no set provisions with regard to the duration and the place of contact. Contact can refer to physical presence, but can also take place by phone, letter or email. A very standard contact agreement after divorce is where a child spends every other weekend and every Wednesday with the non-resident parent. Other frequencies will apply in case grandparents apply for contact. There are however many other possibilities.

In the case of problems concerning contact, for instance where there has been violence in the relationship between the parents, supervised contact may take place, either at the premises of one of the parents or in a contact home. Parental alienation syndrome is recognised in the Netherlands and is believed to exist here. Sometimes members of the Child Care and Protection Board, who prepare advice for the courts in contact and parental responsibility cases, refer to the syndrome in their advice. However, the syndrome itself is not recognised by medical science.

36 Wortmann 2006.
4.3. Enforcement of Contact

Contact may be enforced against the wishes of the resident parent, but the courts are sometimes reluctant to do so, since it is questionable whether enforcing contact is always in the child’s best interest. Fathers’ rights groups in the Netherlands claim that the courts favour unwilling mothers in contact disputes, with the result that many fathers never see their children. One of the proposals regarding continued parenting after divorce seeks to stop this trend by putting more stress on the enforcement of contact, for instance by means of monetary penalties, police enforcement, imprisonment or the termination of parental responsibility. Most of these enforcement options can be and some are already used by the courts. For instance, recently in cases where it appeared that the mother was frustrating contact with the father, the court has divested the mother of her parental responsibility and attributed sole parental responsibility to the father.38

If parents have parental responsibility they cannot relocate to another country with the child without the consent of the other parent.39 If the parents cannot come to an agreement, they may submit their dispute to the court pursuant to Article 1:253a DCC. If the court has convinced itself that an agreement can indeed not be reached, it will issue such an order as it shall consider desirable in the best interest of the child.40 If one of the parents relocates abroad with the child without the consent of the other parent, proceedings pursuant to the Convention on the Civil Aspects of Child Abduction41 may be instituted. In principle the Dutch court will send a child back to the country of habitual residence if it has been wrongfully removed pursuant to the Convention. A recent study,42 reported in a Dutch Legal Journal on private international law, concerned 33 cases of child abduction that came before the Dutch court. In 20 cases the children were returned to the country of their habitual residence, in the other 13 cases prompt removal

38 For instance Court of Appeal The Hague, 31 August 2005, LJN AU2003 or Court of Appeal Amsterdam 27-01-2005 LJN AS6020.
39 A dispute concerning relocation within the Netherlands may also be brought before the court, but since the Netherlands is such a small country, this is not likely to occur.
40 For instance District Court of Utrecht, 26 January 2005, LJN AS6705 and District Court of Utrecht, 26 January 2005, appl. no. 183621/FA RK 04-4750.
was refused. In the majority of these cases this refusal was based on Article 13 under b of the Convention (there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation).

A parent with sole parental responsibility can relocate abroad without the other parent’s consent. However, if there is a contact arrangement in place, it can be enforced or amended if the parent moves to another European Union State pursuant to the EC Brussels II-bis Regulation. If the parent moves to a country outside the EU it may be very difficult to enforce a contact arrangement.

5. Adoption

5.1. General

Adoption was introduced into the Dutch Civil Code in 1956 as a child protection measure, in the sense that it was designed to safeguard the position of children in their foster families by creating permanent legal familial ties. Adoption is nowadays still regarded by the law as a means to find parents for children and not the other way round. Whether this is true in practice is a different question. The situation in the Netherlands with regard to adoption has changed dramatically since 1956 both with regard to the legal rules applying to adoption (step-parent adoption, adoption by cohabiters, adoption by single parents and same-sex parents) as well as with regard to the nature of adoption (intercountry adoption versus national adoption).

The majority of children adopted in the Netherlands come from abroad; this concerns some 1100-1300 children per year. The number of Dutch children adopted in the Netherlands is relatively low and on average concerns 46 children a year (in the ten-year period 1995-2004 a total of 463 Dutch children were adopted, with the lowest number of children in 2000: 23, and the highest number of children in 2004: 76). In 2004 the court granted 1,368 adoption requests, 1,116 of these were ordinary adoptions and 252 concerned step-parent adoptions (130 of these were adoptions by the female partner of the mother). Of the 1,116 ordinary adoptions some 76 concerned Dutch children. Of the foreign children 615 came from China. Besides these international adoptions, in 2003, some 237 children were adopted without court intervention under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter referred to as the Hague Adoption Convention).

Council Regulation (EC) No 2201/2003 Article 41. This Regulation does not apply in Denmark.

Hoksbergen 2002.

Centraal Bureau voor de Statistiek, Voorburg/Heerlen 2005.

There are three main sources with regard to adoption law in the Netherlands: in the case of national adoptions the rules in the Dutch Civil Code will apply, in the case of international adoptions the Placement of Foreign Foster Children Act (Wobka) applies and if the child is adopted from a country that is party to the Hague Adoption Convention, this convention applies as well.

The general attitude towards adoption in the Netherlands is positive. It is frequently stressed that adoption should be a service for children and not for infertile couples. Adoption procedures concerning foreign children are expensive and can vary from 8,500 to 22,500 euros. Some of these costs are tax deductible. There are some provisions with regard to parental leave concerning the adoption of a child: four weeks of adoption leave within 16 weeks of the adoption. Furthermore, adoptive parents can make use of the standard parental leave regulation of 13 weeks (usually unpaid) parental leave for each child.

Adoption is not a contract and can only be pronounced and revoked by a court.

The most important requirement for an adoption under Dutch law is that the adoption has to be in the child’s interest and that it is established at the time of the application for adoption and it is reasonably foreseeable that, in the future, the child has nothing further to expect from his or her parent or parents in the capacity of a parent (Art. 1:227(3) DCC). Once these conditions are met, there are a number of other requirements to be considered, such as the fact that an adoption cannot take place if the child’s parent(s) object(s) to the adoption. However, the court can disregard the parent’s/parents’ objection:

a. if the child and a parent did not live together or hardly ever lived together as a family;
b. if the parent has abused his or her parental authority over the child or has grossly neglected the care and upbringing of the child; or
c. if the parent has been irrevocably convicted of the commission of any of the criminal offences against the minor described in Titles XIII to XV, inclusive and XVIII to XX, inclusive, of Book 2 of the Penal Code (Art. 1:228(2)).

5.2. **Who may adopt Whom?**

Under Dutch law married couples (different-sex or same-sex), couples in a registered partnership (different-sex or same-sex) and unmarried cohabiting couples (different-sex or same-sex) can jointly adopt a Dutch child who is unrelated to them. Adoption by one person (who may either be single, cohabiting, in a registered partnership or married) is also possible. Two persons may not jointly apply for adoption if they would not be permitted to enter into a marriage with each other pursuant to Article 1:41 DCC (Art.
1:227(1) DCC). Grandparents are not allowed to adopt their own grandchildren (Art. 1:228(1)b DCC).

Step-parent adoption is possible under very strict conditions if the child has another parent with whom all familial ties will be severed as a result of the adoption. The preferred method for establishing a legal relationship with the stepchild is joint parental responsibility by the parent together with a person other than a parent pursuant to Article 1:253t DCC.\(^47\) The status of the relationship between the parent and step-parent is of no consequence as long as they have cohabited for a continuous period of three years immediately prior to the adoption request and have taken care of and raised the child together for at least a continuous period of one year prior to the request. Furthermore, the resident parent has to have sole parental responsibility over the child or have shared parental responsibility with the step-parent. The non-resident parent has the right to object to the adoption, his objections can only be disregarded by the court if one of the earlier mentioned criteria of Article 1:228(2) DCC is met.

The Dutch Civil Code contains special provisions with regard to the adoption of a child by the female partner of the mother if the child is born into their relationship. There is no requirement that the couple need to have taken care of the child for one year prior to the request (Art. 1:228(1)f DCC). Furthermore, the Government has proposed to abolish the three-year cohabitation requirement in the case of married or registered female couples. However, at the time that adoption by same-sex couples became possible in the Dutch Civil Code a new requirement was added to protect the rights of the child and the (biological) parents to continue their relationship: it has to be established at the time of the application for adoption and it has to be reasonably foreseeable that, in the future, the child has nothing further to expect from his or her parent or parents in the capacity of a parent (Art. 1:227(3) DCC). The parent in this article may include the sperm donor if he has family life with the child.\(^48\)

5.3. Age Limits and other Prerequisites

In the case of national adoption there is no maximum age for the adopters. The child has to be a minor and the age difference between the adopter and adoptee has to be at least 18 years. (Art. 1:228(1) under c DCC). In the case of international adoption, the Placement of Foreign Foster Children Act sets maximum age limits for the adopting parents. In the case of a joint adoption the prospective adopters have to meet the following criteria: at the moment when the couple apply for permission to adopt (beginseltoestemming) the oldest partner may not be older than 42, which means that by the time a child is actually adopted, the oldest partner will not be over 46. There are special

\(^47\) Court of Appeal The Hague, 20 April 2005, LJN AT4621.
\(^48\) See Vonk 2004, p. 103-117.
circumstances in which the age limits can be extended. Examples of such special circumstances are: the presence of a brother or sister of the child to be adopted in the family, the willingness of the adopters to adopt a child that is difficult to place because it is older than 2 years of age or because it is handicapped. Special circumstances are certainly not the couple’s childlessness, delay because of attempts to conceive a child through assisted reproduction. If both partners have reached the age of 44, they cannot invoke these special circumstances (Art. 5b Wobka). The age limits are at present under discussion. An extensive evaluation of the Act on the Adoption of Foreign Children carried out at the instigation of the Ministry of Justice advises the government not to remove or change the existing age limit. The maximum age limit for a child to be adopted by means of an international adoption is six years.\textsuperscript{49}

At present, some couples try to avoid the age limit by having the youngest partner adopt a child on his own. Once the child is adopted by one of the partners, the Placement of Foreign Foster Children Act no longer applies and the partner can adopt the child if he meets the criteria set out in the Dutch Civil Code, which has no maximum age limits. The aforementioned evaluation advises the government to amend the regulations so that if a person applying for single parent adoption is in a stable cohabitation with a partner, the age of the partner should be taken into account.

There are a number of prerequisites with regard to the duration of the partner’s relationship in the case of joint adoption and with regard to the period of time the adopter(s) has/have taken care of the child preceding the adoption request. If two persons want to adopt jointly, they need to have cohabited for at least three years and have cared for and raised the child together for at least one year prior to the adoption request. A person wishing to adopt the child of his partner needs to have cohabited for a period of three years with the parent and to have cared for the child together with the parent for at least one year directly preceding the adoption request. A single person wanting to adopt needs to have cared for and raised the child for three consecutive years prior to the adoption request (Arts 1:227(2) and 1:228(1) under g DCC).

An adopted child can be adopted for a second time by other parents or another parent if all the criteria set out in the Dutch Civil Code are met.

Foster parents can in theory adopt their foster child if they meet the adoption criteria mentioned earlier. However, it is not the intention of Dutch child care and protection measures, such as consensual and non-consensual discharge of parental responsibility, to permanently deprive parents of their

\textsuperscript{49} Guidelines Concerning the Placement of Foreign Foster Children 2000, Articles 2 and 3.
\textsuperscript{50} Evaluatieonderzoek Wobka 2004.
\textsuperscript{51} The maximum age difference between the oldest adopter and the child is 40 years.
parental responsibility. Parents may always file a request for the reinstatement of parental responsibility, which the court will grant if it is convinced that the child may again be confided to the care of its discharged parent(s) (Art. 1:277 DCC). If all the criteria for adoption set out in the Dutch Civil Code are met, which among other things means that the adoption is in the best interest of the child, the parents do not object to the adoption and the court is convinced that the child has nothing further to expect from his parents as a parent now and in the future, the adoption request may be granted.

5.4. Consequences of Adoption

Adoption under Dutch law means that all legal ties with the child’s parents are severed and new legal family ties are created with the adoptive parents. If the child, at the time of the adoption, has access to a parent with regard to whom legal familial ties cease to exist, the court may rule that a right of access should continue (Art. 1:229(4) DCC). It has been suggested to the Minister of Justice that it would be advisable to start a broad discussion on the question whether a more open adoption, which does not involve a complete break with the child’s family of origin, should be introduced. Since the introduction of adoption in the Dutch Civil Code it has been accepted that an adopted child should be told that its adoptive parents are not its natural parents (this is not the same as telling the child who those other parents actually are). Prospective adopters who indicate that they do not intend to tell the child that it has a different set of parents are unlikely to be able to proceed with the adoption. If a child has been informed of the fact that it has been adopted it may want to discover who his natural parents are. The Dutch Civil Code does not contain a specific regulation with regard to the child’s rights to know its origins, but it is generally accepted on the basis of Article 7 of the International Convention on the Rights of the Child that a child has such a right. The Dutch Supreme Court based an important decision on this article stating that fundamental rights such as the right of respect for one’s private life, the right to freedom of thought, conscience and religion and the right of free speech are based on a general personality right that amongst other things includes the right to know who one’s biological parents are.

In cases of international adoption the Placement of Foreign Foster Children Act contains provisions with regard to the collection, storage and accessibility of information regarding the parentage and environment of the adopted child (Art. 17b en 17d Wobka).

53 Raad voor de Strafrechttoepassing en Jeugdbescherming, letter of 12 December 2004 to the Minister of Justice.
54 Koons 1998.
5.5. Revocation of Adoption

The child can request the revocation of the adoption two to five years after he has reached the age of majority (Art. 1:231 DCC). The court may only grant the request if the revocation is manifestly in the best interests of the adopted child and if the court is convinced, in all conscience, that such a revocation is reasonable. Upon the revocation of the adoption, legal familial ties shall cease to exist both between the adopted child and his or her children, and the adoptive parent or adoptive parents and his or her blood relatives. Legal familial ties that have ceased to exist as a result of the adoption shall revive as a result of the revocation.

An interesting question is what this means when a child has been adopted after surrogacy in combination with IVF. If the child wants to revoke the adoption, will the judge take the interests of the surrogate mother, who will then again become the legal mother, into account? Will a judge also hear a case where the adopted child is the natural child of the adoptive parents? These may be very unlikely situations but the point is that adoption is used to establish legal parenthood in new situation whereas it has not been adapted to these circumstances.

6. Conclusion

From the overview presented in this article it can be concluded that Dutch family law, in particular the law relating to parentage and parental responsibility, is rather complex. This complexity is most likely the result of efforts by successive governments over the past 10 years or so to accommodate social reality in these fields of law without reconsidering the existing underlying principles. Increasing attention has been paid to the interests and rights of children, for instance by introducing the Donor Data Act. Furthermore, two other trends with regard to tension between biological, social and legal parenthood can be discerned: on the one hand, increased recognition of the rights of (biological) fathers and, on the other hand, increased recognition (at least in theory) of the rights of social parents. It may be obvious that these two trends will clash if the legislature is unwilling to attribute parenting rights and responsibility to more than two adults.

Consider for instance the case of lesbian partners who have conceived a child with the help of a known sperm donor. On the one hand, the social mother may acquire the status of legal mother by means of adoption; on the other, the known sperm donor has the right to be heard in the adoption procedure with regard to his intention to act as a parent. The intentions and rights of the parties involved in this scenario – including the child – do not
necessarily correspond, which may lead to uncertainty as to the legal status of the child and subsequent lengthy court procedures.56

Another example is the trend to give legal parents, regardless of the state or status of their relationship, more rights and duties with regard to their children – in particular after separation – whereas, on the other hand, the Government has promised to give social parents more rights and duties with regard to the children in their family. Since only two adults can have parental responsibility, courts are faced with competing applications for joint parental responsibility, for instance by a legal father who is the mother’s ex-partner and a social father who is actually caring for the child together with the mother. The District Court of Utrecht57 recently decided not to attribute either of the applicants with joint parental responsibility and to leave sole parental responsibility with the mother, since in that way the existing status quo was least likely to be disturbed.

There clearly are tensions between biological, social and legal parenthood in Dutch family law, which are the result of ad hoc amendments of the law to accommodate social reality without giving thought to the wider implications of such changes. At present, some social parents can acquire parental responsibility or even legal parenthood, provided that there is no other biological parent eligible for this position. On the other hand the presumption of fatherhood in marriage is still so strong that a biological father of a child born to a woman married to another man, cannot deny the husband’s paternity and thus cannot acquire either the status of legal parent or be attributed with parental authority at his own volition. All in all, it can be said that efforts have been made to accommodate social reality – which is to be applauded – however, this has unfortunately lead to complex and at times incoherent provisions.

56 There is a specific case which has now been submitted to the Supreme Court for the second time: District Court of Utrecht 14 March 2001, case no. 122753, Court of Appeal Amsterdam 22 November 2001, case no. 370/2001, HR 24 January 2003, NJ 2003, 386, District Court of Utrecht 17 March 2004, Court of Appeal Amsterdam 23 December 2004, LJN AR7915, recently submitted to the Supreme Court.
57 District Court of Utrecht 29 September 2004, LJN AT3887.
TENSIONS BETWEEN LEGAL, BIOLOGICAL AND SOCIAL CONCEPTIONS OF PARENTHOOD

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1. Introduction

In this national report I will give an overview of the different assets that may be the object of property rights in Dutch law. The French title for these national reports to be found in the official subject list of the International Academy of Comparative Law is la notion de biens: the notion of... Already here terminological problems start. The Dutch word that corresponds to the term bien is the word goed. It denotes something that can be the object of a proprietary right. It comprises tangible things as well as rights. The nearest equivalent in English would be the term asset. Therefore, in the following report I will use the term asset to denote a bien or goed.

Dutch law uses a very narrow concept of property rights. Property rights or proprietary rights are rights which have as their object a goed or asset in the above sense. This is the reason why in Dutch law intellectual property rights are not regarded as property rights. They have as their object for example a certain text, invention or idea, in short immateriàlia, immaterial things, not an asset, that is to say, not a tangible thing nor a patrimonial right. On the other hand, proprietary rights and intellectual property rights have a common feature in that they work against everyone. For that reason both are called absolute rights. An intellectual property right is a patrimonial right (Art. 3:6 DCC) and is itself seen as an asset (Art. 3:1 DCC).

The holder of a copyright or trade mark is not called owner of the copyright or trade mark, but simply holder of the copyright of trade mark. In Dutch law ownership always relates to tangible objects, movable or immovable objects. Ownership of rights, such as intellectual property rights, is impossible. However, as intellectual property rights are themselves assets, these rights can be burdened with limited proprietary rights, e.g. a right of pledge.

The report will first address the question which objects may be objects of proprietary rights. In the second part intellectual property will be dealt with. It should be noted that the report will be confined to the notion of asset in private law. In Dutch law the definition of asset in private law has no bearing whatever on for example the criminal law notion of theft. Electricity
cannot be seen as a thing in private law, but it can be stolen: illegal tapping of electricity constitutes a criminal act of theft.

2. Property Law

2.1. Some more Definitions

Article 1 of the 3rd Book of the Dutch Civil Code (Art. 3:1 DCC) gives a definition of an asset by saying: assets are all things and all patrimonial rights. The following Article, 3:2 DCC, adds that things (zaken) are tangible objects that are susceptible of human control. Patrimonial rights are rights which can be transferred or which purport to give its holder material benefit or which have been given in exchange for material benefit that has been given or will be given in future (Art. 3:6 DCC). This is not a neat distinction of comparable notions: a thing is not a right but the object of a right. However, the Dutch Civil Code often uses the expression ‘things’ as shorthand for ‘the right of ownership of the thing’. In its turn, the right of ownership or most other patrimonial rights can be the object of a proprietary right, for example where the right of ownership of land is burdened with a right of hypothec or a long lease.

Tangible objects, things (zaken), may be either movable or immovable. Unlike the old Dutch Civil Code from 1838 the new 1992 Civil Code restricts the distinction movable/immovable to things; rights cannot be movable or immovable. Dutch law does not call a right on immovable property an immovable right.

2.2. Movable Property

As said before, things (zaken) are tangible objects that are susceptible of human control (Art. 3:2 DCC). Water in a river or the air around us is said not to be susceptible of human control, but once it has been canned for example it is susceptible of human control and it is therefore regarded as a thing. Whether a collection of tangible objects belonging together constitutes one thing or a number of separate things depends on common opinion. Normally a collection of books will be seen as a large number of separate things. A cd-box, on the other hand, is seen as one thing rather than as a number of separate items: box, booklet and several cd’s.

2.3. Electricity, Water and Gas

Although one can feel electricity in different, often disagreeable, ways, electricity is not seen as a material object, a tangible object that is susceptible of human control. Similarly, water and gas which is not canned but supplied through pipes are not seen as things susceptible of human control. The supply through cables or pipes of electricity, water and gas does not underlie
the rules of sale, as sales contracts are confined to things, movable or immovable, and rights. The supply through cables and pipes of electricity, water and gas is not regarded as the supply of a thing in the sense of Article 7:1 DCC, the first article in the Title on sales contracts. There is no other special contract type (nominate contract) applying to the supply of electricity, water and gas. In practice this does not cause trouble as for these types of contracts standard contracts have been made.

2.4. Computer Software

A disc containing computer software is a tangible object and is therefore treated as a thing. However, it is controversial whether or not the software itself can also be seen as a thing in itself. If you buy software that is transmitted over the internet and not stored on a cd-rom, is this the sale of a movable thing? The question, by the way, does not affect the intellectual property right, the copyright, that the producer of the software program has.

2.5. Immovable Property

A piece of land can be the object of a property right. According to Article 5:20 DCC the right of ownership of land comprises the topsoil, the layers of earth beneath, groundwater that comes to the surface naturally or through an installation, the water above the soil unless it has an open connection to water covering another’s land, buildings permanently attached to the soil unless they are part of another’s immovable thing, and finally, plants and trees connected to the soil. Oddly, a clear definition of a piece of land cannot be found in the Dutch Civil Code. Suppose the owner of a plot of land wants to sell and transfer part of his land. Suppose, that the entire plot of land is one cadastral parcel. Is he able to transfer part of a parcel or should he wait until the part to be transferred has been turned into a new cadastral parcel with its own individual parcel number? The question comes down to the definition of immovable property: can part of a cadastral parcel be regarded as an immovable thing?

In Dutch law the answer is affirmative. A transfer of part of a parcel is possible and this part forms a separate thing even though it has not yet received its own parcel number and registration in the cadastre. The splitting of the parcel and allocation of new parcel number to the newly formed parcels is a mere administrative measure.

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1  Hijma 2001, nr. 196.
2  Van der Steur 2003, p. 176-181.
2.6. **Humans, Human Remains, Body Parts and Embryo’s and Animals**

In Dutch law human beings cannot be seen as objects of proprietary rights; they cannot be regarded as assets in the legal sense of the word. It is generally accepted that for moral reasons embryos cannot be regarded as assets.\(^3\) Body parts which are separated from the human body, e.g. blood or tissue, are seen as assets.\(^4\) The question whether or not human remains can be assets is more difficult to answer. It is highly controversial whether a dead body is an asset or not. A mummy, on the other hand, is more easily seen as an asset.\(^5\) The fact that a mummy is an archaeological find seems to overshadow the fact that these are dead persons. Objects made from human remains can be seen as assets more easily than the human remains themselves, e.g. a beaker made from a scull, or ashes of a cremated corps which have been used to make a diamond.

Animals, on the other hand, are assets if they are susceptible of human control. If so, animals are regarded as movable things. No special rules of private law apply to them. Still, there is a bulk of special legislation on animal welfare such as the Health and Welfare Act for Animals of 1992.\(^6\) Moreover, the Criminal Code contains an article on damaging a thing belonging or partly belonging to another person (Art. 350 Criminal Code). In paragraph 2 of this article the rule on damaging things is applied to animals by analogy. However, the article does not treat animals as things.

2.7. **Goodwill, Clientele**

Although goodwill and clientele can be the object of a sales contract and can be transferred to a company as consideration for the allotment of shares and can be put on the company’s balance sheet as separate assets for accounting reasons, they are not seen as assets in a legal sense, i.e. as objects of proprietary rights.\(^7\)

2.8. **Universitas Rerum et Iuris**

The concept of *universitas rerum* is unknown to Dutch property law. Although it is possible to sell a collection of books or an entire library, the collection of books is not seen as one thing but as a number of separate things. In order to transfer ownership of the books every item has to be transferred separately. So, the fact that the books belong together and form a

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\(^3\) Van der Steur 2003, p. 217-220.
\(^4\) Van der Steur 2003, p. 220-231.
\(^5\) Van der Steur 2003, p. 213-217.
\(^6\) Gezondheids- en Welzijnswet voor Dieren, *Staatsblad* 1992, 585. According to Article 36 in conjunction with Article 121 of this act maltreatment of animals is a criminal act.
\(^7\) Mijnssen & De Haan 2001, nr. 4; Van der Steur 2003, p. 190 et seq. See also the Dutch Supreme Court’s decision in HR 31 May 2002, *NJ* 2003, 342.
\textit{universitas} has no consequences on the definition of what constitutes an 'asset': the \textit{universitas rerum} is not regarded as one single asset. According to common opinion a large heap of unions, on the other hand, is seen as one single asset. However, the heap is not an \textit{universitas rerum}. On the contrary, the concept of \textit{universitas rerum} presupposes that there is a number of separate items.

On the other hand, the concept of \textit{universitas iuris} (a collection of all sorts of assets) does have some importance in Dutch law. Not that such a \textit{universitas} is seen as a single asset, but the fact that a number of assets belong together and share a certain fate may have some legal consequences. The most common examples are matrimonial property belonging to both spouses, the deceased’s estate and the patrimony belonging to a partnership without legal personality.

The creditors of a partnership have an exclusive right to seize the partnership’s assets in execution, a right which excludes the creditors of the partners in private (Art. 7:806 and 7:827 DCC). Within the partners' patrimony the partnership patrimony thus forms a separate patrimony to the benefit of the partnership’s creditors. On the other hand, when private assets of the partners are seized the business creditors have no priority over the private creditors. Similarly, when there are two or more heirs, the creditors of a deceased’s estate have an exclusive right to seize assets from the deceased’s estate in execution, excluding the heirs’ private creditors. Within the patrimony of the heirs the deceased’s estate forms a separate patrimony (Art. 4:184 DCC). Another example from the law of succession: in article 4:183 DCC Dutch law recognizes the \textit{hereditatis petitio}, a right to recover a deceased’s estate in its entirety.\footnote{The practical advantage of the \textit{hereditatis petitio} over the possessory action or the revindicatio is a less strict burden of proof and different limitation periods. See Van Mourik 2002, § XIII 9.}

Still, Dutch law does not recognise the \textit{universitas iuris} as one single asset. In practice it has important consequences on the transfer of an enterprise, whether or not the enterprise has legal personality or not. In order to transfer an enterprise all assets which make up the enterprise should be transferred separately in accordance with the transfer rules which apply to those items. On the other hand, Article 3:222 DCC gives special rules on a right of usufruct on a collection of things and rights, such as a deceased’s estate or an enterprise, but we cannot infer from the article that the deceased’s estate or the enterprise is seen as an \textit{universitas}. Every asset of the collection should be burdened with a usufruct separately. In order to do so, formalities have to be fulfilled which differ according to the nature of the asset. A usufruct on immovable property, for example, needs a notarial deed and registration in the land register.
2.9. **Res extra Commercium**

The Roman concept of *res extra commercium* can no longer be found in the Dutch Civil Code as a legal concept. The Roman concept consisted of three different classes of things. Firstly, the *res communes*, things belonging to everyone, such as the air we breathe, secondly, the *res divini iuris* or *res sanctae*, religious objects, and thirdly, the *res publicae*, things belonging to the government. Dutch law does not recognize open air as a thing. For that reason Dutch law no longer uses the concept of *res extra commercium* in reference to open air. The second category of *res sanctae* is also superfluous, as religious objects are owned by for example churches, museums, governments or private persons. The third category, the *res publicae*, still exists but in principle does not underlie special rules of property law. The standard concept of private ownership applies to things owned by a local government or the national government, although public property may underlie special rules of written or unwritten public law.

An example of a special rule on *res publicae* is Article 436 Code of Civil Procedure which provides that *res publicae* cannot be seized in execution. The article applies to all kinds of assets, immovables, movables, claims and other assets. Book 5 of the DCC contains special rules on immovable *res publicae* belonging to the state and rules on immovable property with a public function, such as roads, even if privately owned. Article 5:24 DCC provides that immovables which have no other owner belong to the State. Moreover, the seabed of the territorial sea and the Waddensea (in the north of The Netherlands) are owned by the State (Article 5:25 DCC). The beaches until the foot of the dunes are presumed to be owned by the State (Art. 5:26 DCC). The riverbed of public waterways are also presumed to belong to the State (Art. 5:27 DCC). Public immovable property (excluding the beaches) which are maintained by a public body are presumed to be owned by that public body. Many church towers from before 1798 became the property of the local city councils in 1798 because the church towers at the time fulfilled public functions such as a look-out and prison and often the bells were used as a warning signal in the case of fire in the city, or enemy armies approaching the city.\(^9\)

Most public roads are owned by local governments or the State. However, a privately owned road may be a public road if it has a public function. Under Article 5:28 DCC all public immovable property other than beaches is presumed to belong to the public authority maintaining the property in question. This provision is especially important for public roads.

\(^9\) Staatsregeling voor het Bataafsche Volk of 1 May 1798. The relevant provision is Article VI Additioneel artikelen tot de Acte van Staatsregeling voor het Bataafsche Volk.

\(^{10}\) More detailed: Ploeger 1997, ch. 9.
2.10. **Obligations**

In Dutch law obligations are owed, not owned. The creditor is said to have a claim against his debtor. He holds the claim but he is not the owner of the claim. The concept of ownership does not apply to a claim or obligation. Ownership is confined to tangible things (Art. 3:2 DCC). The same applies to rights other than personal rights. In Dutch legal terminology we do not say that someone owns a right of pledge. We refer to the pledgee as the holder of the right of pledge. In short you hold a certain right but you do not own it.

3. **Intellectual Property Law**

3.1. **Introduction**

A large part of intellectual property law is based on international treaties and a number of EC regulations and directives. A general and worldwide treaty giving rules on most aspects of intellectual property rights is the WTO agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS-agreement) from 1994. In the following overview I will concentrate on the Dutch national statutes.

3.2. **Copyright**

The Netherlands is a contracting state to the WIPO Berne Convention for the Protection of Literary and Artistic Works of 1886 and to the WIPO Copyright Treaty (Geneva 1996).\(^\text{11}\)

In Dutch national law copyright is protected under the Copyright Act 1912 (*Auteurswet* 1912). The Act has been amended on many occasions, e.g. as a result of EC directives. Article 1 of the Act reads as follows:

> 'Copyright is the exclusive right of the maker of a work of literature, science or art, or his successor in title, to publish and to multiply the work, subject to the restrictions set by this Act.'

The Copyright Act protects not only copyrights which came into being in the Netherlands but also foreign copyrights which have to be protected under the various copyright treaties ratified by the Netherlands.\(^\text{12}\)

\(^\text{11}\) This treaty shall be ratified by the European Union on behalf of all member states. Furthermore, the treaty has been adopted into the EC directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and this EC directive has been implemented into Dutch law by Statute of 6 July 2004, *Staatsblad* 336.

\(^\text{12}\) Berne Convention for the protection of literary and artistic works (1886), Universal Copyright Convention (1952), and the Trade Related Aspects of Intellectual Property
The photographer who makes a portrait or other picture of someone has copyright over the picture, but in addition the person portrayed may have what is sometimes called a publicity right or portrait right which enables him to prevent the photographer from publishing the photo. In effect this right is not recognized as an exclusive right; rather the portrayed person has a legal position which is protected by tort law. The definition of portrait covers among other things photos, drawings, paintings, sculptures and impressions on a coin. The portrait is a representation of (part of) someone’s body (not necessarily his face), from which the person portrayed can be recognized by the public for which the portrait is published.

If the picture has been made with the portrayed person’s permission, the portrait may not be published without the permission of both the author and the person portrayed. The author has a copyright and the portrayed person has a portrait right (Art. 19 and 20 Copyright Act 1912). Where the portrait has been made without the portrayed person’s permission, the author is allowed to publish the portrait unless the portrayed person or, after the latter’s death, his direct relatives have a reasonable interest to oppose publication (Art. 21 Copyright Act 1912). Originally this reasonable interest had a non-financial nature: the protection of the portrayed person’s privacy. Nowadays it also covers financial interests. If the portrayed person is so popular as to enable a commercial exploitation of his portrait and the portrait is indeed used for commercial purposes, the portrayed person is entitled to resist publication if he does not receive a reasonable financial compensation.\footnote{HR 19 January 1979, NJ 1979, 383 ('t Schaep met de vijf Pooten).}

3.3. Trade Mark

The primary source on trade mark law in the Netherlands is the Benelux Trademark Act, based on the Benelux Trademark Treaty, a treaty uniforming trade mark law in Belgium, the Netherlands and Luxemburg. The Benelux Trademark Act has been amended to adopt the EC regulation on the harmonization of trade mark law.\footnote{21 December 1988, 89/104/EEC, OJ L 40, 1.} A new Benelux Trademark Treaty was signed on 25 February 2005, expected to be in effect before the end of 2006. Apart from the Benelux Trademark Act several international treaties apply in the Netherlands: the Paris Convention for the Protection of Industrial Property (1883), the Madrid Agreement concerning the International Registration of Marks (1891), the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957), the Agreement on Trade-related Aspects of Intellectual Property Rights (1994), and the Trademark Law Treaty (1994). In

\footnotesize{Righths (1994). The dates given are the dates of the treaties, not the dates of ratification by the Netherlands.}
addition, the EU Council Regulation nr. 40/94 on the Community Trade Mark (1993) applies.

The Benelux Trademark Act distinguishes general trademarks from individual trademarks. An example of a general trademark is the well-known Woolmark. Until 1987 trademarks were confined to physical products; the Act did not recognize trademarks for services. The latter trademarks could be asserted only with an action in tort. From 1987, however, the provisions on trademarks for physical products apply to services as well. Under Article 10 of the Act the trademark lasts for 10 years, but it can be renewed. Each renewal is for 10 years and the number of renewals available is indefinite so that the trademark may remain valid eternally.

3.4. Patent

Patent law in the Netherlands is governed by national law, European law and international treaties. A national patent, valid in the Netherlands, can be obtained under the National Patent Act 1995 (Rijksoctrooiwet 1995).15 Interest in purely national patents is in decline in the Netherlands. In many more cases an application is filed with the European Patent Office which is able to confer a patent under the European Patent Convention (Munich 1973). Such a European patent will be valid in those member states to the convention mentioned in the applicant’s request. In fact it is a bundle of national patent rights each of which underlies the various national rules on patent law. It is therefore not a uniform patent. It should be noted that the European patent is not restricted to the member states of the European Union: many European states outside the European Union are contracting state to the European Patent Convention. A third way to apply for a patent right is an application under the Patent Cooperation Treaty (Washington 1970). This path will not lead to a uniform patent right but again to a single national or a bundle of different national patents. The Dutch substantive rules on which inventions may be protected by a patent are in line with European and international requirements and will therefore not be discussed here.

3.5. Trade Secrets

Trade secrets cannot be regarded as property in the strict sense of the word. Trade secrets may be protected by adopting non-competition clauses in employment contracts. In order to be valid the non-competition clause should be made in writing and the employee should be at least 18 years old (Art. 7:653(1) DCC). If in relation to the employer’s interests the employee’s interests are unfairly disregarded, the judge may avoid the non-competition

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15 To some part the Act also applies in the Netherlands Antilles.
16 Octrooi being the Dutch word for patent.
clause or part of it (Art. 7:653(2) DCC). The judge may also grant a fair compensation to the employee (Art. 7:653(4) DCC). There is a new draft bill on non-competition clauses to the effect that the employer is always under a duty to pay the employee a fair compensation for the time during which the non-competition clause is valid. The bill also demands that every non-competition clause should expressly state its geographical application and its time limit. The bill (nr. 28167) which is now discussed in the First Chamber of Parliament is fiercely criticised and may never be enacted. The protection of trade secrets is also important in licensing agreements.
List of Questions

I  A is the owner of land C. A has been using the water of red river since 30 years to irrigate the land C. B is authorized by Public Authority to dig the bed of the red river up to the land C in order to search for gas (or for any other reasons). In order to realize the digging B closes access to the red river depriving A of the water. Which remedy does A have against B?

ad I  The fact that B received a permit to dig the river bed and acts within the limits of this permit does not mean that by doing so B cannot commit an unlawful act (tort) against A. If B by denying access to the water commits an unlawful act against A, A can sue B for damages or ask the judge for an injunction which demands to refrain from his unlawful acts.

II  A receives a regular gas supply from the company named B. A stores the gas in a tank before using it. Suppose that A does not pay for the gas supply, will B then be able to claim back the gas which is left in the tank?

ad II  Even though A has not paid for the gas and the non-payment amounts to non-performance of the contract, B does not own the gas in the tank. B merely has contractual rights based on non-performance. He has a claim for the unpaid sum of money, he has the right to withhold any further delivery of gas until the gas bill has been paid, or he has the right to terminate the contract. In order to get payment B will be able to seize A’s property in execution. As the full gas tank is part of A’s assets, the gas may be seized in execution, but so may A’s car or house.

III  A is the owner of a picture-gallery. A authorizes the weekly magazine B to take pictures of the paintings with the promise that B will pay a certain amount of money. Afterwards A sells the picture-gallery to C. The contract of sale has been drafted very broadly and refers to all the rights which A has over the goods involved. Who is entitled to receive the money due by B?

ad III  The contract of sale merely creates obligations for the seller to transfer the assets sold under the contract. The contract itself does not pass ownership of the objects sold. The same applies to the contractual right of A against B to receive the sum of money. Under the contract of sale this contractual right should be assigned to C. If

17 HR 10 March 1972, NJ 1972, 278 (Vermeulen v Lekkerkerker).
all requirements for a valid assignment have been fulfilled the right to receive the sum of money belongs to C. After notice of the assignment has been given to B the latter should pay to C, the assignee. The assignee is then entitled to receive the money.

IV A downloads form an illegal internet site a music recording. He is discovered by accident. Can the editor B who has the copyright on the recording, sue A in order to obtain payment of the copyright?

ad IV Downloading from the internet for private use is allowed. If A uses the downloads for other purposes than private use, the holder of the copyright can sue A for payment of copyright. However, many musicians, composers, text authors and sheet music publishers have joined the Dutch BUMA18 organisation to which the copyright holders have transferred their copyright. BUMA exercises these rights collectively on behalf of all copyright holders who share in the payments to BUMA.

V A is the director of the factory of Company X. Over the past years he has developed a sophisticated logistic system which permits the factory to obtain all necessary components just in time for assembly. Company X has not patented the logistic system created by A. Despite this omission X considers the logistic secrets one of her most valuable trade secrets and has taken all possible steps to protect it. A resigns from his job at company X and after the non-competition clause has elapsed he starts a new job with Company Y which is a direct competitor of X. X is worried that A will introduce the logistic system in the company Y. Are there any remedies which X can use to prevent A from making use of the logistic system?

ad V After the non-competition clause has elapsed, company X in principle has no remedy against its former employee or against company Y. In rare cases X might have a tort action against A and/or Y. As long as the non-competition clause is valid, a tort action can be brought against Y only if Y wilfully profited from A’s breach of contract.

VI A is a non-profit organisation giving help to families whose members have a predisposition to a certain genetic disease. During their activity they have stored a lot of medical data regarding a large group of families. Can the non-profit organisation deliver the data to X company in order to develop a medicine which might be able to

18 Buro voor Muziekauteursrecht. Membership of this organisation is not compulsory.
cure the disease? Is there any difference whether the transfer is made for free or for valuable consideration?

ad VI Such a delivery is contrary to the Protection of Personal Data Act (Wet Bescherming Persoonsgegevens) from 2000. Article 16 of the Act forbids among other things the collection and delivery of medical data unless the Act provides otherwise. Article 21(1)(a) enables collection of medical data by doctors, hospitals and certain institutions for medical or social welfare provided that the data are necessary for the exercise of their medical or social duties. The second paragraph of article 21 adds that medical data may be collected or passed on only to persons who are under a duty of secrecy, and that all other persons who get the data are under a duty of secrecy. Article 21(4) focuses on genetic data and provides that collection of such data is allowed only in relation to the person whose data are collected unless there is strong medical interest in favour of such collection or the collection of data is necessary for medical research or statistics. Article 23(1)(a) provides that collection or passing on of medical and genetic data is allowed if the person whose data are concerned gives his explicit permission.

VII The magazine X published pictures of A (a well known football player) to celebrate the winning of Champions league by his team. After a while magazine X sells posters with the above-mentioned pictures. Does A have any legal remedy to protect his right of publicity? Is there any possibility for A to claim damages? Is there any possibility to obtain the restitution of the money gained by X magazine deriving from the selling of the posters?

ad VII The case involves a portrait made without permission. Copyright of the photo belongs to magazine X. In principle the holder of the copyright may use this photo for whatever purpose unless the use constitutes an unlawful act. The fact that the football player is well known makes commercial exploitation of his portrait possible. In that case publication is not allowed unless a fair compensation is offered. Without such compensation publication constitutes an unlawful act (a tort). As a consequence the football player may demand an injunction to prevent the magazine from publishing his portrait. If the photos have already been published he may demand damages to be paid by the publishing company. The amount to be paid is at least the sum which the football played should have received if he had given his
permission (the fair compensation).\textsuperscript{19} The damages do not normally cover the commercial gains earned by the publishing company.\textsuperscript{20}

\textsuperscript{19} See for example Amsterdam District Court 16 October 2002, \textit{IER} 2003, 18.
\textsuperscript{20} According to the Amsterdam District Court’s decision in 2 February 2005, \textit{IER} 2005, 44 politicians do not have right of publicity which can be exploited commercially. For that reason a politician cannot demand restitution of commercial gains. He can, however, demand immaterial damages.
References

**Hijma 2001**

**Mijnssen & De Haan 2001**

**Van Mourik 2002**

**Ploeger 1997**

**Van der Steur 2003**
1. Introduction

Arbitration statutory law presently in force in the Netherlands came into effect on 1 December 1986. It is contained in Book Four of the Code on Civil Procedure, consisting of Articles 1020-1076. Since its 1986 enactment, the Act has been amended on several occasions, but these changes were limited in number, nature and their reach. Thus, those introduced in 1991 were aimed at the correction of an editorial mistake in Article 1041 para. 1 Rv. Similarly, the amendments in effect as from 1 January 2002 were to a great extent merely terminological adaptations needed as a consequence of the changes introduced in Book 1 Rv relating to the procedure at first instance. Finally, the changes to the definition or evidence of a ‘written form’ in Article 1021 Rv, that came into force on 30 June 2004, were introduced to implement the Directive on Electronic Commerce of 8 June 2000.

Although the Act presently in force cannot be considered to be an ‘arbitration unfriendly’ legal framework, certain shortcomings became evident in practice. Consequently, a different regulation of a number of
issues has appeared desirable and the need for more considerable changes has become apparent. The necessity of a substantial revision of Dutch statutory arbitration law was already recognized when the amendments to Book I, mentioned above, were considered. Several reasons for this can be mentioned. It is believed that a wider acceptance of the provisions of the 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter: Model Law) would make the Netherlands a more attractive venue for arbitration. When the 1986 Act was drafted, the Model Law was considered and its basic principles were incorporated. Yet, it is generally felt that the provisions of the Model Law found insufficient acceptance in the final text of the Act. It is believed that the incorporation of the Model Law solutions in the new legislation would, to a greater extent, result in a more frequent choice of the Netherlands as the place of arbitration.

Besides, in the last decade substantial changes have been introduced in national statutory laws in a number of jurisdictions, as well as in the rules of different arbitral institutions. Consequently, a reform of the statutory law in the Netherlands is considered necessary in order to bring the regulatory framework into line with these modern trends and developments in comparative arbitration regulation and contemporary arbitration practice.

A Working group led by Prof. A.J. van de Berg drafted ‘The Proposals for Changes to Book Four (Arbitration), Articles 1020-1076 Code on Civil Procedure’. Some of the amendments proposed, in particular those

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8 Nota naar aanleiding van het Eindverslag, Kamerstukken II 1999/00, 26 855, nr. 5, p. 3, referred to in ‘Toelichting’, TvA, p. 126. See also, Snijders 2003, aantekening 2. Cf., Sanders 2001, with a summary of the changes proposed by the author, indicating also where a particular issue is addressed in the book, p. 309 et seq.

9 In the process of drafting the Arbitration Act, international treaties and modern arbitration statutes of other countries, in particular those of France and Switzerland were taken into consideration. Other instruments, such as the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law on International Commercial Arbitration were also reviewed. ‘Memorie van toelichting’, TvA, 1984, No. 4A, 19-20. See also, Franx 1985, p. 73 et seq.

10 ‘Toelichting’, TvA, p. 27.

11 E.g., new legislation in England & Wales was enacted in 1996. In 1998 the amendments to the Belgian arbitration statutory law were introduced and the new German Arbitration Act, contained in the Code on Civil Procedure – Book X, came into force. In Sweden changes to the Arbitration Act were introduced in 1999.

12 E.g., the Rules of Arbitration of the International Chamber of Commerce, as well as the Rules of the London Court of International Arbitration were amended in 1998. In the same year, the new Rules of the Netherlands Arbitration Institute came into force and were amended in 2001.

13 ‘Toelichting’, TvA, p. 126-127. See also, Meerdink 2005, p. 75. But see, Snijders 2005, p. 27, expressing a somewhat different view with respect to the reasons for the changes to the arbitration statute.

concerning the structure of the Act and the arbitration agreement will be the subject of analysis in this paper and will be compared with statutory legislation currently in force.

2. Basic Principles and Structure

Basic principles incorporated in the 1986 Act, as well as its structure, have been retained in the Proposals for the new law.

The Act is drafted in a fairly detailed manner, whereby the majority of the provisions are of a supplementary nature. Consequently, they only apply in the absence of a choice by the parties, whereas the provisions which have a mandatory character are very limited in number. The same approach has been followed in the Proposals, where the principle of party autonomy is incorporated and provisions of a mandatory nature are reduced to exceptions.

The structure of the 1986 Arbitration Act has been maintained in the proposed new text. The Act contains provisions which relate to arbitration within the Netherlands (Title One, Arts. 1020-1073 Rv) and those which concern arbitration outside the Netherlands (Title Two, Arts. 1074-1076 Rv). The division into two Titles provides for a clear criterion for the applicability of the Act. The so-called principle of territoriality is incorporated in Article 1073(1), providing that Title One applies if the place of arbitration is in the Netherlands. The text of this provision has remained unchanged in the Proposals.

Finally, there are no changes with respect to the monistic approach in statutory regulation. There is no distinction between ‘domestic’ and ‘international’ arbitration under the 1986 Act. Accordingly, there is no dual regime of statutory regulation: the provisions of Title One apply to both domestic and international arbitrations taking place in the Netherlands. The preference for a monistic approach was primarily inspired by a desire to avoid disputes whether a case is to be considered as domestic or international for the purposes of determining the applicability of a particular regime. Besides, it was held that carefully drafted statutory legislation for international arbitration could also be a suitable framework for domestic arbitration.
Yet, in cases where at least one of the parties has domicile or actual residence outside the Netherlands, certain time-limits are extended under the Act presently in force. In particular, this is so with respect to the appointment of arbitrators (Art. 1027(2) Rv) and regarding challenging arbitrators (Art. 1035(4) Rv). The provisions on the extension of time-limits apply if at least one party, or the challenged arbitrator, is domiciled or has his actual residence outside the Netherlands.\(^{19}\)

However, this difference with respect to the time-limits is no longer maintained in the text of the Proposal.\(^{20}\) The relevant provision of Article 1027(2) is to be changed so as to provide for a time-limit of three months for the appointment of arbitrators. The provision of Article 1035(4) Rv, providing for extensions to the time-limits with respect to challenging an arbitrator in certain circumstances, is to be repealed. Consequently, the time-limits in Article 1035(2) Rv, as amended in the Proposal, apply in all cases, regardless of whether the domicile or actual residence of a party or the challenged arbitrator is within or outside the Netherlands.

3. **Arbitration Agreement**

The relevant provisions of the Act relating to an arbitration agreement have undergone several changes. In particular, the Proposals do not distinguish between the two types of arbitration agreements for the purposes of determining the moment when arbitral proceedings commence. Further changes have been introduced with respect to the written form of an arbitration agreement and the law applicable to the arbitration agreement. Also, a number of new provisions have been introduced, in particular with respect to provisional measures. However, the latter remain outside the scope of analysis.

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\(^{19}\) In the case of the appointment of arbitrators, the time-limit of two months is, under the Act, extended to three months. In the case of challenging an arbitrator, the time-limit of two weeks for withdrawal for the challenged arbitrator is extended to six weeks in case either one of the parties or the challenged arbitrator is domiciled or has his actual residence abroad. In the same situation, the time-limit for submitting a request for a challenge to the competent court is extended from four weeks to eight weeks.

\(^{20}\) Thus, there is the time-limit of two weeks for the arbitrator to withdraw. If the arbitrator does not withdraw, the request for a challenge to the competent judge at the District Court is to be submitted within two weeks from a written declaration by the arbitrator that he does not intend to withdraw. If no such declaration is made, the request to challenge is to be filed within six weeks from the moment when the notification of a challenge is received by the arbitrator.
3.1. Types of Arbitration Agreements and the Commencement of Arbitral Proceedings

The general provision relating to an arbitration agreement contained in Article 1020 Rv has remained, to a great extent, unchanged in the Proposals. The only exception is a suggestion to repeal paragraph 2, where the expressions ‘arbitration clause’ and ‘submission’ are defined in the Act. This provision is quite rightly considered to be unnecessary, bearing in mind that paragraph 1 of the same provision already states that ‘[p]arties may agree to submit to arbitration disputes which have arisen or may arise between them out of a defined legal relationship, whether contractual or not’. Thus, it is obvious that this determination includes both a submission agreement and an arbitration clause.

The definitions of the two types of arbitration agreements in Article 1020(2) do not imply any different treatment with respect to their validity under the legislation currently in force. The Act only provides for their separate treatment in Articles 1024 (submission agreement) and 1025 (arbitration clause), concerning the procedure for commencing arbitration and the contents of a submission agreement. Thus, unless the parties have agreed otherwise, the arbitration shall be deemed to have commenced by the conclusion of a submission agreement (1024(2) Rv). If arbitration is to be commenced on the basis of an arbitration clause and provided that no other method for the commencement has been agreed upon, the proceedings are considered to have been initiated on the day when a party receives a written notice containing information that the other party is commencing arbitration (Art. 1025(1) and (3) Rv).

In the Proposals all the provisions relating to the distinction between a submission agreement and an arbitration clause are repealed. Thus, Article 1024(1), providing that the submission agreement shall describe the matters which the parties wish to submit to arbitration is omitted in the Proposals. The reason for this is that such a requirement already follows from the text of Article 1020(1), which refers to a ‘defined legal relationship’. Similarly, the provisions contained in Article 1024 and 1025 are repealed under the Proposals. There is a new provision (Art. 1035B), which deals with the commencement of arbitration. No distinction is any longer maintained between a submission agreement and an arbitration clause. The provision

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21 Article 1020 Para. 2 reads as follows: ‘The arbitration agreement mentioned in paragraph (1) includes both a submission by which the parties bind themselves to submit to arbitration an existing dispute between them and an arbitration clause under which parties bind themselves to submit to arbitration disputes which may arise in the future between them’.
23 Articles 1024 and 1025 Rv.
24 Articles 1024(1) Rv.
follows the determination used in Article 21 of the Model Law and states that arbitration is deemed to be commenced on the date on which a request for arbitration is received by the respondent.

The purpose of the changes addressed is merely to simplify the provisions on the commencement of arbitration and to do away with the redundant definitions. Thus, they have no importance concerning the question of the validity of the two types of arbitration agreements. Different to some other jurisdictions, where the validity of an arbitration clause may exceptionally be excluded for certain types of disputes, the Act contains no provisions that limit or exclude the effectiveness of arbitration clauses. The same approach is maintained in the Proposals.

The provisions contained in paragraphs 5 and 6 of the present Act have been retained in the Proposals.

3.2. **Subject-matter Arbitrability**

As mentioned previously, other issues dealt with in Article 1020 Rv have remained unchanged. This includes the definition of objective or subject-matter arbitrability: ‘legal consequences of which the parties cannot freely dispose’ remain outside the arbitration domain.

Just as statutory definitions in other jurisdictions employing either the same or different approaches to defining arbitrability, the one provided in the Act does not give a clear answer as to which matters are ‘capable of settlement by arbitration’. Usually, it is impossible to draw up a comprehensive list of arbitrable matters in a certain legal system, without a careful study of other fields of law and guidance from the judiciary. The suggestions addressed in the coming text illustrate that the question of arbitrability remains a rather controversial issue in legal theory in the Netherlands, certainly in the areas of law where there has been no guidance from the judiciary so far. The controversy lies in particular in defining a uniform approach to determine the scope of arbitrable matters.

It is generally held that matters of public policy are not arbitrable as they are not considered to be at the free disposal of the parties. These are, in particular, matters in which a decision has an *erga omnes* effect, such as

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26 See e.g., Article 1678(2) of the Belgian Code of Civil Procedure, which provides for the *ipso jure* nullity of an agreement to arbitrate future disputes falling within the competence of the Labour Court.

27 Paragraphs 4 and 5 respectively. It is expressly stated that the expression ‘arbitration agreement’ includes an arbitration clause which is contained in articles of association or rules which bind the parties. When an arbitration agreement refers to a set of arbitration rules, such rules will be considered to form part of the agreement.

28 Article 1020(3) of the present Act (para. 2 under the text of the Proposals).

29 The same is true for paras. 5 and 6 of Article 1020 of the present Act, contained in paragraphs 4 and 5 of the Proposals. See supra note 27.

matters of family law (divorce, adoption) or a declaration of bankruptcy.\textsuperscript{31} Some authors are of the opinion that whether a particular matter has a public policy nature should be decided on the case-by-case basis.\textsuperscript{32} Others attempt to identify a certain line of reasoning to be applied when examining whether a certain issue is of a public policy nature.\textsuperscript{33}

Prof. Sanders suggests that the exclusive jurisdiction of national courts entails the non-arbitrability of a subject-matter, but the problem lies, in his view, in the fact that it is not always clear when exclusive jurisdiction is in fact provided. However, whenever it is clear that exclusive jurisdiction is provided, it implies objective non-arbitrability. Such exclusive jurisdiction is provided in Article 80 of the Patent Act of 1995 relating to the validity of a patent and Article 14D of the Uniform Benelux Trademark Act. Similarly, special court proceedings are provided for in the 1958 Agricultural Lease Act Articles 128 and 129.\textsuperscript{34} In contrast to these obvious situations in which arbitration is excluded, the author suggests distinguishing other matters in which the question of arbitrability is likely to arise. Thus, some questions in such disputes are arbitrable, whereas certain aspects fall outside the domain of arbitration. Such is the case with respect to labour contracts, disputes involving the renting of houses, insolvency proceedings and questions pertaining to company law.\textsuperscript{35}

Although the statutes mentioned provide for the exclusive jurisdiction of the judiciary, it may be argued that the exclusivity provisions relate only to the jurisdiction of the courts in relation to the jurisdiction of other courts and not to arbitration.\textsuperscript{36} Thus, the criterion of exclusive jurisdiction should always be viewed in the context of the purpose which a particular provision intends to achieve. If it is merely part of the general rules on the allocation of jurisdiction, without any reason or intention to exclude arbitration, they should not be interpreted as implying the non-arbitrability of a subject-matter. A similar line of reasoning can also be applied when a special procedure is provided for certain disputes. Arbitrators should not be competent to deliver decisions which have an \textit{erga omnes} effect, as their jurisdiction is based on a private agreement between the parties. Such an agreement, and consequently a decision delivered on the basis thereof, can have binding effect only between the parties, although there are some examples in comparative law pointing to a different approach. For example, in some jurisdictions, such as Switzerland and the United States, an arbitral award may be the basis for registering the invalidity of a patent.

The Proposals also retain the provision in Article 1020 paragraph 4 of the Act (para. 3 in the Proposals). It enlarged the domain of arbitrability by

\textsuperscript{31} Snijders 2003, Article 1020, n. 5.
\textsuperscript{32} Meijer 2005, p. 1237, n. 6.
\textsuperscript{33} Snijders 2003, Article 1020, n. 5.
\textsuperscript{34} Sanders 2001, p. 36-38. Cf., De Witt Wijnen 2005.
\textsuperscript{35} Sanders 2001, p. 36-38.
\textsuperscript{36} Lazic & Meijer 2002.
expressly providing that the parties may agree to submit to arbitration ‘the
determination only of the quality or condition of goods, the determination
only of the quantum of damages or a monetary debt’, as well as ‘the filling of
gaps in, or modification of, the legal relationship between the parties’.

3.3. Formal Validity of an Arbitration Agreement

A number of amendments with respect to arbitration agreements are
suggested in the Proposals. These relate in particular to the written form of
an arbitration agreement, a provision relating to a state as a party to
arbitration and the law applicable to an arbitration agreement.

3.3.1. Written Form as a Condition of the Validity of an Arbitration
        Agreement

The Act presently in force provides in Article 1021(1) that an arbitration
agreement must be proven by an instrument in writing. Accordingly, the
only requirement is that there is evidence of the arbitration agreement. Only
when it is argued that there is no arbitration agreement will its existence
have to be proven by an instrument in writing. If an arbitration agreement
must be proven, according to Article 1021, an instrument in writing which
provides for arbitration or which refers to standard conditions providing for
arbitration is sufficient, provided that this instrument is expressly or
impliedly accepted by or on behalf of the other party. There is no
requirement for an exchange of documents. Accordingly, the definition of a
written form is less stringent than the requirement under Article II(2) of the
1958 New York Convention37 or Article 7(2) of the Model Law.38

Accordingly, written evidence of an arbitration agreement is sufficient
under the present Act, whereby a written form is not a condition for the
validity or existence of an arbitration agreement. However, it is intended to
amend this provision so as to convert a requirement of written evidence into
a condition for the existence and the validity of an arbitration agreement. The
main reasons for this are found in similar legislative solutions in comparative
law,39 but also because of the need to adjust the statutory legislation so as
properly accommodate Article 6 of the European Convention on Human
Rights. Namely, since the parties waive their constitutional right of access to
the judiciary by entering into an arbitration agreement, the requirement of a
written form should be a condition for the validity of such an agreement, and

37 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New
38 See also, Sanders 1999, p. 157.
39 Such as the relevant provisions in English, German and Italian statutory law, as well
        as in the Model law. Namely, in all these statutes a written form is a condition for the
        validity of an arbitration agreement and not merely written evidence.
not merely a requirement of written evidence. Therefore, it is suggested that the relevant provision of Article 1021(1) should be amended, whereby the wording that an arbitration agreement shall be ‘proven’ by an instrument in writing should be replaced by the wording that an arbitration agreement shall be concluded in written form (Art. 1021(1) of the Proposals).

3.3.2. Definition of an ‘Agreement in Writing’

The definition contained in Article 1020(1) of the Act can be found in paras. 2 and 6 of the Proposals. The relevant provision of Article 6:227a of the Civil Code, relating to the conclusion of an arbitration agreement by electronic means, is reproduced in para. 6 of the Proposals. The second sentence of Article 1020(1) of the Act is now contained in paragraph 2 of the Proposals, whereby the wording has remained basically unchanged. It reads as follows:

‘For the purpose of the first paragraph an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party’.

As mentioned previously, this definition is more favourable than the definitions under Article II(2) of the New York Convention and Article 7(2) of the Model Law, as there is no requirement for an exchange of documents. The provisions concerning the written form of an arbitration agreement in the New York Convention and in the Model Law have been subject to criticism in legal writing and have often been considered as outdated and unable to meet the needs of modern commerce. Many statutes on arbitration provide for a less stringent requirement of the written form. Besides, the Working Group within the UNCITRAL has been discussing a new provision on the written form of an arbitration agreement. The definition of an ‘agreement in writing’ under the law of the Netherlands can be invoked and relied upon also in cases that fall within the scope of application of the New York Convention, on the basis of the more-favourable-right provision contained in Article VII(1) of the Convention.

In connection with the arbitration clause contained in the general conditions in consumer contracts it should be mentioned that important changes have been suggested for introduction in the Civil Code. These changes are further discussed infra, under § 3.3.3.

41 In the Act, this provision of the Civil Code is referred to in para. 1 of Article 1020. For more on this issue, see infra under 3.3.4.
42 See e.g., Kaplan 1996, p. 27 et seq.
In arbitration theory and practice in the Netherlands it is held that an arbitration agreement is entered into if a party to the arbitral proceedings fails to raise the plea of the invalidity or non-existence of an arbitration agreement before submitting a statement of defence.\textsuperscript{44} In the Proposals it is now expressly regulated in Article 1021(3) that an arbitration agreement is considered to have been entered into if a respondent fails to raise the plea that the tribunal has no jurisdiction on the ground that there is no valid arbitration agreement before submitting a statement of defence.\textsuperscript{45} The only difference compared to the Act presently in force is that a failure to object in the Proposal is also regulated in the context of the validity of an arbitration agreement. Accordingly, this may be relevant from a theoretical point of view, but does not alter the regulation under the present Act. This is particularly so bearing in mind that the provisions contained in Articles 1052(2) and 1065(2) have remained virtually unchanged. From the wording of these two provisions it is obvious that a party is precluded from raising the plea of a lack of jurisdiction for invoking the invalidity of an arbitration agreement if it has failed to do so before submitting a defence, whereby the only exception is the objection of invalidity because the dispute is not capable of settlement by arbitration.

In order to establish whether the new regulation contained in Article 1020(3) of the Proposals presents an improvement on the Act it is interesting to compare the relevant provisions of the Netherlands Act with corresponding provisions in some other statutes, such as the German Arbitration Act of 1998 (contained in the Code on Civil Procedure, the 10th Book) and in the Model Law. Besides the general provision on waiver in Article 1027, the German Act provides that a plea that the arbitral tribunal lacks jurisdiction shall be raised no later than the submission of the statement of defence (Art. 1050(2)). In the context of the form of an arbitration agreement, it expressly states that non-compliance with the form requirements ‘is cured by entering into an argument on the substance of the dispute in the arbitral proceedings’ (Art. 1031(6)). A similar result follows from Articles 4 (general provision on waiver), 16(2) (the plea of lack of jurisdiction) and 7(2) of the UNCITRAL Model Law.\textsuperscript{46}

\textsuperscript{44} ‘Memorie van Toelichting’, TvA 4, 1986, p. 179; Snijders 2003, Article 1021, n. 1; Van den Berg 1987, p. 5. See also, Article 1052(2) Rv and 1065(2) Rv. From the two provisions it follows that if a party fails to raise the plea of the invalidity of the arbitration agreement before submitting a defence, the party is precluded from raising this plea at a later stage in the arbitral proceedings and in the proceedings before the court, unless the objection relates to the non-arbitrability of the subject-matter of the dispute.

\textsuperscript{45} Article 1023(3) of the Proposals reads as follows: ‘3. An arbitration agreement is also entered into if a respondent fails in accordance with article 1052, second paragraph, to raise a plea that the arbitral tribunal lacks jurisdiction on the ground that there is no valid arbitration agreement’. (translation: VL).

\textsuperscript{46} Article 7(2) of the Model Law provides, \textit{inter alia}, that an arbitration agreement ‘is in writing if it is contained in … or in an exchange of statements of claims and defence
The German Act and the Model Law do not contain provisions corresponding to Article 1052(2) and 1065(2) of the Netherlands Act, according to which any reason of invalidity, either formal or substantive, except non-arbitrability of the subject-matter, may not be successfully invoked for the first time after submitting the statement of defence in arbitral proceedings. Consequently, a lack of form is rectified under the German Act and the Model Law by a failure to object to the validity of the agreement before entering into an argument on the merits. What will be the consequences of a failure to object with respect to substantive validity is not expressly regulated in the two Acts. Presumably the general provisions on waiver, as well as provisions relating to the time-limit in which a lack of jurisdiction is to be raised, will be relevant, but the actual reach of these provisions will be determined by the judiciary. It is most likely that not all reasons affecting the jurisdiction of arbitrators will deserve the same treatment. Most probably, the non-arbitrability of the subject-matter would not fall within the reach of the ‘waiver of the right to object’ provisions.

As indicated previously, if the validity of an arbitration agreement, either formal or substantive, is not contested before submitting a defence, it is clear that a party cannot successfully invoke this ground in proceeding for setting aside (Art. 1065(2) Rv referring to 1052(2) Rv) or in the proceeding for the recognition and enforcement of a foreign arbitral award (Art. 1076(2) Rv). Therefore, introducing the new text of Article 1020(3) in the Proposals is of little practical relevance. Yet, inserting the wording concerned may be interesting from a theoretical point view. The purpose of the new provision now contained in Article 1021(3) could be to distinguish between the reasons for which such objection will be unsuccessful in the later stages. Solutions similar to the regulatory scheme in the German Act and in the Model Law would thereby be provided for. Thus, if a late objection relates to the formal invalidity or non-existence of an arbitration agreement, it will be unsuccessful because the arbitration agreement is considered to comply with the requirement of a written form according to the newly introduced Article 1020(3) of the Proposals. A reliance on Article 1052(2) would not only be unnecessary, but would also not be entirely appropriate. Namely, the party's objection will be unsuccessful not because it is strictly speaking precluded from raising the plea at the later stage, but because the agreement does comply with the requirement of written form. In contrast, if a party raises an objection as to the validity of an arbitration agreement other than relating to formal invalidity, such an objection will be unsuccessful because the party is precluded from raising such a plea at the later stages according to Articles 1065(2) and 1052(2) in the setting aside proceedings and according to Article 1076(2) Rv in the procedure for recognition and enforcement.

in which the existence of an agreement is alleged by one party and not denied by another'.
If this is the interpretation that is intended to be attained by including this provision, then it is more appropriate to introduce wording which more closely resembles the expressions used in the Model Law or in the German Act.\textsuperscript{47}

3.3.3. Arbitration Clause in General Conditions

As already mentioned, Article 1021(2) incorporates the part of the present Article 1021 according to which an instrument in writing, which refers to standard conditions providing for arbitration, is deemed sufficient if such an instrument is expressly or impliedly accepted by or on behalf of the other party. In this context a rather important amendment is suggested in the Proposals relating to the text of Article 6:236 sub n of the Civil Code. Namely, this provision is to be changed so as to include an arbitration clause on the so-called ‘blacklist’ of unreasonably onerous clauses in standard or general conditions. When the Act was drafted it was considered whether to place the arbitration clause on this list, in particular from the point of view of a consumer in arbitration.\textsuperscript{48} One of the arguments in favour of including the clause on the ‘list’ was concern about the extent of a consumer’s influence on the choice of arbitrators and consequently the fact that consumers may have the impression that arbitrators lack impartiality. Besides, a simplified procedure before the court of first instance was intended to offer an ‘inexpensive alternative’ to consumers. An arbitration clause was not placed on the blacklist after all. It was held that the new statute on arbitration did provide for a legislative procedural framework in which the impartiality of arbitral proceedings was sufficiently guaranteed.\textsuperscript{49} Consequently, an arbitration clause is expressly excluded from the list in Article 6:236 sub n of the Civil Code.

Although it remained outside the list, an arbitration clause was in certain circumstances denied effect by applying the relevant provisions of the Civil Code. Thus, an arbitration clause contained in the general conditions was considered unacceptable as being unreasonably onerous to the other party by the application of Article 6:233 of the Civil Code.\textsuperscript{50} Similarly, the rules of general contract law contained in Article 6:248(2) of the Civil Code

\begin{itemize}
\item \textsuperscript{47} For example, the words ‘The requirement of written form in the meaning of para. 1 is complied with if a respondent …’ could be added.
\item \textsuperscript{48} Hondius 1996, p. 139.
\item \textsuperscript{49} ‘Toelichting’, TvA, p. 130.
\item \textsuperscript{50} HR (Dutch Supreme Court) 23 March 1990, NJ 1991, p. 214 (Botman v Van Haaster), where the arbitration rules agreed upon contained provisions which may be considered as unreasonably onerous for one of the parties. In a transaction concerning flower bulbs, the rules referred to in the general conditions provided that only the members of a particular Association were allowed to initiate arbitral proceedings, whereas non-members could rely on an arbitration clause only when raising a counterclaim. Consequently, an arbitration clause referring to such rules was considered to be unreasonably onerous.
\end{itemize}
also apply to an arbitration clause. According to this provision, the rule on
the binding character of an obligation under the contract will not apply to the
extent that, in the given circumstances, this would be unacceptable according
to the criteria of reasonableness and fairness. Thus, it was considered
contrary to the criteria of reasonableness and fairness to hold a person of
limited means bound by an arbitration clause. It was concluded that the
claimant would have been deprived of the right to pursue his claim had the
court declared its lack of jurisdiction.\(^{51}\) Indeed, only in exceptional
circumstances would an arbitration clause be denied effect as being contrary
to the criteria of reasonableness and fairness.\(^{52}\)

Several reasons are mentioned for adding an arbitration clause to the
‘blacklist’ in Article 6:236 sub n of the Civil Code. Most importantly, the
relevant provisions of EC Directive 93/13 indicate that arbitration clauses
contained in standard conditions can be considered as unfair terms in
consumer contracts.\(^{53}\) Besides, the position of the ‘weaker party’ in arbitral
proceedings has lately been the subject of a continuous debate in the legal
literature in the Netherlands.\(^{54}\) The suggested amendment to the text of
Article 6:236 sub n of the Civil Code is only one among several provisions in
the Proposals which are introduced with the purpose of creating a more
favourable procedural framework for a weaker party in arbitral
proceedings.\(^{55}\) Also, it was the conclusion of the Netherlands Association for

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\(^{51}\) Kantonrechter Zierikzee, 19 February 1988, TzA 1988, p. 147. After submitting his
claim to an arbitral institution, the claimant was informed that the claim would only
be dealt with after a deposit to cover the costs had been made. The amount of the
costs exceeded the amount of his claim. Thereafter, the Claimant initiated
proceedings before the Court.


\(^{53}\) Council Directive 93/13/EEC on unfair terms in consumer contracts of 5 April 1993,
OJ L 95 21/04/1993. Relevant is Article 3 which in para. 3 refers to the Annex
containing an indicative and non-exclusive list of terms that can be considered as
unfair. The Annex under (q), reads as follows: ‘(q) excluding or hindering the
consumer’s right to take legal action or exercise any other legal remedy, particularly
by requiring the consumer to take disputes exclusively to arbitration not covered by
legal provisions, unduly restricting the evidence available to him or imposing on him
a burden of proof which, according to the applicable law, should lie with another
party to the contract; Cf., European Court of Justice, C-404/97, 27 June 2000, NJ 2000,
730 (Océano Grupo Editorial v Murciano Quintero) relating to a forum selection clause
considered in connection with the costs for the consumer.

\(^{54}\) See e.g., Van Bladel 2002; Sillevis Smitt 2003, p. 2146. For other literature on this issue,
see ‘Toelichting’, TzA, p. 128.

\(^{55}\) Other amendments intended to improve the position of a weaker party can be found
in the following provisions of the Proposals: a more detailed regulation concerning
the privileged position of a party in appointing arbitrators (Art. 1028), basic
principles of arbitration procedure are laid down with more particulars in Article
1036, the Proposals provide for a more structured rules on the conduct of arbitral
proceedings than the present text of the Act (Arts. 1036–1043) and the deposit of an
award with the Registry of the District Court is no longer obligatory, but is left to the

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Procedural Law that an arbitration clause should be included on the 'blacklist' under Article 6:236 of the Civil Code.\textsuperscript{56}

In general it cannot be said that the interests of a weaker party are insufficiently considered when applying the legislation presently in force. Yet the considerations addressed justify the decision to list an arbitration clause among unreasonably onerous clauses in standard conditions. A similar trend in providing for a different regulatory scheme for arbitration clauses in consumer contracts is followed in other jurisdictions as well.\textsuperscript{57}

3.3.4. Arbitration Agreement Concluded Electronically

As mentioned previously, Article 1021 was changed in order to implement the Directive on Electronic Commerce of 8 June 2000. The changes to Article 1021(1) were introduced on 30 June 2004. It was expressly stated that an arbitration agreement could be proven electronically, whereby the provision of Article 6:227a(1) of the Civil Code was declared to be analogously applicable.

The suggested changes to convert a requirement of written evidence into a condition for the existence and validity of arbitration agreement have already been explained.\textsuperscript{58} Consequently, the wording 'can be evidenced by electronic means' is also to be amended so as to state that the requirement of written form is a condition for the validity or existence of an arbitration agreement. Besides, the text of Article 6:227a(1) of the Civil Code is reproduced in paragraph 6 of Article 1021, so that a reference to this provision of the Civil Code is no longer needed. The relevant provision of Article 1020(6) reads as follows:

\begin{quote}
'The requirement of written form as referred to in the first to third paragraph will also be met if the arbitration agreement is concluded by electronic means and if
a. it may be consulted by the parties;
b. the authenticity of the agreement is guaranteed to a sufficient degree;
c. the time of the conclusion of the agreement can be established with a sufficient degree of certainty;
d. the identity of the parties can be established with a sufficient degree of certainty'.
\end{quote}

agreement between the parties (Art. 1058), whereby the costs are reduced. 'Toelichting', TvA, p. 128.


\textsuperscript{57} See e.g., Article 1031(5) of the 1998 German Arbitration Act. It is interesting in this context to refer to Article 17 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), where the effectiveness of forum selection clauses is limited in those contracts where a consumer is a party.

\textsuperscript{58} See supra, § 3.3.1.
These rules expressed in Art. 1020(6) also apply to questions regulated in Article 1072BB of the Proposals. It is a general provision according to which the requirement of written form is complied with if a particular agreement or communication is concluded or made electronically. Thus, whenever a written form is required, either for an agreement or for any submission to be filed in the proceedings or for any other communication or procedural act, these can be concluded or performed by electronic means, unless the parties have agreed otherwise. This does not apply to any procedural action that has to be carried out in proceedings before the courts, unless it is permitted by the rules that apply in such a procedure. Article 1072BB expressly provides that, in the circumstances dealt with therein, the rules on the conclusion of arbitration agreements by electronic means contained in Article 1020(6) apply analogously.

3.3.5. A State as a Party to Arbitration

This is a new provision suggested for introduction as paragraph 5 of Article 1021. It is modelled on Article 177(2) of the Swiss Private International Law of 1987. According to Article 1021(5), if a party to an arbitration is a State, a legal person under public law or a state-controlled enterprise, it cannot rely on its own law to contest its capacity to be a party to an arbitration or to enter into an arbitration agreement or to object to the arbitrability of the dispute. This provision incorporates the approach that has already been accepted by the judiciary in the Netherlands, and as such does not introduce any new position in dealing with this issue. Yet it is desirable and useful to introduce an express provision on the capacity of the state, as it adds to the clarity and transparency of the approach taken.

For the definition of a ‘state’ it is suggested to consult the UN Draft Article on Jurisdictional immunities of States and Their Property of the International Law Commission.

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61 ‘Toelichting’, TvA, p. 131, also referring to the commentaries in the corresponding provision of the Swiss Act on Private International Law.
62 Article 2 of the Draft UN Convention reads as follows: “State” means:
(i) the State and its various organs of government;
(ii) constituent units of a federal State;
(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
(iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
3.3.6. Law Applicable to an Arbitration Agreement

An express provision on the law applicable to arbitration agreements is very seldom found in arbitration statutes, outside the context of the provisions on challenging the award and provisions on the recognition and enforcement of awards.\textsuperscript{63} Decisions on the validity of arbitration agreements are frequently made without any reference to a particular law, especially as far as the issue of substantive validity is concerned. In other words, deciding on the substantive validity of arbitration agreements usually involves an interpretation of the wording, where the question of ‘which law applies’ does not play a decisive role.

The Proposal contains a new provision on the law applicable to arbitration agreements in Article 1020(4). The relevant provision of the 1987 Swiss Act on Private International Law served as a model for the drafting of this Article 1021(4). However, the Proposals depart to a certain extent from the approach maintained in Article 178(2) of the Swiss Act. Article 1021(4) reads as follows:

‘Notwithstanding provisions in the first to third paragraph, an arbitration agreement is valid if it is valid under the law of the Netherlands or under the law which is applicable according to Article 1054, second paragraph’.

Accordingly, the law applicable to arbitration agreements is either the law of the Netherlands, as the law of the place of arbitration (\textit{lex arbitri}), or the rules of law applicable to the substance of the dispute (\textit{lex causae}). Thus, the applicability of the \textit{lex arbitri} and the \textit{lex causae} is alternative, \textit{in favorem validitatis} of the arbitration agreement. The relevant provision of Article 1054(2), referred to in Article 1021(4), remains unchanged. It provides that the arbitral tribunal shall decide in accordance with the rules of law chosen by the parties. In the absence of such a choice, the arbitrator shall make an award in accordance with the rules of law which he considers appropriate.

The approach taken in the Proposals differs to a certain extent from Article 178(2) of the Swiss Act. The latter provides for the alternative application of either the law chosen by the parties, or the law governing the subject-matter of the dispute, ‘in particular the law governing the main contract’, or Swiss law. In other words, an arbitration agreement is valid if it is valid under either the \textit{lex arbitri}, or the \textit{lex causae} or under the law chosen by the parties. The law determined by the parties as being applicable to the arbitration agreement is omitted from the Proposals. The reason for this can be found in the fact that the parties seldom, if ever, make a choice in that respect. It is maintained that in the absence of a choice of law, the laws with the

\textsuperscript{63} Article 178 para. 2 of the Swiss Private International Law Act of 1987 is the exception to this, as it contains an express provision on the applicable law.
which the arbitration agreement is most closely connected should be applicable, and these are the *lex arbitri* and the *lex causae*.\(^{64}\)

It is true that the parties usually do not determine which law will apply to their arbitration agreement. Yet it would be better to follow more closely the approach in the Swiss Act and to introduce the choice of law among the alternative applicable laws. There are several reasons for this. In practice it would make no difference, as the solutions suggested in the Proposals would apply in most situations anyway, since no choice of law is usually made. However, such an approach would be in accordance with party autonomy as an underlying principle in arbitration, which is otherwise accepted and followed in the Proposals. The fact that the opportunity to choose the applicable law is seldom used should not be a reason to depart from party autonomy as a matter of principle. Besides, it is not inconceivable that the parties would wish to determine the applicable law when a submission agreement is concluded.

The relevant provision of the Swiss Act clearly defines the scope of application of the provision containing the definition of the written form of the agreement and the provision containing the conflict of law rules for the substantive validity of the arbitration agreement.\(^{65}\) Accordingly, the formal validity will be examined in accordance with the definition provided in Art. 178(1) when the arbitration takes place in Switzerland, a provision which is not a private international law provision. The substantive validity will be decided according to the law determined by the rules of private international law contained in Article 178(2).

The Proposals in Article 1021(4) do not clearly indicate that the rules of private international law contained therein shall apply regarding only the substantive validity of an arbitration agreement. Instead, it uses the wording ‘notwithstanding provisions in the first to third paragraph’. As already explained, the provision of paragraph one to three relate to the written form.\(^{66}\) If it is indeed intended to distinguish between the provisions relating to the written form in paragraphs 1 to 3 and the private international law rules in Article 1021(4), it would be a better approach to simply use the expression ‘as regards substantive validity’ or any other similar wording in the latter provision.

\(^{64}\) ‘Toelichting’, TvA, p. 131. Cf., Meijer 2005, n. 2. Commenting on the existing Act, which does not contain any provision on the law which is applicable to arbitration agreements, it is stated that the parties seldom, if ever, choose the applicable law. Therefore, it is usually determined either on the basis of the implicit choice or on the basis of the closest connection. In both situations it is presumed that either the law of the place of arbitration or the law applicable to the substance of the dispute applies to the question of the validity of the arbitration agreement.

\(^{65}\) The question of formal validity is dealt with in para. 1 of Article 178, which expressly states ‘[a]s regards its form, the arbitration agreement shall be valid if …’. The same provision in para. 2 states ‘[a]s regards its substance…’.

\(^{66}\) Cf., ‘Toelichting’, TvA, p. 131, where para. 2 of Article 1020(3), which relates to the definition of a written form, is also referred to.
According to Article 1073(1) RV already discussed, Title One, thus also Article 1021(4), applies if the seat of arbitration is in the Netherlands. However, there is no reference to Article 1021(4) in the relevant provisions relating to arbitration outside the Netherlands in which the validity of an arbitration agreement is referred to. All these provisions refer to the invalidity of an arbitration agreement ‘under the law applicable to it’, but they neither indicate how the applicable law is to be determined nor do they refer to Article 1021(4). Most probably, in practice this will not lead to the inconsistent application of the rules of private international law, as it may be concluded that Article 1021(4) incorporates the approach that is accepted in arbitration theory and practice in the Netherlands. Yet, for the sake of clarity and uniformity in the regulations, as well as the legal certainty and predictability of the results it is more appropriate to refer to the same set of private international law rules whenever the courts in the Netherlands have to decide on the question of the law which is applicable to the substantive validity of an arbitration agreement.

4. Conclusions

Only a very few issues contained in the proposed amendments to the Dutch arbitration statutory law have been addressed, in particular the structure of the statute and the issues pertaining to the formal and substantive validity of arbitration agreements. Obviously, the Proposals follow the basic structure of the Act, whereby the division of provisions that apply to arbitration in the Netherlands and arbitration to be held outside the Netherlands has been maintained. This approach in statutory regulation provides for very clear rules concerning the scope of application and, as such, is properly retained in the Proposals.

A few provisions that were adapted to situations with international elements have been repealed. Besides, the provisions relating to the moment when arbitration commences have been simplified and the provision on the content of a submission agreement has been repealed. Consequently, the definitions of an arbitration clause and a submission agreement have been omitted.

The reasons justifying the intention to replace the requirement of ‘evidence in writing’ with a requirement that an arbitration agreement has to be ‘concluded in writing’ are explicable. However, it is not so obvious where this idea is being carried out, besides in the change in terminology. This is particularly so bearing in mind that a tacit acceptance of an instrument in writing is sufficient in order to comply with the requirement of a written form. That part has remained unchanged and does not depart from the approaches taken in comparative statutory law.

67 Articles 1074, 1074D and 1076 of the Proposals.
An improvement is also the decision to put an arbitration clause on the list of terms contained in standard conditions that can be onerous for a consumer as a weaker party. The same can be said of the provision relating to a State as a party to arbitration.

However, it is doubtful whether the newly introduced provision of Article 1021(3) is really required. In particular, it is not clear what is intended to be achieved by introducing this provision. If the purpose is to distinguish between the reasons for ‘rectifying’ a written form from the other circumstances in which a failure to object in good time results in a loss of the right to object later, whereby a regulation similar to the Model Law would be achieved, then the insertion of this provision may be justifiable at least from a theoretical point of view. If this was not the purpose to be achieved, this provision is unnecessary. This is particularly so bearing in mind the relevant provisions on the time-limit to object and those expressly regulating the consequences of a failure to object in good time.

Major objections relating to the provision on the law applicable to the arbitration agreement may be the following: (1) law chosen by the parties as the alternative applicable law is omitted, (2) the scope of application of the provisions defining the written form and the provision containing the rule of private international law to be used in determining the law which is applicable to substantive validity is not clearly defined, (3) there is no reference to the relevant provision on the applicable law elsewhere where the issue of the validity of the agreement is referred to.
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De Witt Wijnen 2005
PRIVATE INTERNATIONAL LAW ASPECTS OF HOMOSEXUAL COUPLES: THE NETHERLANDS REPORT

I. Curry-Sumner

1. Introduction

Prior to 1998, same-sex couples were by-and-large ignored in the Dutch legal system. Same-sex couples were not entitled to formalise their relationships being left in regulation limbo-land, having to organise their own affairs. Since 1998, this situation has changed radically and since 2001 same-sex couples have been able to choose from one of four different types of relationship form.1
- Since the 1st April 2001,2 same-sex couples can opt to get married: same-sex marriage.
- Since the 1st January 1998,3 they can opt to register their partnership: registered partnership.
- Same-sex couples can also choose to enter into a cohabitation contract: cohabitation contract.
- Finally, they can also choose to do nothing at all: informal cohabitation.

Only the first two of these relationships forms will be discussed in this paper. Although the number of couples living in informal relationships is on the increase,4 this paper is too restricted in ambit in order to deal with the complicated problems associated with the private international law aspects of couples living in informal relationships. Before delving into the private international law rules and procedures with respect to same-sex couples, it is important to first appreciate the background to these pieces of legislation.

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1 Prior to 1998, same-sex couples were only presented with the latter two of these options (namely informal cohabitation and a cohabitation contract).
2 Staatsblad 2001, No. 9.
3 Staatsblad 1997, No. 324.
4 See, for example, Schrama 2004.
I. CURRY-SUMNER

1.1. Historical Precursors

1.1.1. Dutch Court Decisions

The legal journey resulting in the legislative enactment of registered partnership was not smooth. Around the beginning of the 1990s, two cases brought the legal problems facing same-sex couples to the forefront of judicial awareness. In 1989, the District Court in Amsterdam decided the first case (involving two men) and in 1989 the Dutch Supreme Court eventually decided the second case (involving two women). Both courts held against the petitioners, with the Dutch Supreme Court holding that,

Civil marriage is since time immemorial understood to be an enduring bond between a man and a woman to which a number of legal consequences are attached, which partly relate to the difference in sex and the consequences connected therewith for the descent of children. Marriage has these characteristics not only in The Netherlands but in many countries. Moreover, it cannot be said that the general opinion in the legal community has developed such that the considerations just mentioned do not justify the distinction in treatment on the grounds of sexual orientation, which can manifest itself in the impossibility to enter a relationship-like marriage with a person of the same sex as oneself.

Nonetheless, although the Dutch Supreme Court held that it was not discriminatory to deny same-sex couples the possibility to get married, it made no ruling on whether the denial of the legal effects of marriage was discriminatory. The court insinuated that this scrutiny was a task for the legislature and not for the judiciary.

1.1.2. First Kortmann Committee

The insinuation by the Dutch Supreme Court for parliamentary scrutiny was duly heeded and led to the formation of the First Kortmann Committee. The committee published its report, Leefvormen (Lifestyles), on the 20th December 1991. It suggested the introduction of one of two schemes: a registration scheme at the local city council (so-called ‘light registration’) or a registration at the Registry of Births, Deaths and Marriages (so-called ‘heavy registration’). The report also suggested that any scheme should be open to same-sex and different-sex couples as well as within the prohibited degrees.

8 In 1990 besliste de Hoge Raad dat een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is, in: HR 19 October 1990, NJ 1992, 129.
of marriage. After initial research conducted by the Instituut voor onderzoek naar Overheidsuitgaven (Institute for Review of Public Expenditure), only the latter proposal for a ‘heavy’ registration scheme was maintained. Even so, the Bill submitted to Parliament in 1994 did not provide for the registration of different-sex couples, instead limiting registration to same-sex couples and those within the prohibited degrees of marriage. However, in view of an influential memorandum published in September 1995, the possibility of registering was again opened to both different-sex couples and same-sex couples (although not to couples within the prohibited degrees of marriage). It was hoped that this amendment would meet complaints raised principally from the COC (Dutch homosexual lobby group) that registered partnership was in essence a second-class marriage. Others, including many academics, were nonetheless extremely critical of the move.

Meanwhile, as the First Kortmann Committee was discussing a national system of partnership registration, municipalities all over The Netherlands were already tackling the problem first hand. According to Dutch law, municipalities are allowed to maintain an unlimited number of registers. As a result, a number of city councils began to create registers for same-sex relationships, despite the fact that these registrations had no legal consequences. In 1991, the town of Deventer registered the first same-sex relationship. In the following years more than 130 municipalities also established such a register.

1.1.3. Second Kortmann Committee

Despite the political activity of the early 1990s, the pressure to allow same-sex couples to marry in the same manner as different-sex couples continued to intensify. A majority of the Parliament was in favour of opening civil marriage to couples of the same-sex. In April 1996, this pressure led the Dutch House of Representatives of Parliament to adopt two non-binding

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9 Boele-Woelki 1999, p. 3.
11 Kamerstukken II 1994/95, 22 700, nr. 5 (Notitie Leefvormen).
12 Kamerstukken II 1994/95, 22 700, nr. 5, p. 5 and 23 761, nr. 7, p. 10.
15 For an English overview see Maxwell 2001, p. 141-207.
16 Those parties which supported the opening of civil marriage to same-sex couples were: the Labour Party (Partij van de Arbeid), Democrats 1966 (D66), Green Left (Groen Links) and the Party for Democracy and Freedom (Volkspartij voor Vrijheid en Democratie).
17 The term House of Representatives has been used as a translation for the term Tweede Kamer, although this author prefers the term Second Chamber, the presidents of both chambers of Parliament have opted for the terms ‘House of Representatives’ and ‘Senate’. These translations have been used throughout this paper.
resolutions submitted by Van der Burgh and Dittrich demanding the swift introduction of same-sex marriage. The Government, wary of unleashing an anti same-sex marriage backlash in neighbouring countries, decided instead to appoint a committee to examine the issues surrounding the introduction of same-sex marriage. As a result the Second Kortmann Committee was established on the 28th May 1996, with the aim of investigating whether the institution of marriage should also be open to same-sex couples. In the meantime, passage of the Registered Partnership Bill continued and was eventually enacted in 1997.

In October 1997, the Second Kortmann Committee published its report. The Committee agreed that whatever the eventual result was to be, only one institution should exist and registered partnership should be abolished. A second area of consensus was that no familial legal ties should be created by operation of law as a result of celebrating a same-sex marriage since this would involve too great an abstraction from the biological reality that same-sex couples cannot conceive children naturally. It was here, however, that the unanimity of the Committee floundered. Only five of the eight members supported the opening of civil marriage to same-sex couples. Three discernible categories of arguments were forwarded by the members of the Committee on both sides. The first category concerned arguments related to the principle of equality; the second, the social meaning of the marital bond and finally the international repercussions of such a move. The majority of the Committee recognised the flexible and continually evolving nature of marriage and stressed the importance of the principle of equality above all other issues. The minority did not see equality as an issue, believing instead that same-sex and different-sex couples were not equal since same-sex couples were unable to reproduce naturally. It was noted by all members that international recognition of such an institution could cause problems for those couples wishing to have their partnership recognised abroad, but the majority indicated that such couples would be aware of the difficulties and eventually the opening of civil marriage in The Netherlands could have a positive rather than negative effect on international recognition.

The Cabinet, led by Prime Minister Kok, felt that the scales were not tilted in favour of opening civil marriage to same-sex couples, although the Cabinet did agree to allow same-sex couples to adopt Dutch children. Nonetheless, after the 1998 general elections and the reappointment of the

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18 Kamerstukken II 1995/96, 22 700, nr. 18 and 14; Handelingen II, 1995-1996, p. 4883. These resolutions were supported with 81 votes to 60.
19 Staatsblad 1997, No. 324 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerd partnerschap.
20 Kortmann Commissie 1997, p. 24, § 5.5.
22 Kortmann Commissie 1997, p. 17-21, Chapter 4.
‘purple coalition’, the Cabinet agreement stated that it would submit a proposal to Parliament before the 1st January 1999 calling for the opening of civil marriage to same-sex couples. In the meantime, such a proposal was sent to the Council of State along with a proposal to allow same-sex couples to adopt children. Less than two years later both Chambers accepted the proposals. On the 1st April 2001, The Netherlands became the first country in the world to allow for same-sex civil marriage.

1.2. Structure of this Paper

This paper has been divided into three main sections. Section 2 will deal briefly with the substantive law rules relating to the celebration of a same-sex marriage and the registration of a partnership. Section 3 will deal solely with the private international law aspects of same-sex marriage, whilst Section 4 will be devoted to an analysis of the relevant private international law rules in relation to registered partnership. In order to aid simultaneous comparison between the relevant rules for these two institutions the same structure has been used in each section. However, from the outset it must be mentioned that this paper can, in the limited space available, only attempt to deal with some of the aspects related to such relationships. A choice has therefore been made to limit this paper to the structural aspects of such relationships, i.e. the establishment of the relationship (Sections 3.1 and 4.1) and the dissolution thereof (Sections 3.2 and 4.2). In Section 5 a number of conclusions will be reached with regards the approaches taken and the possible improvements which can be made. The following abbreviations have been used throughout this paper:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>WCE</td>
<td>Private International Law (Divorce) Act</td>
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<td></td>
<td>Wet conflictenrecht echtscheiding</td>
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<tr>
<td>WCGP</td>
<td>Private International Law (Registered Partnerships) Act</td>
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<td>Wet conflictenrecht geregistreerd partnerschap</td>
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<tr>
<td>WCH</td>
<td>Private International Law (Marriages) Act</td>
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<td>Wet conflictenrecht huwelijk</td>
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<td>Neth. CC</td>
<td>Dutch Civil Code</td>
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<td>Burgerlijk Wetboek</td>
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23 The Cabinet was called the ‘purple coalition’ because when the colours of the main political parties in the Cabinet are mixed, purple is the result.

24 There were of course those academics who were against the opening of marriage to same-sex couples, although these commentators represented a minority in Dutch literature: e.g. Nuytinck 1996, p. 125.
2. **Substantive Law Regulations**

2.1. **Same-sex Marriage**

The legal changes made to the marriage laws in The Netherlands in 2001 did not fundamentally alter the procedure by which two persons are allowed to marry. Only the eligibility criteria were amended. In this way, The Netherlands has retained one marital institution, which since the 1\textsuperscript{st} April 2001 has been open to both different-sex and same-sex couples. Nonetheless, it must be noted that Dutch law only defines marriage in its civil law context.\textsuperscript{25} No religious marriage ceremony may take place prior to the parties having informed the minister of religion that a civil marriage has already taken place.\textsuperscript{26}

Prior to the celebration of a marriage, information must be submitted to the Registrar in the place of residence of one of the parties.\textsuperscript{27} If both parties have a place of residence outside of The Netherlands, this information must be given to the Registrar in The Hague.\textsuperscript{28} The Registrar is under a legal duty to then prepare an instrument of registration unless he or she believes that making such an instrument would be against public policy.\textsuperscript{29} A number of documents must be lodged with the Registrar pursuant to Article 1:44, Neth. CC.\textsuperscript{30} The parties are entitled to select a different municipality for the celebration of the marriage or registration of the partnership than that where the information has been deposited.\textsuperscript{31} This is known as a *keuzegemeente* or a ‘municipality of choice’. If the marriage is not celebrated within a year of the date of the instrument, a new instrument must be drawn up.\textsuperscript{32} Once the instrument has been deposited with the Registrar, the parties must wait fourteen days.\textsuperscript{33} This period allows the Registrar to determine whether there are any important reasons why the marriage should not be celebrated.\textsuperscript{34}

\textsuperscript{25} Article 1:30, Neth. CC.
\textsuperscript{26} Article 1:68, Neth. CC. A minister of religion who does not abide by this legal rule can face a pecuniary fine of up to € 2,250, Article 449, in combination with Article 23, Dutch Criminal Code.
\textsuperscript{27} *Marriage*: Article 1:43(1), first sentence, Neth. CC; *Registered Partnership*: Article 1:80a(4), first sentence, Neth. CC.
\textsuperscript{28} *Marriage*: Article 1:43(1), second sentence, Neth. CC; *Registered Partnership*: Article 1:80a(4), second sentence, Neth. CC.
\textsuperscript{29} Article 1:80a(4), in conjunction with Article 1:46, Neth. CC.
\textsuperscript{30} This includes a birth certificate of each of the parties and a certified true copy of their registration in the personal records database, an instrument of consent to the marriage if required, a death certificate all of those whose consent would have been required, evidence proving previous marriages or registered partners have been properly terminated, and an instrument of declaration to marry.
\textsuperscript{31} Article 1:80a(4), in conjunction with Article 1:43(2), Neth. CC.
\textsuperscript{32} Article 1:80a(4), in conjunction with Article 1:46, Neth. CC.
\textsuperscript{33} Vlaardingerbroek et al. 2004, p. 103, § 3.9.1.
\textsuperscript{34} Article 1:80a(6), in conjunction with Article 1:62, Neth. CC.
In terms of the dissolution of a marriage, the same options are available to same-sex couples as to opposite-sex couples. According to Article 1:149, Neth. CC, a marriage ends upon the death of one of the parties, if one of the parties goes missing and this is followed by a new marriage or registered partnership, by divorce, by the dissolution of a marriage after a judicial separation or by the conversion of a marriage into a registered partnership. At present, although there are proposals to introduce a form of administrative divorce, divorce can only be petitioned via the court. The rules are identical regardless of whether the divorce concerns a same-sex marriage or a different-sex marriage.

2.2. Registered Partnership

When the institution ‘registered partnership’ was introduced in 1998, a separate title was inserted into the Dutch Civil Code. The positioning of this new title, entitled Title 5 A, is significant when one is analysing the Dutch approach to this new institution. Being positioned between Title 5: Marriage and Title 6: Rights and Duties of the Spouses, it is clear that the Dutch Government saw this institution as a new institutionalised relationship form akin to marriage. Nonetheless the creation of a new title in the Civil Code, also shows that the Government wished to make a distinction between registered partnership on the one hand and marriage on the other.

As well as all the preliminary procedures prior to the registration of a partnership being identical to those for the celebration of a marriage, the ceremony for the registration of a partnership also closely resembles that of marriage, apart from two important differences. Firstly, the future parties to a registered partnership, as with parties to a future marriage, must declare that they consent to the registration. However, with registered partnerships, the parties do not need to give this consent in any particular prescribed format. The second difference is that registered partners may celebrate a religious ceremony before the civil ceremony takes place, whereas future

35 Article 1:149(a), Neth. CC.
36 Article 1:149(b), Neth. CC.
37 Article 1:149(c), Neth. CC.
38 Article 1:149(d), Neth. CC.
39 Article 1:149(e), Neth. CC.
40 Kamerstukken II 2005/06, 30 145 (Proposal from Minister Donner) and Kamerstukken II 2005/06, 29 676 (Proposal from Mr. Luchtenveld).
41 Article 1:51, Neth. CC.
42 For more on this topic see, Curry-Sumner 2005, p. 117-158.
43 Although the law requires no specific form for the registration of the partnership, such form can be provided: Vlaardingerbroek et al. 2004, p. 117-118, § 4.3.5.
44 Article 1:67, Neth. CC is not applicable to registered partnerships. See Curry-Sumner 2005, p. 127-128.
45 Article 1:68, Neth. CC is not applicable to registered partnerships. Article 449, Dutch Criminal Code, stipulates that the celebration of a religious wedding prior to a civil
spouses are prohibited from doing so. The reasoning for the fact that Article 449, Dutch Criminal Code is not extended to registered partners lies in the fact that registered partnerships are not celebrated in church.

The termination of a registered partnership is governed by Articles 1:80c-1:80g, Neth. CC. For the most part, these methods have been inspired by the methods available to married couples to terminate their marriage. However, judicial separation, available to married couples wishing to terminate their marriage, is not available to registered partners. The majority of spouses using the judicial separation procedure often do not wish to divorce for religious reasons. The Government, believing that those involved in a registered partnership would not have such religious convictions, saw no reason to extend the possibility of such a judicial separation procedure to registered partnership. This reasoning can, however, be challenged, and some commentators have called for an extension of the rules on judicial separation to registered partners. Furthermore, unlike marriage, registered partnerships may be terminated by means of an administrative procedure devoid of judicial intervention. The registered partnership in this case must be terminated by a mutual agreement. A distinction must be drawn between the agreement to terminate (beëindigingsovereenkomst) and the declaration to terminate (beëindigingsverklaring).

3. Same-sex Marriage and Private International Law

3.1. Establishment

According to Dutch law, no difference is drawn between same-sex and different-sex marriage in terms of the residency requirements imposed on wedding will be fined up to a maximum of € 2,250. Article 90-octies, Dutch Criminal Code, states that the term ‘marriage’ must be interpreted to include ‘registered partnerships’ throughout the Dutch Criminal Code except in Article 449. For more information on the relationship between Arts. 1:68 and 1:80a, Neth. CC and Article 449, Dutch Criminal Code see Loonstein 2005, p. 126-128.

46 Some authors have called for the repeal of the prohibition on religious marriages prior to civil marriages: Roes 2001, p. 111-113; Plasschaert 2002, p. 654; Loonstein 2005, p. 126-128.


48 Article 1:149, Neth. CC.

49 For detailed information see Boele-Woelki, Braat & Sumner 2003, p. 121-126.


51 Heida 2000, p. 41.

52 Judicial separation brings to an end the community of property and up until the abolition of the duty of cohabitation, also brought such a duty to an end (Art. 1:83 (old), Neth. CC). The judicial separation also affects certain provisions with respect to children, maintenance and the use of the common household.

53 See, for example, Waaldijk 2000, p. 178.

54 See further, Curry-Sumner 2005, p. 150-152.
aspirant spouses. According to Article 1:43, Neth. CC, aspirant spouses must make a declaration of their intent to marry at the Registry of Births, Deaths, Marriages and Registered Partnerships of the residency of one of the parties. If neither of the parties is resident in The Netherlands, but at least one of them is a Dutch citizen, then they may declare their intent to marry at the Registry in The Hague. These provisions apply equally to same-sex and different-sex couples. However, these rules are only part of the story, since reference must also be made to the relevant Dutch choice of law rules.

3.1.1. 1978 Hague Marriage Convention

The choice of law rules governing the celebration of a marriage in The Netherlands stem from the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages. This Convention, currently in force in The Netherlands, Luxembourg and Australia, entered into force on the 1st May 1991. The central question which the Staatscommissie posed was whether same-sex marriages could be regarded as falling within the ambit of this Convention. On this point, the members of the Staatscommissie appeared deeply divided. Some members, agreeing with the position eventually adopted by the Dutch Government, believed that same-sex marriages could not be regarded as falling within the scope of this Convention. These members highlighted the absence of a definition of the term ‘marriage’ in the Convention, and that the term needed to be understood in its broadest, international sense. According to these members the emphasis should be placed on the word ‘international’ (and not on the term ‘broadest’) in that certain minimum criteria need to be satisfied.

The other members of the Staatscommissie argued otherwise. Although these members also referred to the absence of any definition of the term ‘marriage’, they also referred to the explicit discussion of same-sex marriages during the preparatory meetings, leading to the eventual adoption of the 1978 Marriage Convention. According to the answers to the preparatory questionnaire promulgated prior to the drawing up of the Convention, a small majority of States believed that matters such as the sex of the parties ‘should be governed by the law applicable by the Convention. Any seriously offensive results that might be reached under this law could presumably be

55 Article 1:43, first sentence, Neth. CC. The term residency in this context refers to the definition provided in Article 1:10, Neth. CC. For translations of Book 1, Dutch Civil Code, see Sumner & Warendorf 2003.
56 Article 1:43, second sentence, Neth. CC.
57 Tractatenblad 1987, No. 137.
58 Kamerstukken II 1999/00, 26 672, nr. 3, p. 5 (Explanatory Notes), and 1999-2000, 26 672, nr. 5, p. 19 (Note as a result of report).
60 Staatscommissie Internationaal Privaatrecht 2001, p. 9. This is a quote from the explanatory report accompanying the Convention.
avoided by the public policy exception’.61 Furthermore, from an examination of the Dyer Report, accompanying the Convention,62 it would appear that the issue of same-sex marriages was explicitly discussed during the preparations, and therefore to speak of a lacuna in the legislation would be simply incorrect. The choice therefore to avoid any definition of the term ‘marriage’ was therefore an explicit choice, made in full awareness that in the future same-sex marriages may well be deemed to fall under the Convention, and thereby resort to the public policy exception may well have to be made.63

At this point, it is perhaps fitting to note, that in an article on the Staatscommissie’s report, Pellis refers to a passage by Batiffol made during a meeting of the Special Commission on the 15th October 1976,64 where it is stated:

M. Batiffol (France) est de l’avis de ceux qui estiment indispensable d’introduire une clause générale d’ordre public. Pourquoi? Parce que l’expérience montre que les législateurs, quel qu’ils soient, s’avèrent incapables de donner une liste exhaustive des cas qui pourraient se présenter. A l’instar du Délégué espagnol, il signale que toutes les législations sont sujettes à transformation et que l’on ne sait pas ce que deviendront demain des hypothèses considérées aujourd’hui comme manifestement contraires à l’ordre public (il en va ainsi de l’homosexualité: peut-elle revêtir ou non le form d’un mariage? La question est posée, et il n’est pas exclu que dans certaines systèmes on y répondre par l’affirmative).

3.1.2. Private International Law (Marriages) Act

Although the Staatscommissie remained divided on the question whether same-sex marriages fell within the ambit of the 1978 Hague Convention, in Dutch terms this impasse remained somewhat theoretical since a Dutch judge or Registrar would readily apply the Private International Law (Marriage) Act to such cases, without first seeking reference from the Convention. Although the WCH refrains from providing a definition of the term ‘marriage’, as a result of the legislation opening marriage to same-sex couples, the WCH was amended. Article 3(1)(d) of the Act had previously stated that the celebration of a marriage could be refused if it would be in breach of the provision that a man may only be united with a woman and a woman with a man at any one time. As a result of the legislative amendments broad about by the introduction of same-sex marriage, Article 3(1)(d) of the Act now reads that the solemnisation of a marriage will be

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61 Quotation from the answers by the United States of America to Question 6 of the questionnaire, see further Acts et Documents de la Treizième Session, Tome II, Mariage – 1978, p. 334. All those States to have ratified the Convention also provided a similar response.


63 Van Rijn van Alkemade 1989, p. 223.

64 Pellis 2002, p. 165.
refused if ‘it would be in breach of the provision that a person may only be united in marriage with one person at one time’. Furthermore, as a result of the passing of private international rules in the field of registered partnership, a further restriction has been imposed namely that the solemnisation of a marriage may also be refused ‘if it be in breach of the provisions that those who wish to celebrate a marriage, may not already be involved in a registered partnership’.

3.1.3. The End Result

It is therefore clear that a Dutch judge or Registrar will apply the relevant rules of the WCH in determining whether or not a party is allowed to celebrate a same-sex marriage in The Netherlands. Article 2(a), WCH states that the celebration of a marriage will be permitted if ‘each of the future spouses meet the requirements of Dutch law for entry into a marriage and one of them possesses Dutch nationality or has his or her habitual residence in The Netherlands’. In combining this rule with the abovementioned residency rules, as long as one of the parties has his or her habitual residence in The Netherlands, or one of the parties has Dutch nationality, the couple will be allowed to marry in The Netherlands. Nonetheless, should neither of the parties have their habitual residence in The Netherlands nor possess Dutch nationality, the alternative choice of law rule laid down in Article 2(b), WCH can be used. This rule allows a marriage to be performed in The Netherlands if both of the parties satisfy the law of the State of their nationality with regard to the marriage conditions. As a result of all these different rules the following can be deduced.

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65 Staatsblad 2001, No. 128.
66 Article 3(1)(e), WCH, introduced as a result of Wet van 6 juli 2004, houdende regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap, Staatsblad 2004, No. 621.
Table 1: Couples allowed to celebrate a same-sex marriage in The Netherlands

<table>
<thead>
<tr>
<th>Habitual Residence</th>
<th>Both parties habitually resident in NL</th>
<th>One party habitually resident in NL</th>
<th>Neither party habitually resident in NL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both parties possess Dutch nationality</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
</tr>
<tr>
<td>One party possesses Dutch nationality and the other a nationality which permits the marriage</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
</tr>
<tr>
<td>One party possesses Dutch nationality and the other a nationality which does not permit the marriage</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
</tr>
<tr>
<td>Both parties possess a nationality which permits the marriage</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
</tr>
<tr>
<td>One party possesses a nationality which permits the marriage and the other a nationality which does not</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Not permitted</td>
</tr>
<tr>
<td>Both parties possess a nationality which does not permit the marriage</td>
<td>Marriage permitted</td>
<td>Marriage permitted</td>
<td>Not permitted</td>
</tr>
</tbody>
</table>

3.1.4. Recognition of Marriages celebrated Abroad

Although in 2001, when the Staatscommissie published its report on the private international law aspects of same-sex marriage no other country in the world recognised such a marital form, this is no longer the case in 2005. Belgium, Spain and Canada have all since passed legislation allowing same-sex couples to marry, and the Supreme Court of Massachusetts and the Constitutional Court of South Africa have held that same-sex couples should be allowed to marry. These marriages will be recognised in the Netherlands according to the same rules applicable to marriages between different-sex couples, i.e. those laid down in Article 5 WCH.

68 Ley 13/2005 de 1 julio 2005 por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, BOE No. 153.
69 Act C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, 2005, c.33.
71 Fourie and Bonthuys v. Minister of Home Affairs et al, Case CCT 60/04, Decide on 1 December 2005.
72 For more information on the working of this rule, see Frohn 2001, p. 166-170.
3.2. Dissolution

3.2.1. Jurisdiction

In The Netherlands, as in 23 other European Union Member States, the Brussels IIbis Regulation is applicable in the field of divorce jurisdiction.73 The question, which remains, as yet unanswered, is whether same-sex marriages fall within the scope of this Regulation. From a Dutch point of view, there is only one marital institution, which is open to couples regardless of their sex.74 To introduce a distinction would be discriminatory and contrary to the policy behind opening marriage to same-sex couples. Although the ECJ has already determined that a registered partner is not to be understood as equivalent to a spouse in the context of European legislation,75 the ECJ has yet to address the issue whether a couple legally and validly ‘married’ in one Member State is entitled to be treated as married in other Member States. Nevertheless, regardless of the outcome of any future case, The Netherlands has already chosen to apply the same rules as those laid down in Brussels IIbis to all those cases not falling within the material scope of this Regulation.76

However, unlike registered partnerships,77 no forum necessitatis has been created for same-sex married couples. Take the following example,

Yolanda, a female Belgian national, and Roxelana, a female Turkish national, celebrate their marriage in Rotterdam, The Netherlands. Two years later they decide to move to Austria. Once there, they realise that their relationship has hit rocky ground and wish to divorce. Their relationship not being recognised in Austria would mean that they would be without recourse to a forum to dissolve their relationship.

In order to avoid this situation, a so-called forum necessitatis should be introduced. This is the case for those couples having entered into a registered partnership, but is not the case for those having married.78 This situation should be rectified as soon as possible.

3.2.2. Choice of Law Rules

Due to the fact that there are no international treaties, conventions or bilateral agreements applicable in this field of law, reference in this section can only

73 EC Regulation No. 2201/2003 of 27 November 2003, all EU Member States apart from Denmark.
74 Article 1:30, Neth. CC.
76 A situation supported by the Staatscommissie Internationaal Privaatrecht 2001, p. 20.
77 Curry-Sumner 2005, p. 441-444.
be made to the relevant domestic Dutch law, which is to be found in the Private International Law (Divorce) Act (Wet conflictenrecht echtscheiding, hereinafter abbreviated to WCE). Issues relating to choice of law can arise in two situations, either in terms of a divorce or in terms of the conversion of a marriage into a registered partnership.79 However, as a result of debates in the Dutch Parliament in October 2005, the conversion procedure allowing couples to convert a marriage into a registered partnership, and subsequently dissolve their registered partnership by means of an administrative declaration will more-than-likely be abolished.80 The private international law issues surrounding this lightning divorce will thus not be discussed in this paper.81

If the marriage is dissolved other than by means of a conversion into a registered partnership (that is to say, by divorce or conversion of a judicial separation into a divorce) then the ordinary rules of the Private International Law (Divorce) Act (Wet conflictenrecht echtscheiding, hereinafter abbreviated to WCE) will apply.82 In applying this legislation the parties are in principle permitted to choose Dutch law as the applicable law to their divorce.83 This choice must be made by the parties together or by one of them and uncontested by the other. If such a choice is absent then the reference will be made to the choice of law ladder in Articles 1(1) to (3), WCE.

3.2.3. Recognition

As already stated, a number of countries have, since the opening up of civil marriage to same-sex couples in The Netherlands, also allowed same-sex couples to marry. It is, therefore, possible that couples married in these countries may get divorced and seek recognition of their divorce in The Netherlands. Furthermore, it is also possible that countries although not allowing same-sex couples to marry domestically, would recognise same-sex marriages celebrated abroad and thus allow these parties to petition for divorce. In all these cases, the ordinary rules surrounding the recognition of divorces obtained abroad would apply to same-sex divorces.

As a result, the Netherlands would apply the Brussels IIbis recognition regime to divorces obtained in other Member States, e.g. in Belgium or Spain. According to Article 21, Brussels IIbis, a judgment issued in a Member State shall be recognised in the other Member states without any special procedure

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79 The procedure to convert a marriage into a registered partnership is laid down in Article 1:77a, Neth. CC.
80 Kamerstukken II 2005/06, 30 145, nr. 4 and Kamerstukken II 2005/06, 29 676, nr. 35, Article Fa. The same proposal was also made in the original proposal by Minister Donner, Kamerstukken II 2003/04, 29 520, nr. 1-9.
81 For further information on this issue, see Sumner 2003, p. 15-23 and Sumner 2004a, p. 231-237.
83 Article 1(4), WCE.
being required. In terms of divorces falling outside the scope of Brussels IIbis, i.e. those divorces obtained in non-Member state countries, the ordinary rules of Dutch private international law apply. In this case, the Hague Convention of the 1st June 1970 on the recognition of divorces and legal separations, and the International Commission on Civil Status Convention on the recognition of decisions relating to the marital bond signed in Luxembourg on the 8th September 1967 as in force. In the eyes of the Dutch authorities, divorces pertaining to cease the bond established as a result of a same-sex marriage, fall within the material scope of these conventions and thus international obligations under these obligations will be honoured.

Should none of the international instruments be applicable, resort will be made to the WCE. In this case the divorce will be recognised, as long as:

1. The foreign divorce must have been obtained by a competent authority.
2. If the divorce was obtained as a result of a unilateral petition, it will only be recognised if it was obtained as the result of a proper legal process (behoorlijke rechtspleging). Nonetheless, even if either of these first two criteria are not met then the dissolution may still be recognised if the other party either expressly or implicitly consented to the procedure.
3. A foreign decision may also not be contrary to Dutch public policy.
4. Finally, a decision will not be recognised, even if it complies with the aforementioned criteria if it is not in conformity with a previous decision.

84 This replaces the old Article 14, Brussels II rule. The removal of the exequatur procedure forms one of the general principles of the legislation. See further, Storrme 2005, p. 64, § 27.
85 Australia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Hong Kong, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the United Kingdom have all ratified this Convention.
86 This Convention has been ratified by The Netherlands, Austria and Turkey, and has been signed by Belgium, France, Germany and Greece.
87 With respect to divorces, no definitive answer has yet been given as to whether administrative divorces fall within the scope of Article 2, WCE. In Rb Amsterdam, 6 June 1984, NIPR 1985, 111, the rechtbank decided that an administrative decision granted by a Thai Registrar fell within the scope of Article 2, WCE. It has been suggested that administrative divorces do fall within the scope of these rules, see Boele-Woelki 2000, p. 3971-3973; HR, 15 July 2001, NJ 2002, 223, annotated T. de Boer, § 9; Mostermans 2003, p. 96, § 271, Contr Hof Den Haag 3 May 2000, NIPR 2000, 175, which regarded such divorces as falling under Article 3, WCE.
89 Article 2(2), WCE.
90 Mostermans 2003, p. 102-103, § 289-293.
3.3.  

Interregional Consequences

Although in 2001 it was unclear whether a same-sex marriage celebrated in The Netherlands would be recognised in the other parts of the Kingdom of The Netherlands,91 this has now been affirmatively answered by the Joint Court of Appeal of the Netherlands Antilles and Aruba.92 The case concerned a lesbian couple, one Dutch and one Aruban, married in The Netherlands. The couple sought recognition of their marriage in Aruba, which was initially refused by the Registrar. The Joint Court of Appeal held that the marriage must be recognised on the basis of Article 40, Charter for the Kingdom of The Netherlands (Statuut voor het Koninkrijk der Nederlanden), and thus registered the Population Register, but not in the Registers of Civil Status. According to Article 1:26, Aruban Civil Code, only marriages celebrated in Aruba can be registered in these registers. In terms of the legal consequences for the couple themselves, this difference is insignificant.93

4.  

Registered Partnership

The introduction in 1998 of a new formalised institution alongside marriage created a great deal of attention not only in family law circles, but also in Dutch (and of course foreign) private international law circles. How were international cases to be dealt with? Was this family form to be governed by the same rules as those on marriage, or according to the rules on contractual agreements? Were foreign nationals allowed to register their partnership in The Netherlands? These and many other questions were answered in a report published by the Staatscommissie in May 1998. Although the Staatscommissie published explicit proposals for legislation, these proposals lay virtually untouched for more than five years, before eventually becoming law on the 1st January 2005.94 The influential nature of the Staatscommissie report is to be found in the explanatory notes to the Private International Law (Registered Partnerships) Act (Wet conflictenrecht geregistreerd partnerschap, hereinafter abbreviated to PIL(RP)A). Save for a few minor amendments, the text of the explanatory notes is more-or-less identical to the 1998 Staatscommissie report.95

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93 Boele-Woelki 2005, p. 221.
94 Nonetheless, even before these rules become effective, they were being referred to by courts and Registrars. See, for example, Rb Roermond, 29 March 2001, NIPR 2001, 188.
95 Kamerstukken II 2002/03, 28 924, nr. 3 (explanatory notes).
4.1. Establishment

4.1.1. Choice of Law Rules

As the Staatscommissie had already pointed out in May 1998, registered partnerships do not fall within the ambit of the abovementioned 1978 Hague Marriage Convention or the WCH. Therefore, new choice of law rules needed to be formulated to deal with such relationships. In so doing, the Dutch Government opted to maintain a distinction between the formal and essential validity of the relationship. Furthermore, a distinction was also made between partnerships registered in The Netherlands (with unilateral choice of law rules being applied) and partnerships registered abroad. Although these distinctions have been made, the end result is unsurprisingly uniform. According to Articles 1(1) and 1(2), WCGP questions related to the formal and essential validity of partnerships registered in The Netherlands will be governed by Dutch law. This therefore means that all partnerships registered in The Netherlands will need to be registered in accordance with Articles 1.80a et seq., Neth. CC. The alternative choice of law rule applicable to (same-sex) marriages is therefore not replicated with respect to registered partnerships. The absence of such an alternative is easy to explain when one realises that the institution of registered partnership is not widely accepted. Both the Staatscommissie and the Dutch Government therefore felt that it was not unreasonable to force couples wishing to register their partnership in The Netherlands to comply with Dutch law.

4.1.2. Recognition of Foreign Relationships

When dealing with the recognition of relationships registered abroad, one must first address the preliminary issue of characterisation. Before can one determine whether particular form of ‘registered partnership’ will be recognised in The Netherlands, the question must first be answered whether the registration can even be considered to be a form of ‘registered partnership’. This legal issue can, however, be approached from two different perspectives. On the one hand, one can emphasise the contractual nature of the relationship. The parties to a non-marital registered relationship agree upon certain legal effects pursuant to a mutual agreement; the moment the relationship is registered the contract becomes enforceable. Alternatively, one could place more emphasis on the effect on the parties’ personal status. Upon registering the relationship, the parties acquire a status as registered partners, with certain rights and duties, capacities and

96 Staatscommissie Internationaal Privaatrecht 1998.
97 See Article 2(b), WCH.
incapacities attendant upon that status.99 Accordingly, one is confronted with a choice between two traditional private international law legal categories: personal status and contract.100 Although this dilemma has been important in other jurisdictions, in The Netherlands a clear choice has been made for the latter of these two approaches.

In terms of the issue of characterisation, the legislation passed by the Dutch parliament differs markedly from the recommendations of the Staatscommissie. Unlike, the Staatscommissie, which left the question of characterisation open-ended, Article 2(5), WCGP provides for a list of criteria in order to determine whether a foreign relationship can be characterised as a ‘registered partnership’ for the purposes of the WCGP.101 Article 2(5), in conjunction with Article 2(4), ordains the following criteria:

- the registration was completed before a competent authority in the place where it was entered into;
- the institution is exclusive, i.e. that a registered partnership cannot be concluded alongside another registered partnership or marriage;
- the partnership must only be concluded between two persons;
- the solemnisation of the registered partnership creates obligations between the partners that, in essence, correspond with those in connection to marriage;
- the partnership must be based on a legally regulated form of cohabitation.

The dearth of a characterisation provision in the original proposals by the Staatscommissie and in the current work on the codification of Dutch private international law has, fortunately, not been followed in this field.107 Nonetheless, although these criteria appear clear and workable, a certain degree of confusion surrounds the precise application of Article 2(5)(c), WCGP. According to the wording of the Article, the obligations which the

99 Allen1930, p. 288. He comments on the fact that a status is the state of being from which a number of capacities and incapacities flow. A status is thus, according to him, ‘… the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both’.
100 Some authors believe one should distinguish between the category of marriage and the category of contract: Henneron 2004, p. 464-468 and Kessler 2004, p. 69-76.
101 On the interaction of Articles 2(1) and 2(5), WCGP see. Sumner 2004, p. 55-57.
102 Articles 2(4) and 2(5)(a), WCGP.
103 Article 2(5)(b), WCGP.
104 Article 2(5)(b), WCGP.
105 Article 2(5)(c), WCGP.
106 Article 2(5), WCGP.
107 On the lack of a provision dealing with characterisation in the proposals for the codification of Dutch private international law, see Jessurun d’Oliveira 2003, p. 1-6 and Vlas 2003, p. 443.
partners owe to each other should correspond with those in connection to marriage. However, in the explanatory notes to the Act it is stated,

'The proposed rules also lend themselves to application on legal institutions which do not have the name “registered partnership”, but still possess the key characteristics thereof, even if this is not complete. Examples are the Belgian statutory cohabitation, the PACS in France and the statutory regulated cohabitation forms in Catalonia and Aragon’.108

It is, therefore, not entirely clear how these criteria will be interpreted. Although the explanatory notes refer to the subsequent promulgation of information on these criteria, no such information has been released. Which foreign relationships satisfy these criteria is thus still an unanswered question. A better solution would have been if certain ‘registered partnerships’ would have been a priori listed as fulfilled such criteria, leaving the criteria to be applied on an ad hoc basis for new forms of ‘registered partnership’.109

Nonetheless, once it has been determined that a foreign relationship can be characterized as a ‘registered partnership’ for the purposes of the WCGP, the question is whether such a relationship will then be recognised. The starting point for both the Dutch Government and the Staatscommissie was that the recognition rules on registered partnership should correspond to the equivalent recognition rules for marriage.110 As a result, Article 2(1), WCGP is a replica of Article 5(1), WCH, subject to the standard public policy exception.111

The distinction thus created between registered partnership and marriage in terms of foreign relationships is a very difficult one and will thus often turn on semantics. For example, a Swedish registered partnership, which in Sweden is virtually identical to marriage, will more-than-likely be recognised in The Netherlands in accordance with the rules laid down by the WCGP and not under the WCH.112 Although in the majority of cases this will not lead to differences in the legal rights offered to same-sex couples, this may be of importance should the parties have children. Take the following example,

108 Kamerstukken II 2002/03, 28 924, nr. 3, p. 3.
109 Such a solution has, for example, been adopted in the United Kingdom. See further Curry-Sumner 2005, p. 341-343.
111 Article 3, WCGP.
112 This solution would thus follow the approach adopted the European Court of Justice in the case of D and Sweden v. Council where a Swedish registered partnership was held not to be considered as equivalent to a marriage in determining eligibility to spousal housing allowance.
Lotta and Janik, both Swedish nationals, register their partnership in Stockholm. They subsequently use the possibilities for artificial insemination and Lotta conceives a child. According to Swedish law both Lotta and Janik are the legal parents of the child. The following year the parties decide to move to Almere, The Netherlands.

Two questions arise. The first in relation to the recognition of the parties’ relationship. Their relationship would satisfy the characterisation criteria laid down in Article 2(5), WCGP. As such they would be determined to have validly registered a partnership according to Swedish law. However, the second question then relates to the issue of parentage. According to Article 1(1), Wet Conflictenrecht Afstamming (Private International Law (Parentage) Act), the parentage of the birth mother and her ‘husband’ will be determined according to the law of the parties’ common nationality, or in the absence thereof of their common habitual residence, or in the absence thereof according to the habitual residence of the child. Two issues arise on the basis of this Article. Firstly, the Article is phrased in non-gender neutral terminology, causing problems for the recognition of joint legal parentage of same-sex couples. Secondly, if the parties have already been determined to have registered a partnership and not celebrated a marriage, this Article would more-than-likely deemed not be applicable. Further analysis of the Wet Conflictenrecht Afstamming also indicates no rule which would allow Janik to have her legal parentage recognised. Obviously there appears to have been little thought paid to the ensuing consequences of characterisation of a particular relationship as a marriage or a registered partnership. It will thus have to be seen whether these distinctions are able to stand the test of time.

4.2. Dissolution

4.2.1. Jurisdiction

In crafting international jurisdictional rules for the dissolution of registered partnerships The Netherlands has strived for simplicity. By virtue of Article 4(4), Dutch Code of Civil Procedure, the Brussels IIbis regime is mutatis mutandis applicable to all questions of international jurisdiction with respect to the dissolution of registered partnerships. In this way The Netherlands endorses one set of international jurisdictional rules applicable in all situations; the same grounds apply whether the case falls inside or outside the material scope of Brussels IIbis and whether the case involves the dissolution of a marriage or registered partnership. Alongside these rules, Dutch law also provides for the residuary jurisdiction of Dutch courts if the
relationship was registered in The Netherlands.\footnote{Last sentence, Article 4(4), Dutch Code of Civil Procedure.} In this way, Dutch law recognises the need for a \textit{forum necessitatis}.\footnote{\textit{Kamerstukken II} 1999/00, 26 855, nr. 3, p. 33 and thus following the advice of the Dutch Staatscommissie, see Staatscommissie Internationaal Privaatrecht 1998, p. 35. Such a solution has also found academic support, \textit{e.g.} Joppe 2000, p. 393-394 and Mostermans 2001, p. 304.}

When the Dutch \textit{Staatscommissie} published its proposals in 1998, there were in fact only four countries besides The Netherlands that had introduced equivalent legislation, namely Denmark, Norway, Sweden and Iceland. It was thus deemed suitable to provide an unconditional forum to all those couples who had registered their partnership in The Netherlands. However, by the time the Government eventually enacted legislation in this field, the number of jurisdictions to have introduced a form of registered partnership had increased dramatically. It would therefore have been advisable for the Government to restrict this \textit{forum necessitatis} to those couples who are unable to dissolve their relationship outside of The Netherlands.\footnote{This solution has, for example, been followed in \textit{Switzerland} (Art. 65b, Swiss Code of Private International Law) and the \textit{England & Wales} (Sec. 221(1)(c)(iii), Civil Partnership Act 2004 (Civil Partnership Act 2004) (dissolution), Sec. 221(2)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 222(c), Civil Partnership Act 2004 (presumption of death)), \textit{Scotland} (Sec. 225(1)(c)(iii), Civil Partnership Act 2004 (dissolution), Sec. 225(2)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 1(3)(c), Presumption of Death (Scotland) Act 1977 as amended by § 44, Sch. 28, Civil Partnership Act 2004 (presumption of death)) and \textit{Northern Ireland} (Sec. 229(1)(c)(iii), Civil Partnership Act 2004 (dissolution), Sec. 229(2)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 230(c), Civil Partnership Act 2004 (presumption of death)).

Furthermore, as a result of the passing of the WCGP, Article 1:80c, Neth. CC has also been amended so as to provide a general rule of competency for the Dutch Registrar of Births, Deaths, Marriages and Registered Partnerships with respect to the administrative dissolution of non-marital registered relationships. Article 1:80c(2), Neth. CC now provides that the Dutch Registrar is competent on identical grounds to those laid down in Brussels IIbis,\footnote{Article 1:80c(2), Neth CC refers to Article 4(4), Dutch Code of Civil Procedure, which in turn refers to Article 4(1), Dutch Code of Civil Procedure and thus to the application of the jurisdictional grounds stated in Brussels IIbis.} thus furthering the simplicity in jurisdictional grounds for relationship breakdown in The Netherlands.

4.2.2. Choice of Law Rules

Despite the apparent complexity of the Dutch choice of law rules laid down in the WCGP, the ultimate scheme is based on a simple distinction. It is
assumed that Dutch law will apply in all cases unless certain conditions are present. As a result, three categories must be distinguished, namely,

- registered partnerships registered in The Netherlands;
- registered partnerships registered abroad where dissolution is sought on grounds of mutual consent and,
- registered partnerships registered abroad where dissolution is sought on grounds of a sole petition.

In the first category, Dutch law, as both lex fori and lex loci registrationis, will be applied in all cases. In the second category, Dutch law will be applied, unless the parties have made a choice for the lex loci registrationis. In the third category, Dutch law will also be applied, unless either the parties have jointly chosen for the lex loci registrationis or this choice has been made by one party and is not contested by the other, or one party has made a choice of law for the place where the relationship was registered and both parties have close ties with that country. The choice is, however, restricted to the substantive requirements of the dissolution; the form and manner in which the dissolution takes place will be determined according to Dutch law. This approach is therefore based on the choice of law rules in the field of divorce as proposed by the Dutch Staatscommissie, save for the replacement of the choice for the lex patriae with the lex loci registrationis.

4.2.3. Recognition

In drafting rules dealing with the recognition in The Netherlands of dissolutions obtained abroad a distinction has been drawn between those relationships terminated with mutual consent and those dissolved upon the request of one of the parties. Although this distinction has been made, the requirements therefore are identical. Four minimum conditions must therefore be satisfied, namely:

1. A foreign relationship dissolution must have been obtained by a competent authority. Whether the authority was competent is to be judged according to ‘international standards’ and not the jurisdictional

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118 Article 22, WCGP.
119 Article 23(1), WCGP.
120 Article 23(2), WCGP.
121 Article 23(1), WCGP.
122 Article 23(3), first sentence, WCGP.
123 Article 23(3), second sentence, WCGP.
124 Article 23(4), WCGP.
125 With respect to registered partnerships, administrative decisions have been expressly included: Mostermans 2003 p. 112-113, § 328-329.
rules of the issuing country or Dutch law. However, if the Dutch authorities would have been competent on identical grounds, then it would appear somewhat hypocritical to refuse recognition on the basis that jurisdiction was assumed on grounds not in accordance with international standards. This could thus be important in cases where a foreign judge assumes jurisdiction on the basis of an unconditional *forum necessitatis*.

2. If the dissolution was obtained as a result of a unilateral petition, it will only be recognised if it was obtained as the result of a proper legal process (*behoorlijke rechtspleging*). Nonetheless, even if either of these first two criteria are not met then the dissolution may still be recognised if the other party either expressly or implicitly consented to the procedure.

3. A foreign decision may also not be contrary to Dutch public policy.

4. Finally, a decision will not be recognised, even if it complies with the aforementioned criteria if it is not in conformity with a previous decision.

5. **Conclusions**

Same-sex couples in The Netherlands are offered an array of legal options when wishing to regulate their relationship. Since 2001, same-sex couples in The Netherlands are able not only to register a partnership or conclude a cohabitation contract, but are also entitled to legally marry. The opening up of civil marriage to same-sex couples in 2001 was an important milestone not only in The Netherlands but also worldwide. It signalled a fundamental paradigm shift in our notion of the term ‘marriage’. It would appear that the challenge now is for private international law to deal with this modernised notion. It has thus been necessary not only to adapt various private international law rules in the field of marriage law, but also create an entirely new set of rules for the international regulation of registered partnerships.

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127 An unconditional *forum necessitatis* is not an internationally recognised standard of jurisdiction and would thus, under normal circumstances not be recognised. However, such a ground is also recognised in Dutch internal procedural law, and it would therefore be rather hypocritical to refuse to grant recognition to a foreign dissolution on this basis, if a Dutch court would be able to grant a dissolution having declared itself competent on identical grounds. For more on this ground of jurisdiction, see Curry-Sumner 2005, p. 436-437 and the evaluation of such criteria in Curry-Sumner 2005, p. 438-445.
129 Article 24(2), WCGP. This is another example of the favor divortii and favor dissolutionis principles explained in Curry-Sumner 2005, p. 446-463.
Anno 2006, the fortunes of same-sex couples in The Netherlands are reasonably well protected. Both in terms of domestic legislation and the recognition of foreign relationships, The Netherlands provides for extensive regulation of such relationships. The time is now ripe to take a step backwards and assess the situation. Although one is able to now provide answers to questions, the provision of such answers simply leads to more questions. Are the differences between these various domestic institutions still necessary? What consequences does the distinction between registered partnership and marriage have in the field of private international law? Should more attention be paid to the function of foreign institutions instead of semantic differences (which are often made for political reasons) in dealing with issues of characterisation. Nonetheless, it can easily be concluded the same-sex couples in The Netherlands are fortunate. Same-sex couples are treated practically identically to the different-sex couples in virtually all legal fields of law. Same-sex couples are provided with choices in terms of the legal regulation of their relationship, and same-sex couples having entered into relationships abroad are provided with a large certain degree of legal certainty in requesting recognition of their relationship.
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LE RAPPORT NÉERLANDAIS SUR LA RESPONSABILITÉ CIVILE, PÉNALE ET DISCIPLINAIRE DES MAGISTRATS

LE JUGE NÉERLANDAIS: INDÉPENDANT ET IRRESPONSABLE

V.V.R. van Bogaert

1. Contexte

1.1. Le cadre constitutionnel

L’ordre judiciaire néerlandais est basé sur la théorie de l’Etat de droit (Rechtsstaat) comme celui qui s’est développé dans la première moitié du dix-neuvième siècle en Allemagne. De nombreuses fondements de l’Etat de droit se retrouvent dès lors – quoique le plus souvent de manière implicite – dans le système constitutionnel néerlandais. Les principes de la séparation des pouvoirs, l’indépendance judiciaire et la souveraineté de la loi générale jouent notamment un rôle important dans le cadre de la responsabilité des juges.

Dans la constitution néerlandaise (Grondwet – GW), la séparation des pouvoirs se retrouve de manière quasi-implicite. C’est ainsi, par exemple, que l’article 81 GW stipule que la compétence législative est accordée conjointement au gouvernement et aux États généraux. Que la compétence administrative revienne exclusivement au gouvernement n’est toutefois pas (plus) explicitement inscrit dans la constitution.1 L’attribution de la compétence juridictionnelle et de l’effet ultérieur de celle-ci s’y trouve en revanche explicitement stipulé, notamment au chapitre 6 GW.2 La majeure

1 Traduction française faite par les services de traduction du Vertaalbureau Van Bogaert.
2 Jusqu’en 1983, ce fut cependant le cas; l’article 56 GW (1972) déterminait notamment ce qui suit: ‘De uitvoerende macht berust bij de Koning’ (le pouvoir exécutif incombe au Roi).
3 La séparation des pouvoirs et la répartition des compétences entre les différents organes (pour autant que possible) indépendants ressort déjà aussi de l’article 57 GW où il est stipulé que, lorsqu’une personne exerce une fonction déterminée, comme celle de ministre, elle ne peut être également membre notamment du parlement et de la Cour de Cassation (ce que l’on appelle les ‘incompatibilités’) On se reporterà, par exemple, à l’article 15 alinéas 7 et 8 RO où des dispositions similaires sont reprises qui concernent les membres de l’administration des tribunaux.
partie des dispositions comprises dans ce chapitre traitent du pouvoir judiciaire et s’intitule *Rechtspraak* (juridiction). Le terme de ‘pouvoir judiciaire’ utilisé dans la constitution renvoie seulement à l’organe chargé de la juridiction et ne désigne pas la fonction juridictionnelle elle-même aussi.3

La constitution ne donne pas d’autre interprétation (de fond) du concept précité de ‘pouvoir judiciaire’; les instances qui en relèvent sont dès lors indiquées par la loi conformément au premier alinéa de l’article 116 GW. C’est ce qui se passe dans l’article 2 de la Loi sur l’Organisation judiciaire (*Wet op de Rechterlijke Organisatie* – RO). Il y est stipulé que le terme de ‘pouvoir judiciaire’ ne couvre que les instances judiciaires de ce que l’on appelle le pouvoir judiciaire ‘ordinaire’, à savoir les tribunaux, les cours de justice et le *Hoge Raad* (la Cour de Cassation néerlandaise). Les instances juridictionnelles de droit administratif spéciales telles que la Division de juridiction administrative du Conseil d’Etat (*Afdeling bestuursrechtspraak van de Raad van State* – ABRvS), le Collège d’appel pour la vie professionnelle (*College van Beroep voor Bedrijfsleven* – CBB) et le Conseil central d’appel (*Centrale Raad van Beroep* – CRvB) n’appartiennent donc pas au pouvoir judiciaire au sens constitutionnel du terme.

Le sixième chapitre de la Constitution commence par l’octroi de la compétence juridictionnelle au pouvoir judiciaire. L’article 112 alinéa 1 GW stipule que le pouvoir judiciaire est chargé du jugement des litiges portant sur les droits civils et sur les créances. La disposition assure également que le pouvoir judiciaire soit en principe toujours apte à prendre connaissance des litiges relatifs à ces droits et créances indépendamment du fait qu’ils trouvent eux-mêmes leur origine dans le droit civil.4 Cependant, conformément au deuxième alinéa du présent article, tous les litiges ne doivent pas être réglés par le pouvoir judiciaire. L’article 112, alinéa 2 ouvre notamment la possibilité pour le législateur de confier le jugement des litiges qui ne sont pas nés de rapports de droit civil aux instances juridictionnelles qui n’appartiennent pas au pouvoir judiciaire. De la sorte, la compétence de créer de telles instances judiciaires est également accordée au législateur.

L’article 113, alinéa 1 GW stipule ensuite que le jugement des faits délictueux est également confié au pouvoir judiciaire. En ce qui concerne le jugement des faits délictueux, le pouvoir constituant apporte moins de clarté que le premier alinéa ne le laisse supposer vu que, dans le troisième alinéa de l’article 113, il est stipulé que les peines d’emprisonnement peuvent être imposées par le pouvoir judiciaire exclusivement. Van der Pot/Donner en tire pour conclusion que les autres peines telles que les amendes pourraient également être imposées par d’autres instances que le pouvoir judiciaire.5 Que le législateur partage cette idée ressort, par exemple, de la Loi sur les

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4 *Kamerstukken II* 1979/80, 16 162, nr. 3, p. 6.
médias (Mediawet), de la Loi sur le tabac (Tabakswet) et de la Loi sur le maintien administratif des prescriptions de circulation (Wet administratiefrechtelijke handhaving verkeersvoorschriften).6

Le fait que les compétences du pouvoir judiciaire soient établies dans la Constitution (articles 112 et 113 GW) et qu’il appartienne au juge de décider s’il est compétent pour prendre connaissance d’une affaire indique que le pouvoir judiciaire doit être considéré comme un pouvoir constitutionnel indépendant. La Constitution ne décrit pas précisément comment la répartition des compétences se fait entre les différentes instances judiciaires (qu’elles appartiennent ou non au pouvoir judiciaire). On retrouve cet élément dans diverses lois organiques telles que la Loi sur l’Organisation judiciaire (Wet op de Rechterlijke Organisatie), le Code de procédure civile (Wetboek van Burgerlijke Rechtsvordering – Rv), le Code de procédure pénale (Wetboek van Strafordering – Sv), la Loi générale de droit administratif (Algemene wet bestuursrecht – Awb), la Loi sur le Conseil d’État (Wet op de Raad van State), la Loi de juridiction administrative de l’organisation professionnelle (Wet Bestuursrechtspraak Bedrijfsorganisatie – WBB) et la Loi d’appell (Beroepswet). Une discussion détaillée sur ce sujet nous porterait trop loin dans le cadre de ce rapport.

Le fait que le juge néerlandais soit réellement indépendant d’un point de vue constitutionnel est généralement accepté – bien que la Constitution ne le stipule pas explicitement – et est déduit, pour le pouvoir judiciaire au sens constitutionnel du terme, de l’article 117, alinéa 1 et alinéa 4 GW. On y trouve respectivement stipulé que les membres du pouvoir judiciaire sont nommés à vie (par arrêté royal) et que la loi7 réglemente le statut juridique des membres du pouvoir judiciaire et du procureur général à la Cour de Cassation.8 Le fait aussi qu’un collège judiciaire soit désigné pour décider de la suspension et du licenciement de juges (article 117 alinéa 3 GW) indique que le pouvoir constituant avait à l’esprit la garantie de l’indépendance du juge lors de la rédaction de la Constitution.

A la Chambre des députés se trouve actuellement une proposition de loi en complément de La loi générale de droit administratif (Algemene wet bestuursrecht), ce que l’on appelle la quatrième tranche de la Loi générale de droit administratif, où des règles générales sont notamment données en ce qui concerne l’amende administrative (Kamerstukken II 2003/04 et 2004/05, 29 702, nrs. 1-6). Voir annexe 2 dans le Mémoire informatif à la Quatrième tranche (Kamerstukken II 2003/04, 29 702, nr. 3, p. 168-169) pour plus d’exemples de lois où la compétence d’imposition d’amendes est confiée aux instances qui n’appartiennent pas au pouvoir judiciaire.


6 A la Chambre des députés se trouve actuellement une proposition de loi en complément de La loi générale de droit administratif (Algemene wet bestuursrecht), ce que l’on appelle la quatrième tranche de la Loi générale de droit administratif, où des règles générales sont notamment données en ce qui concerne l’amende administrative (Kamerstukken II 2003/04 et 2004/05, 29 702, nrs. 1-6). Voir annexe 2 dans le Mémoire informatif à la Quatrième tranche (Kamerstukken II 2003/04, 29 702, nr. 3, p. 168-169) pour plus d’exemples de lois où la compétence d’imposition d’amendes est confiée aux instances qui n’appartiennent pas au pouvoir judiciaire.


Comme remarqué plus haut, bon nombre d’instances juridictionnelles telles que l’ABRvS et le CRvB ne sont pas couvertes par le terme de ‘pouvoir judiciaire’ (cfr. article 116 alinéa 1 GW joint à l’article 2 RO), ce qui a pour conséquence que la garantie de l’indépendance de ces juges ne peut être déduite de l’article 117, cette disposition n’ayant trait qu’aux membres du pouvoir judiciaire. Cela ne veut pourtant pas dire, en principe, que ces juges ne peuvent être considérés comme indépendants. L’indépendance (mais en fait le statut juridique) de droit constitutionnel des membres de l’ABRvS, par exemple, est établie par la Constitution en son article 74 GW.9 Pour le reste des fonctionnaires chargés d’une juridiction, elle n’est toutefois pas garantie constitutionnellement mais l’on pourrait arguer que cette garantie pour les fonctionnaires précités est réglée par loi officielle et de manière similairement implicite comme cela s’est fait dans la Constitution pour les membres du pouvoir judiciaire (selon l’article 4 Beroepswet et l’article 5 WBB).10

1.2. Exercice de compétence judiciaire

Dans le cadre de l’Etat de droit, le concept de loi joue un rôle central. En fait, il s’agit de la pierre angulaire de l’Etat de droit.11 Le concept de loi de l’Etat de droit est un ‘concept unitaire’ dans lequel sont réunis tant les éléments matériels que formels. Les deux principales exigences pour une loi au sens de l’Etat de droit sont que, lors de la réalisation de la loi, la représentation populaire soit (pour le moins) concernée et que son texte contienne une prescription générale qui vaille de manière égale pour chacun. Ce n’est qu’alors qu’une loi peut être générale dans le temps (durabilité) et prévisible pour les citoyens. ‘Das rechtsstaatliche Gesetz ist der »freie« Staatswille, Allgemeinwille und Selbstbestimmung der einzelnen sind in ihm vermittelt; die Herrschaft dieses Gesetzes bedeutet »die Herrschaft des Prinzips der staatsbürgerlichen Freiheit«’.12

9 Voir aussi les articles 3 et 3a de la Loi sur le Conseil d’Etat (Wet op de Raad van State) concernant respectivement la nomination à vie et la réglementation de la suspension et du licenciement des conseils d’Etat qui correspond à la réglementation de suspension et de licenciement des fonctionnaires judiciaires ‘ordinaires’ (voir chapitre 6A Wrra).

10 Dans ces articles, la Loi sur le statut juridique des fonctionnaires judiciaires (Wrra) est déclarée en grande partie d’application conforme, dont, par exemple, aussi l’article 1a Wrra (la nomination à vie des fonctionnaires chargés d’une juridiction).

11 Böckenförde 1991, p. 149.

Lors de l’élaboration organisationnelle de l’Etat de droit, il est dès lors indispensable de préserver le caractère général de la loi. La séparation du pouvoir de l’Etat en un pouvoir législatif, exécutif et judiciaire n’a, en effet, de sens que lorsque l’on comprend dans le concept de ‘loi’ une norme générale dominante – ce qui implique aussi certaines exigences qualitatives – et pas seulement quelque chose qui est établi selon une procédure déterminée par un organe législatif.

Compte tenu de la place centrale occupée par la souveraineté de la loi dans le concept d’Etat de droit, il n’y a pas lieu de s’étonner que la position indépendante du pouvoir judiciaire par rapport aux deux autres pouvoirs de l’Etat soit également liée indissolublement à la loi et à son caractère général. Cette indépendance du juge par rapport au pouvoir exécutif ou plus précisément législatif ne peut exister dans l’idée de l’Etat de droit que sous réserve de la dépendance judiciaire de la loi générale.

Dans le lien qui unit le juge (politiquement neutre) indépendant à la loi réside en premier lieu la légitimation de ses décisions. En outre, les autres pouvoirs de l’Etat ne sont assujettis à la loi que si le juge est indépendant par rapport à eux. Cela ne se peut que si le juge ne peut recevoir d’instructions individuelles concernant l’exercice de sa fonction, ni du pouvoir exécutif ni du pouvoir législatif. En ce qui concerne l’indépendance par rapport au pouvoir législatif, il est, par conséquent, important que la loi comporte une norme générale et que le législateur ne puisse utiliser la loi comme instrument lui permettant de donner des indications au juge. Enfin, le lien judiciaire à la loi sert de garantie contre un pouvoir débridé du juge indépendant par rapport aux autres pouvoirs de l’Etat et par rapport au citoyen.13

Dans le système de l’Etat de droit, le juge remplit une fonction charnière, étant le garant de la loi et, par là, de l’ensemble de l’ordonnancement de l’Etat de droit. C’est le pouvoir judiciaire qui assure la liaison entre les deux autres pouvoirs d’Etat et la loi par l’application de la loi générale.

Dans un Etat de droit, la garantie de l’impartialité judiciaire au sein de la procédure est insuffisante; l’indépendance selon le droit constitutionnel du juge doit être garantie aussi. La nécessité de cette indépendance apparaît

notamment dès que, par exemple, le pouvoir exécutif agit hors de ses compétences.

Pour que cette indépendance ne soit pas vide de sens, il n’est pas possible, selon le point de vue de l’Etat de droit, de demander au juge de se justifier et/ou de le tenir pour responsable de l’exercice de sa fonction. Dans le cadre du principe de *checks and balances*, la dépendance absolue du juge par rapport à la loi est la condition et la légitimation de cette indépendance. Du point de vue de l’Etat de droit, la compétence du juge se limite, dès lors, à l’application de la loi ou, autrement dit, à la simple subsomption d’un complexe de faits sous une norme légale.

Nous retrouvons également dans le droit néerlandais le fondement de l’Etat de droit esquissé ci-dessus concernant la relation entre le juge et les deux autres pouvoirs d’Etat et, plus particulièrement, concernant la relation entre le juge et la loi. Les articles 11, 12 et 13 de la Loi relative aux dispositions générales (*Wet houdende Algemeene Bepalingen* – Wet AB) sont les dispositions les plus importantes dans lesquelles l’exercice des compétences judiciaires se trouve décrit de manière plus approfondie et dans lesquelles la relation plus spécifique du juge à la loi est formulée.

C’est dans l’article 12 de la Wet AB que se manifeste le mieux l’existence d’une séparation entre les pouvoirs judiciaire et législatif. Cette disposition est reprise de l’article 5 du *Code Napoléon* (*CN*) qui a été introduit à l’époque en France en prévention des situations intolérables qui existaient sous l’Ancien Régime suite à la compétence qu’avaient les parlementaires d’exécuter les arrêts de règlement. Dans l’article 12 Wet AB, il est, dès lors, inscrit que le juge ne peut rendre que des décisions qui soient contraignantes pour les parties; il ne peut donc lier aucun effet général à son prononcé. S’il venait à le faire, il se retrouverait dans le domaine du législateur et enfreindrait en cela aussi la (souveraineté de la) loi en plaçant sa volonté particulière au-dessus de la volonté du législateur.

Le lien qui unit le juge à la loi découle logiquement de l’article 12 Wet AB. Ce lien est explicité dans l’article 11 par la reprise de la formulation qui s’y trouve contenue – laissant peu de place à l’imagination – à savoir que ‘le juge doit parler de droit selon la loi’. Cette dépendance du juge à la loi implique ensuite aussi qu’il ne peut teinter cette loi par une interprétation et porter atteinte ainsi à la volonté du législateur. Ce fondement se retrouve également dans la législation néerlandaise et notamment dans la même disposition, article 11 Wet AB, où se trouve stipulé que le juge ne peut ‘en aucun cas juger de la valeur intrinsèque ou du bien-fondé de la loi’.

En outre, la mise en dépendance du juge par rapport à la loi, du point de vue du droit néerlandais, est énoncée également dans une disposition constitutionnelle, à savoir l’article 120 GW. Il y est notamment stipulé que le juge ne procède pas au jugement de la constitutionnalité de la loi. Cette disposition est venue en place de la phrase reprise dans l’article 131 alinéa 2 GW (1972): ‘Les lois sont inviolables’, qui apparaissait dans notre Constitution depuis 1848.
Avec l’introduction en 1848 de la disposition stipulant que les lois sont inviolables, le pouvoir constituant visait à laisser au législateur la décision de savoir si (le contenu de) la loi était conforme ou non à la Constitution et donc à retirer cette compétence notamment au juge (mais aussi à l’administration). Cependant, cette ‘inviolabilité de la loi’ n’a jamais été réellement incontestée. Aujourd’hui encore, on entend toujours plus de voix s’élever pour plaider en faveur de l’octroi au juge d’une compétence de contrôle de la constitutionnalité d’une loi.14

L’introduction de la nouvelle formulation dans l’article 120 de notre Constitution actuelle de 1983 par rapport à la compétence de contrôle de la constitutionnalité judiciaire ne vise aucune modification de la situation existante avant cette année. Bref, l’article 120 constitue une nouvelle confirmation du fait que l’ordre du droit néerlandais – notamment en ce qui concerne la position du juge par rapport au législateur – selon le droit constitutionnel est basé sur les fondements de l’Etat de droit: la séparation des pouvoirs, la souveraineté de la loi, le lien subséquent du juge (notamment) à la loi et, par voie de conséquence, la position indépendante du juge. Cette indépendance judiciaire est, comme on le dit, reconnue aussi par le pouvoir constituant néerlandais et, quoique de manière implicite, se trouve ‘ancrée’ dans la Constitution (article 117 GW).

Enfin, nous connaissons encore une dernière disposition dans laquelle le mode d’exercice des compétences judiciaires est décrit plus en détail, à savoir l’article 13 de la Wet AB. Il est stipulé dans cet article que ‘le juge qui refusera de juger sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice’. Cette disposition est reprise de l’article 4 du Code Napoléon, où le référé législatif est supprimé pour les tribunaux inférieurs et où la compétence d’interprétation de la loi a été accordée implicitement aux juges.15

Un même raisonnement qu’à l’article 4 CN se retrouvait à l’article 13 de la Wet AB, à savoir que le déni de justice par le juge n’est pas permis et qu’une compétence d’interprétation du juge doit nécessairement découler de

14 Voir l’intiative-proposition de loi de Halsema où il est proposé de supprimer partiellement ce qui est stipulé dans l’article 120 GW, de sorte que tout juge néerlandais – et donc aussi le légendaire juge de canton de Middelburg – peut contrôler les lois formelles au chapitre I de la Constitution (Kamerstukken II 2001/02 – 2004/05, 28 331).

15 Ce référé législatif a été une procédure facultative où des juges pouvaient, si nécessaire, avoir recours au législateur pour se faire expliquer la loi ou, à la requête, créer une nouvelle loi. Cette figure juridique supprimée à l’article 4 CN était, en principe, conforme aux fondements de l’Etat de droit: elle avait, en effet, pour but de sécuriser la souveraineté de la loi et de mettre un terme à l’utilisation des parlements français sous l’Ancien Régime pour développer sa propre jurisprudence et rédiger des règles générales relatives à l’interprétation et l’application des lois. Cela s’est fait en retirant la compétence d’interprétation des lois aux juges et en accordant cette compétence au pouvoir législatif exclusivement. Voir, en outre, à ce sujet notamment Hufteau 1965.
cette interdiction. Il en résulte donc une friction entre les articles 11 et 13 de la Wet AB, vu que la première disposition nommée interdit l'interprétation judiciaire de la loi alors que la deuxième l'impose.

1.3. **Evolution de l'exercice de la compétence judiciaire et de l'indépendance judiciaire**

1.3.1. L'exercice de la compétence judiciaire à ce jour

Le cœur même de la compétence d'interprétation judiciaire qui était déjà présente avec l’entrée en vigueur de la Wet AB de 1838 dans son article 13 a depuis lors, et notamment après la deuxième guerre mondiale, pu se développer jusqu'à une situation où la loi fait essentiellement office de fil conducteur et non plus de moyen *nec plus ultra* pour résoudre les litiges et répondre aux questions juridiques.

Le juge néerlandais d'aujourd'hui ne peut pas (plus) être considéré comme l'applicateur de la loi (au sens de l'Etat de droit); il se présente plutôt comme ‘inventeur de droit’ ou même comme ‘créateur’ ou ‘façonneur de droit’, se situant à côté ou juste en dessous du législateur. En effet, l’interprétation de la loi *praeter et contra legem* mais aussi le façonnement de nouvelles règles juridiques par le juge se font systématiquement dans la pratique. En outre, le juge néerlandais s’inspire également de plus en plus de sentences antérieures, notamment du *Hoge Raad* et s’y sent lié.16

C'est ainsi, par exemple, que dans l’affaire *Enka/Dupont*,17 la Cour de Cassation a estimé qu’une partie au procès, malgré la présence d’une interdiction légale d’appel, en cas de négligence de formes essentielles telles que la violation du principe du contradictoire, devait avoir la possibilité de faire appel en instance supérieure de la sentence en première instance. Cette sentence, qui est en fait *contra legem*, est reprise à plusieurs occasions par le juge18 et s’est donc développée en une nouvelle règle de droit. Bien que nous ne connaissions pas de jure de système de précédents de droit aux Pays-Bas et qu’il soit même interdit au juge, dans l’article 12 de la Wet AB, d’accorder un effet général à ses sentences, nous pouvons dire à juste titre qu’une espèce de système de précédents est apparu de facto dans la pratique judiciaire néerlandaise. Vu l’espace que le juge s’est amenagé (initialement) – et qui n’est reconnu ou confirmé que plus tard jusqu’à un certain point par le législateur (pouvoir constituant) – en matière d’exercice de sa compétence juridictionnelle, une forme de fonctionnement de précédents des sentences

17 HR (Dutch Supreme Court) 29 mars 1985, NJ 1986, 242, a.nt. WHH et LWH.
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judiciaires est devenue également nécessaire pour la sûreté et l’uniformité du droit.19 Comme le juge s’estime lié à des sentences antérieures, notamment de collèges judiciaires qui rendent la justice en dernière instance, comme la Cour de Cassation dans les affaires civiles et les affaires pénales et comme la Division de juridiction administrative du Conseil d’Etat dans les affaires administratives, une hiérarchie est également apparue dans la pratique entre les juges, selon le droit strictement constitutionnel, qui n’a pas lieu d’être.

Bien que le lien entre le juge et la loi ne soit pas encore légalement établi (supra 1.2), le législateur (pouvoir constituant) – comme nous l’avons déjà relevé ci-dessus – a reconnu de diverses manières dans la pratique le glissement de la position du juge par rapport à la loi.20

La répartition des compétences entre le pouvoir judiciaire et le pouvoir législatif et, plus particulièrement, le lien du juge à la loi s’est manifesté, outre la disposition de l’article 120 GW dont il a déjà été question, jusqu’en 1983 dans la Constitution néerlandaise en ce qui concerne aussi la cassation des décisions judiciaires par le Hoge Raad. En effet, il était inscrit encore dans la Constitution de 1972, en son article 179, que le Hoge Raad pouvait annuler et priver de leur effet les actes, dispositions et jugements des membres du pouvoir judiciaire qui étaient contraires ‘aux lois’. Dans l’actuel article 118 alinéa 2 GW, le terme de ‘lois’ a disparu. La disposition s’énonce désormais comme suit: ‘Le Hoge Raad est chargé, dans les cas et dans les limites déterminés par la loi, de la cassation des sentences judiciaires pour motif de violation du droit’ [en italique VVB]. Une conformité de fond est ainsi obtenue avec l’article 99 RO (ancien), maintenant l’article 79 RO, où les motifs de la cassation sont (également) inscrits. En 1963 déjà, en effet, cette disposition avait été modifiée et la formulation selon laquelle la Cour de Cassation


20 Kortmann considère la ‘tâche de création juridique du juge’ comme extralégale (Kortmann 2005, p. 250-251). Au sens strict, il a raison en cela vu que le législateur (pouvoir constituant) n’a nullement nullement expliqué cette tâche judiciaire. On peut cependant, à partir de diverses modifications de la loi, déduire, selon moi, que le législateur (pouvoir constituant) a reconnu la compétence de créateur juridique du juge en fournissant, pour le moins, au juge un espace de mouvement pour procéder à cette création de loi.
pouvait annuler notamment des arrêts et des décisions judiciaires pour motif de ‘violation de la loi’ avait été remplacée par ‘violation du droit’.21

Le remplacement du terme ‘loi’ par le terme ‘droit’ tant dans l’article 118 alinéa 2 GW que dans l’article 79 RO visait une extension de la compétence de cassation du Hoge Raad pour que le Hoge Raad puisse non seulement user de son pouvoir de cassation en cas de violations de la loi mais aussi en cas de violations du droit non écrit. L’on songeait notamment au moment de la modification de la loi au droit coutumier (y compris au droit international public) et aux ‘règles qui devaient être trouvées hors de la loi’, comme c’est principalement le cas dans le cadre du droit privé international.

Avec cette extension des compétences – qui s’était faite en réalité déjà avant la modification de la loi de 1963 dans la pratique jusqu’à un certain degré – l’objectif de la juridiction de cassation a également changé. De fait, en France au moment de la Révolution, l’objectif consistait à veiller à une application correcte et uniforme de la loi et à protéger la loi contre son interprétation par le juge; aujourd’hui, le but consiste à tendre vers une unité du droit et une sûreté du droit et à combattre les décisions abusives. En outre, le façonnement22 et le développement du droit sont mêmes désignés comme tâches du Hoge Raad; c’est notamment le cas depuis l’introduction en 1988 de l’article 101a RO (ancien), maintenant l’article 81 RO. Il y est notamment stipulé que, lorsque la Cour de Cassation juge qu’une plainte ne peut donner lieu à une cassation et n’exige pas de réponse aux questions juridiques dans l’intérêt de l’unité juridique ainsi que du développement du droit, il n’existe qu’une obligation limitée de motivation.23

1.3.2. L’indépendance (et l’impartialité) judiciaire à ce jour

Comme on l’a déjà dit plus haut, il découle de l’article 117 GW que le juge néerlandais est constitutionnellement indépendant. Cette indépendance constitutionnelle implique tout d’abord que le pouvoir judiciaire soit politiquement neutre et dès lors indépendant par rapport aux deux autres pouvoirs, à savoir l’exécutif et le législatif. En second lieu, cette


22 Voir déjà Kamerstukken II 1962/63, 2079, nr. 4, p. 2, où le gouvernement dit que l’extension des motifs de cassation dans l’article 99 RO (ancien) offre l’avantage qu’il crée la possibilité d’une création juridique. Voir aussi le Rapport provisoire du 30 septembre 1980 dans le cadre de la révision de la constitution, où la fraction CDA signale l’intérêt d’une extension de ce que l’on appelle la ‘cassation dans l’intérêt de la loi’ en rapport avec l’importante tâche de création juridique du Hoge Raad (Kamerstukken II 1980/81, 16 163 (R 1146), nr. 6, p. 2).

indépendance implique aussi qu’il n’y ait pas de hiérarchie entre les juges et qu’ils soient indépendants entre eux. Il résulte aussi de l’absence d’une hiérarchie mutuelle et de la dépendance subseqüente que nous n’accordons pas de jure un effet de précédent et une valeur générale aux sentences judiciaires.

Outre l’indépendance constitutionnelle, nous reconnaissons également l’impartialité judiciaire au sein de la procédure. C’est ce que stipule l’article 12 RO, où il est établi que

‘les fonctionnaires judiciaires notamment à charge juridictionnelle (...) ne peuvent en aucune manière s’immiscer auprès des parties ou de leurs avocats, de procureurs ou mandataires au sujet de quelque litiges pendants ou de litiges dont ils savent ou suspectent qu’ils leur seront attribués’.

Les juges qui sont partiaux ou donnent l’apparence de l’être peuvent être récusés par les parties au procès. Les juges ne doivent cependant pas attendre une éventuelle procédure de récusation; ils peuvent aussi se dispenser de l’affaire. Par rapport à la question de savoir s’il y a lieu pour le juge de se retirer ou d’introduire une requête pour pouvoir se dispenser, il existe, depuis le mois de mars 2004, un code de conduite établi par l’Association de juridiction néerlandaise (Nederlandse Vereniging voor Rechtspraak – NVvR) et l’assemblée des présidents, appelé Leidraad onpartijdigheid van de rechter (fil conducteur d’impartialité du juge). Ce fil conducteur se compose de dix recommandations qui ne sont pas de nature exécutoire; il vise à offrir au juge un simple outil lui permettant de juger de son impartialité (ou de sa partialité) dans une affaire concrète.

La distinction pratiquée ici entre indépendance constitutionnelle et impartialité judiciaire dans la procédure s’estompe notamment sous

24 Voir les articles. 36-41 Rv; articles. 512-518 Sv; articles. 8:15-8:20 Awb.
25 Il s’agit de la décision informelle du juge de ne pas traiter lui-même l’affaire sur la base de faits et de circonstances par lesquels son impartialité pourrait être/serait compromise.
26 Cfr. article 40 Rv, article 517 Sv et article 8:19 Awb.
27 Voir sous <http://www.rechtspraak.nl/naar+de+rechter/landelijke+regelingen/Al gemeen/>.
l'influence de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du Conseil de l'Europe (CEDH). Le droit international a, en effet, une grande influence sur l'ordre juridique néerlandais en raison du système d'incorporation pratiqué par les Pays-Bas en ce qui concerne l'effet de celui-ci; tout le droit international (exécutoire pour le Royaume des Pays-Bas) se répercute dans l’ordre juridique national sans transposition dans le droit national et doit être appliqué par les instances publiques en tant que tel.29 Pourtant, si l’application du droit international devait s’avérer inconciliable avec le droit national, le juge sera tenu d’appliquer le droit national à moins qu’il s’agisse de normes du droit international public écrites ‘contraignantes pour tous’ conformément aux articles 93 et 94 GW; autrement dit, si elles revêtent le caractère matériel de prescriptions généralement contraignantes et sont notifiées. Dans ce cas, le juge doit appliquer prioritairement la règle du droit international et laisser hors d’application la règle de droit national. Ce régime s'étend dans tous les cas aux lois au sens formel et peut-être aussi à la Constitution elle-même. Le juge néerlandais doit toujours contrôler in concreto si une disposition du droit international revêt un effet contraignant pour tous.30

La CEDH et les arrêts de la Cour européenne des droits de l’homme jouent un rôle très important en maints domaines, donc aussi dans le cadre de la demande de la position et du travail du pouvoir judiciaire. Comme cela s’avéra plus loin par rapport à la responsabilité civile relative à l’acte


29 Ceci se base sur une règle non écrite du droit constitutionnel. Ce point est déterminé par la Cour de Cassation notamment dans l’affaire Grenstraktaat van Aken (HR 3 mars 1919, NJ 1919, 371). Le pouvoir constituant a confirmé ensuite ceci en 1983 en autant de mots (Kamerstukken II 1977/78, 15 049 (R1100), nr. 3, p. 10 et suiv.).

judiciaire, l’influence de l’article 6 alinéa 1 CEDH est sensible dans le cadre actuel en raison du fait que l’on ne peut accepter – et assurément actuellement – que cette disposition sera toujours considérée en principe par le juge comme une disposition ‘contraignante pour tous’. 

Dans la première phrase de l’article 6 alinéa 1 CEDH, il est notamment dit que ‘Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi’. Selon la jurisprudence constante de la CEDH, on vise par le concept de ‘juridiction’ non seulement les instances judiciaires qui sont de tout temps ordinairement comprises dans le ‘pouvoir judiciaire’ mais toute instance qui a pour tâche de ‘to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner’ et toute instance qui a la compétence de ‘to quash in all respects, on questions of fact and law, the decision of the body below’. Ce n’est pas le lieu ici de déterminer si l’organe en question se compose de membres du jury, de juges de carrière et/ou de juges profanes.

Il est difficile de déterminer ce que la Cour européenne entend précisément par les termes de ‘indépendant et impartial’ au sens du premier alinéa du présent article vu que la Cour n’applique généralement pas de distinction entre les deux concepts. Certains auteurs tentent néanmoins, à l’occasion de divers arrêts de la Cour de Strasbourg, de procéder à une telle distinction et essaient de coller des ‘définitions strasbourgeoises’ sur les différentes ‘espèces’ d’indépendance qui sont distinguées ordinairement dans la littérature par rapport au droit national. Selon moi, cela conduit cependant à un résultat assez forcé, vu que la Cour européenne elle-même ne

31 Infra 2.3.
33 Voir notamment Campbell et Fell contre Royaume-Uni, CEDH 28 juin 1984, nrs. 7819/77 et 7878/77, par. 76.
35 Zie notamment Schmautzer contre Autriche, CEDH 23 octobre 1995, nr. 15523/89, par. 36.
donne pas de définitions bien délimitées et ne peut en fait pas en donner non plus.

En effet, le fait que la CEDH soit rédigée à partir de la perspective des choix de parties plaignantes et non de choix dogmatiques impose à la Cour de sensibles limitations en termes de liberté de mouvement. Il s’agit de limitations dont la Cour semble aussi convaincue. La Cour nous rappelle dans ses arrêts à tous les coups que son rôle ne s’étend qu’au contrôle par cas de la compatibilité du droit national avec la Convention.39 Comme dans le cas aussi de l’indépendance et de l’impartialité judiciaire, cela conduit ordinairement à des sentences casuïstiques qui sont bourrées de lieux communs. Comme la CEDH n’est pas un traité constitutionnel – comme l’est mutatis mutandis le Traité CE – on ne peut non plus attacher de critères et/ou définitions institutionnels à cette Convention et l’on ne peut dès lors attendre non plus de la Cour strasbourgeoise de tels critères et définitions.

Le concept ‘d’impartialité’ est décrit en termes assez généraux par la Cour européenne comme étant l’absence de préjugés ou de parti pris. En ce qui concerne cette impartialité, la Cour établit une distinction entre une approche subjective et objective.40 Dans le cadre de l’impartialité subjective, la Cour regarde les idées personnelles du juge en question. Cette impartialité est supposée exister jusqu’à preuve du contraire par la Cour strasbourgeoise. Un appel de partialité subjective du juge réussit cependant rarement vu la difficulté de prouver les idées personnelles ou les préjugés de quelqu’un.41

Dans le cadre de l’impartialité objective, on se tourne vers la question de savoir si, selon les termes de la Cour dans l’affaire Piersack, ‘he [le juge – VVB] offered guarantees sufficient to exclude any legitimate doubt’ par rapport à son absence de préjugés. Il s’agit ici de questions par rapport à la composition du tribunal, aux fonctions secondaires et à l’implication

39 Dans les affaires Kleyn e.a. contre Pays-Bas (CEDH 6 mai 2003, nrs. 39343/98, 39651/98, 43147/98 et 46664/99, par. 193) et Pablo Ky contre Finlande (CEDH 22 septembre 2004, nr. 47221/99, par. 29) notamment, la Cour européenne a établi clairement, dans le cadre de l’indépendance judiciaire, en premier lieu que: ‘although the separation of powers between political organs of government and the judiciary has assumed growing importance in the Court’s case-law (...), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether, in a given case, the requirements of the Convention are met’. Cfr. aussi McGonnell contre Royaume-Uni, CEDH 8 février 2000, nr. 28488/95, par. 51.


Le juge néerlandais: indépendant et irresponsable

antérieure d’un ou de plusieurs membres du tribunal à un stade antérieur de
la procédure.  

La question de savoir s’il s’agit d’impartialité objective est traitée
souvent par la Cour européenne contradictoirement à la question de
l’indépendance vu que, comme le dit la Cour, ‘the concepts of independence
and objective impartiality are closely linked’  

En ce qui concerne ‘l’indépendance’, la Cour strasbourgeoise ne donne en fait aucune définition;
elle déclare seulement que le juge doit être indépendant par rapport au
pouvoir exécutif et aux parties.  

La Cour européenne des droits de l’homme
donne ensuite une énumération des diverses circonstances qui pourraient
influencer cette indépendance, comme le mode de nomination des instances
judiciaires, la durée du mandat, ce que l’on appelle ‘l’appearance of
indépendance’ et la présence de garanties contre une pression extérieure;
cette dernière exigence pouvant en fait être considérée comme un objectif qui,
selon les termes de Wagner, ‘est réalisé par la réponse à un certain nombre
d’exigences spéciales’.  

Comme le disent Jacobs et White, il ne s’agit pas,
dans ce cadre, directement de la personne, du comportement ou d’une
implication antérieure dans la procédure d’un membre spécifique d’un
tribunal mais d’aspects plus formels de l’organisation judiciaire tels que la
séparation des pouvoirs et le statut juridique.  

En outre, lorsque nous examinons de plus près la conception de
l’indépendance par la Cour européenne et la façon dont l’interprétation de
cette conception se rapporte aux fondements de l’Etat de droit esquissés ci-
dessus qui se situent en principe à la base même de l’ordre juridique
de la Cour concernant l’indépendance judiciaire sont en contradiction avec le principe
d’indépendance de l’Etat de droit qui implique la neutralité politique du
juge. Ainsi, la nomination et/ou le licenciement des juges par des organes
des pouvoirs législatif et exécutif n’est pas jugé(e) contraire à l’indépendance
par la Cour européenne, à moins qu’il ne s’agisse de préférence; de même

l’élection des juges est jugée conciliable avec l’indépendance judiciaire au sens de la Convention et un mandat à vie n’est pas davantage une exigence nécessaire pour la protection de cette indépendance. Le contrôle exercé sur le juge par un organe extérieur au pouvoir judiciaire n’est donc pas contraire à la CEDH, à condition cependant, selon l’arrêt Van den Hurk, que cette instance non judiciaire n’ait pas la compétence de défaire des décisions judiciaires exécutoires.

Bref, on peut établir clairement que, selon la Cour européenne des droits de l’homme, il n’est pas question de violation de l’indépendance au sens de l’article 6 alinéa 1 de la CEDH tant que le juge en question, dans les circonstances données en vue de la protection juridique du plaignant, a pu rendre son jugement sans préjugés ni parti pris – ceci, en principe, indépendamment de l’interprétation du statut juridique et de l’organisation judiciaire dans son ensemble. Cette conclusion n’a pas de quoi surprendre étant donné, comme on l’a dit, que la Convention n’est pas un traité constitutionnel qui offre des points d’ancrage à des critères institutionnels. Un choix dogmatique manque dans la Convention et n’a pas non plus été créé par la Cour européenne des droits de l’homme. Cette absence d’un choix dogmatique peut être vue comme un inconvénient mais offre en même temps un avantage vu qu’elle réduit le nombre de violations des particularités judiciaires nationales que l’on observerait sans nul doute autrement.

Si un choix dogmatique est effectivement fait en faveur du principe d’indépendance de l’Etat de droit, en principe les Pays-Bas ne passeraient pas l’examen portant sur la question de la neutralité politique des juges. Les membres à charge juridictionnelle du pouvoir judiciaire sont, en effet, désignés par le gouvernement (article 117 alinéa 1 GW). En outre, pour les membres du Hoge Raad s’applique le principe qui veut qu’avant qu’un nouveau membre ne soit nommé, la Chambre des députés des Etats généraux procède d’abord à une sélection entre les candidats et propose ensuite trois personnes à la nomination (article 118 alinéa 1 GW).

voir, concernant la nomination par le pouvoir exécutif, notamment. Ringeisen contre Autriche, CEDH 16 juillet 1971, nr. 2614/65, par. 95 et Campbell et Fell contre le Royaume-Uni, CEDH 28 juin 1984, nrs. 7819/77 et 7878/77, par. 78. Voir par. 80 de l’affaire précitée Campbell et Fell concernant le licenciement; voir aussi Bryan contre le Royaume-Uni, CEDH 22 novembre 1995, nr. 19178/91, par. 36.

Cfr. Ringeisen contre Autriche, CEDH 16 juillet 1971, nr. 2614/65, par. 95.
2. La responsabilité civile

2.1. Remarques générales

Au dix-neuvième siècle déjà, le juge civil avait la compétence de prendre connaissance des actions en dommages et intérêts pour agissements abusifs des pouvoirs publics. Cette compétence du juge de droit civil repose aujourd'hui sur l’article 112, alinéa 1 GW, où il est stipulé que ‘au pouvoir judiciaire incombe le règlement des litiges portant sur des droits civils et sur des créances’. Le juge civil possède cette compétence depuis l’arrêt du Hoge Raad du 31 décembre 1915 dans l’affaire Guldemond/Noordwijkerhout expliquée au sens le plus large et cette compétence est depuis lors dépendante de la formulation subjective du fondement de l’action (objectum litis). Autrement dit, dès que le requérant déclare dans son acte d’assignation qu’il est question d’un ‘fait abusif’, la compétence du juge civil est ainsi attribuée. La nature véritable du litige (de droit public ou privé) ne joue aucun rôle dans l’établissement de la compétence.

Le dogme de l’acte abusif des pouvoirs publics s’est développé en raison d’agissements (prétendus) abusifs du pouvoir exécutif et s’y rapporte donc au premier ressort. Actuellement, l’État est responsable tant pour ce qui concerne les agissements de droit (public et privé) préjudiciables que les agissements de fait; sous le terme ‘d’agissements’ – comparable à ce qui se trouve stipulé dans l’article 6:162 alinéa 2 BW – il faut également entendre les omissions.

Jusqu’à la seconde moitié du siècle précédent environ, les actions pour agissements abusifs des pouvoirs publics n’aboutissaient que dans le cas d’une administration abusive. Avec l’arrêt Pocketbooks II de 1969, le Hoge Raad a estimé que les actions en dommages et intérêts pour réglementation abusive étaient aussi acceptables. La question de la réglementation abusive a fortement gagné en importance au cours de ces dernières années et, lorsque


56 Pendant longtemps, le contrôle de l’acte judiciaire public assuré par le juge civil n’était pas possible; seuls des agissements publics abusifs selon le droit privé pouvaient donner lieu à des dommages et intérêts. Un changement est survenu ici avec l’arrêt Ostermann (HR 20 novembre 1924, NJ 1925, 89). Voir aussi Van Maanen 1996.

57 HR 24 janvier 1969, NJ 1969, 316, a.nt. HD.

la possibilité d’un contrôle constitutionnel judiciaire sera introduite,\(^{59}\) connaîtra une importance certainement encore plus grande.

En principe, l’action en dommages et intérêts pour juridiction abusive doit être possible. Cependant, comme nous en reparlerons plus loin, ce point est considéré aux Pays-Bas comme particulièrement problématique.

Quand, en général, un fonctionnaire dans l’exercice de ses fonctions, se comporte de manière abusive, la responsabilité de l’État sera fondée ordinairement sur l’article 6:162 BW avec l’application de ce que l’on appelle le critère Babbel. Les comportements d’un fonctionnaire (dans ce cas) ou d’un organe sont assimilés à ceux de l’État lorsque les comportements concernés ‘dans les relations sociales équivalent à des comportements de la personne juridique’.\(^{60}\)

En outre, l’État peut, en principe, aussi, sur la base de la responsabilité qualitative de l’article 6:170 BW, être tenu responsable vu que les fonctionnaires peuvent généralement être considérés comme des ‘subalternes’ au sens de l’article précité. La responsabilité qualitative tirée de l’article 6:170 BW n’a, depuis l’acceptation du critère Babbel précité dans le cadre de la responsabilité des personnes juridiques en vertu de l’article 6:162 BW, en fait qu’une fonction complémentaire. Les cas où la responsabilité de l’État est basée sur la responsabilité qualitative sont dès lors assez rares. Cela n’arrive en fait que si le fonctionnaire en question a usé abusivement de sa compétence, étant donné qu’un tel agissement dans les relations sociales n’équivaut pas à un agissement de la personne juridique elle-même.\(^{61}\)

En principe, il est également possible de tenir un fonctionnaire/organe personnellement responsable en plus de l’État en vertu de l’article 6:162 BW. Dans ce que l’on appelle l’arrêt Houtvester de 1933, le Hoge Raad a accepté une telle double responsabilité par rapport aux personnes juridiques de droit public.\(^{62}\) Dans l’arrêt État des Pays-Bas et M. Van Hilten contre M.\(^{63}\) du 11 octobre 1991, la Cour de Cassation a confirmé sa décision de l’arrêt Houtvester et accepté même explicitement la responsabilité des fonctionnaires judiciaires. Une action intentée contre un fonctionnaire en personne ne peut, selon le Hoge Raad, être honorée que si le comportement abusif est imputable au fonctionnaire personnellement au vu des circonstances du cas.\(^{64}\)

\(^{59}\) Voir l’initiative-proposition de loi déjà nommée de Halsema (supra note de bas de page 14).

\(^{60}\) HR 6 avril 1979, NJ 1980, 34 a.nt. CJHB (Kleuterschool Babbel).


\(^{63}\) Pour la définition du terme ‘fonctionnaire judiciaire’, voir l’article 1 alinéa 1 sub b RO; l’on entend également sous ce terme les fonctionnaires judiciaires qui sont chargés d’actes juridictionnels. Dans l’affaire Van Hilten, il s’agissait cependant de la responsabilité personnelle d’un officier de justice.

Le régime brièvement exposé ici concernant la responsabilité de l’État et la responsabilité personnelle des fonctionnaires devrait, en principe, devoir s’appliquer aussi dans le cas d’agissement judiciaire abusif. Cependant, un autre régime est d’application ici. Étant donné que la responsabilité personnelle des juges pour des agissements préjudiciables pratiqués dans l’exercice de la fonction est, aux Pays-Bas, bien plus controversée que la responsabilité de l’État pour l’agissement précité et que le juge néerlandais jouit aussi de l’immunité de droit civil, je me pencherai d’abord ci-dessous, mais pour des raisons pratiques aussi, sur la responsabilité des juges en personne.

2.2. Responsabilité personnelle du juge

2.2.1. Immunité judiciaire

Jusqu’au 1er janvier 1997, la situation Van Hilten évoquée brièvement ci-dessus était d’application, en théorie en tout cas, en ce qui concerne la responsabilité civile du juge en personne. Cela a pris fin avec l’entrée en vigueur de la ‘Loi du 29 novembre 1996 portant création de la Loi modifiée relative au statut des fonctionnaires judiciaires’ (Wet rechtspositie rechterlijke ambtenaren – Wrra). Dans l’article 42 Wrra qui est introduit dans la loi précitée, il est stipulé qu’un juge (fonctionnaire judiciaire) qui a porté préjudice à un tiers dans l’exercice de sa fonction ne peut être tenu responsable par ce tiers. Cette immunité vaut tant pour les dommages résultant de ce que l’on appelle les ‘fautes professionnelles’, comme la perte de dossiers (article 42 alinéa 1 Wrra), que pour les dommages résultant d’une ‘sentence judiciaire’, en quoi il faut également entendre le déni de justice, si l’on en croit la Mémoire informatif (article 42 alinéa 3 Wrra). Pour les
dommages résultant de ‘fautes professionnelles’, la loi déclare clairement que l’État peut en être tenu responsable et que, lorsqu’un fonctionnaire judiciaire agit intentionnellement ou de façon consciemment imprudente, l’État peut, en vertu de l’article 42 alinéa 2 Wrera, intenter une action récursoire vis-à-vis du fonctionnaire concerné.67 En ce qui concerne la possibilité d’une responsabilité de l’État pour acte juridictionnel abusif, le législateur nous laisse dans l’incertitude et déclare que l’on ne peut dire nettement si l’État pourra être poursuivi avec succès à cet égard.68

En outre, jusqu’au 1er janvier 2002, il était possible de poursuivre le juge (et uniquement lui) pour déni de justice en dommages et intérêts (articles 844-852 Rv (ancien)). Par déni de justice, il faut comprendre le refus par le juge de statuer sur des requêtes ou de statuer sur un litige qui lui est confié; le propos n’est pas ici de traiter du fait de savoir si le déni de justice concerné a été la conséquence d’un manque à ses devoirs (négligence) ou du fait que le juge pensait qu’il n’était pas tenu de statuer.69 Depuis l’entrée en vigueur de la ‘Loi de révision du droit de la procédure pour les affaires civiles, en particulier le mode procédural en première instance’ (Wet tot herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg), cette possibilité a également disparu. Au lieu de la procédure de responsabilité spéciale en cas de déni de justice selon les articles 844-852 Rv (ancien), un seul article de loi a vu le jour, à savoir l’article 26 Rv: ‘Le juge ne peut refuser de statuer’. Suite à la modification de la loi précitée, il n’existe pas (plus) de possibilité de tenir le juge pour personnellement responsable de la violation de cette interdiction.70 Compte tenu du fait qu’une nouvelle interdiction de déni de justice est peut-être sympathique et pourrait assurément être fonctionnelle aussi, l’historique de la réalisation de cette disposition ne permet nulle part d’en déduire quelle est la relation entre l’article 26 Rv et l’interdiction de déni de justice en vigueur depuis 1838 dans l’article déjà traité plus haut, l’article 13 de la Wet AB. On ne peut donc dire avec certitude si la nouvelle disposition apporte une quelconque valeur ajoutée à cet égard.71

2.2.2. Motifs d’introduction de l’immunité judiciaire

Il est à remarquer que l’immunité de droit civil du juge est introduite sans bruit. Ni l’introduction de l’article 42 Wrera ni la suppression de la procédure...
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civile de déni de justice par l’article 844 et suiv. Rv (ancien) n’ont suscité la moindre discussion aux Pays-Bas. Les États généraux n’ont connu le moindre débat non plus dans le cadre du vote de la ‘Loi du 29 novembre 1996 portant création de la Loi modifiée relative au statut des fonctionnaires judiciaires’ et de la ‘Loi de révision du droit de la procédure pour les affaires civiles’, où les dispositions ont été introduites ou supprimées. C’est d’autant plus remarquable, me semble-t-il, que les raisons invoquées par le gouvernement pour leur introduction sont dénuées de toute cohérence logique et sont de nature purement pragmatique.

En ce qui concerne l’exclusion de la responsabilité personnelle pour ‘fautes professionnelles’ (article 42 alinéa 1 Wrra), le gouvernement déclare dans le Mémoire informatif que cela servira la confiance du public dans le pouvoir judiciaire, car:

‘Si quelqu’un, par exemple, intentait une action en justice contre un juge ou un officier de justice où il déclare le fonctionnaire judiciaire responsable des dommages résultant d’une erreur professionnelle de ce fonctionnaire judiciaire et que, dans cette procédure, la responsabilité personnelle de l’intéressé venait à être rejetée par le juge statuant, cela pourrait donner lieu à une accusation de politique corporatiste. À l’inverse, la crainte de cette accusation pourrait avoir pour effet de voir le juge conclure trop rapidement à l’existence d’une responsabilité personnelle. Dans les deux cas, la confiance dans le pouvoir judiciaire s’en trouvera atteinte.’

Une telle motivation témoigne, à mon sens, uniquement d’un manque de confiance dans le pouvoir judiciaire de la part des pouvoirs publics eux-mêmes. En outre, il est tout aussi bien si pas meilleur de défendre un raisonnement inverse, consistant à dire que la confiance dans le pouvoir judiciaire se trouve précisément accrue en cas d’acceptation d’une responsabilité personnelle des fonctionnaires judiciaires. En effet, le pouvoir dominant perd de son autorité normative lorsque le pouvoir lui-même viole ses propres normes. C’est d’autant plus vrai lorsque cette violation est commise par un juge étant donné que le juge est l’organe par excellence qui doit utiliser le pouvoir. Cette perte d’autorité peut ensuite être restaurée si (les conséquences de) ces fautes sont réparées. C’était, en outre, également la justification qui se dissimulait derrière l’ancienne responsabilité des juges pour déni de justice et qui se dissimule derrière les malversations dans notre Code pénal.

Le gouvernement poursuit son argumentation de la justification de l’exclusion de la responsabilité personnelle des fonctionnaires judiciaires pour ‘fautes professionnelles’ en affirmant que la rupture avec la situation pratique n’est pas grande vu qu’en premier lieu, la responsabilisation des fonctionnaires judiciaires se produit rarement, ‘par manque d’intérêt’, vu que l’on peut poursuivre aussi l’État pour agissements abusifs de ses

72 Kamerstukken II 1994/95, 24 220, nr. 3, p. 4.
73 Voir Van Bogaert 2005, chapitre II.
fonctionnaires et, en second lieu, parce que les rares poursuites qui sont engagées ne sont pas ‘rétribuées légèrement’.74

La motivation de cette raison pragmatique est comme un serpent qui se mord la queue. On peut, en effet, décemment se poser la question de savoir si le fait que des actions en dommages et intérêts contre des fonctionnaires judiciaires en personne n’aient pratiquement jamais été rétribuées n’était pas la cause du faible nombre d’actions intentées contre ces fonctionnaires judiciaires. Qu’il soit question d’un ‘manque d’intérêt’ est une conclusion qui ne vient de rien et n’est pas fondé sur la moindre donnée empirique.

Pour justifier l’article 42 alinéa 3 Wrra, où la responsabilité judiciaire pour sentences judiciaires abusives est exclue, le législateur se contente de recourir à quelques lieux communs: notamment que ‘en ce qui concerne le système des voies de recours juridiques (…), les sentences judiciaires [doivent être] en principe tenues hors de la sphère de responsabilité’ et qu’il est généralement admis que (…) les dommages résultant d’une sentence abusive ne peuvent engendrer en aucun cas une responsabilité personnelle des juges’.75

L’argument de ce que l’on appelle le système fermé des voies de recours juridiques est déjà critiqué et rejeté par bien des juristes. Tout d’abord parce qu’une voie de recours ne peut prévenir ou réparer en toutes circonstances les dommages occasionnés abusivement par des sentences judiciaires et, en second lieu, parce qu’une procédure de responsabilité contre le juge et/ou l’Etat pour sentence abusive ne porte pas atteinte à l’autorité de la chose jugée de cette sentence et qu’aucune violation n’est dès lors faite au système (fermé) des voies de recours.76 En outre, le deuxième argument, à savoir le fondement visiblement accepté de façon générale selon lequel un acte juridictionnel abusif ne peut donner naissance à une responsabilité personnelle du juge, n’est étayé ou fondé sur le moindre fait ou argument.

Il faut admettre que divers jurisconsultes ont estimé qu’une responsabilité professionnelle des juges – hormis le cas du déni de justice – était exclue vu que le législateur n’a demandé dans le temps la création d’une procédure de responsabilité séparée qu’en cas de déni de justice (articles 844-852 Rv (ancien)). Suite à cela, le législateur n’aurait voulu admettre en aucun cas la responsabilité professionnelle.77 D’autres ont, en revanche, objecté que le simple fait que le législateur n’ait pas voulu codifier les autres cas de la prise à partie française dans une lex specialis ne justifie en rien la conclusion selon laquelle le législateur n’a pas voulu de responsabilité personnelle des juges.

74 Kamerstukken II 1994/95, 24 220, nr. 3, p. 4.
75 Kamerstukken II 1994/95, 24 220, nr. 3, p. 5.
76 Voir Van Bogaert 2005, p. 304-311 et la littérature qui s’y trouve citée.
77 Oudeman 1847, p. 310; Van Boneval Faure 1889, p. 256; Telders 1935, p. 625; Wolfsbergen 1943, p. 244; Wolfsbergen 1946, p. 49; Blomkwist 1972, p. 283; Van Zeben 1972, p. 211-212 (cependant, selon Van Zeben, cette exclusion d’une responsabilité personnelle du juge, sauf pour le déni de justice, n’est pas (plus) à défendre); Kortmann 1985, p. 36.
jugés sur la base des dispositions générales relatives à un acte abusif pour motif, par exemple, de dol ou de concussion.

Les deux fondements concernant l'intention du législateur sont cependant tout aussi défendables, vu que rien de l'historique de la loi des articles 844 et suiv. Rv (ancien) ne permet de conclure pourquoi, outre le déni de justice, le législateur n’a pas repris, par exemple, le dol et la concussion dans la procédure de responsabilité personnelle spéciale. Le rejet de toute forme de responsabilité professionnelle judiciaire – la responsabilité pour déni de justice, en effet, n’existe plus non plus – engendre cependant, selon moi, une discordance entre les fonctionnaires judiciaires et les autres, qu’aucune raison convaincante n’est venue justifier et qu’à mon sens, surtout en cas de comportement préjudiciable reprochable personnellement, on ne pourrait trouver. En outre, on se trouve en présence d’une situation étrange où le juge qui s’est rendu coupable, par exemple, d’un dol peut (en principe) être poursuivi au niveau pénal mais pas personnellement en dommages et intérêts.

Dans le Mémoire informatif à la nouvelle interdiction de déni de justice de l’article 26 Rv qui est venue remplacer la procédure de responsabilité précitée, le gouvernement donne comme raison de la suppression de la procédure de déni de justice que la procédure de déni de justice telle qu’inscrite dans les articles 844-852 Rv (ancien) était ‘obsolète’. En effet, cette procédure n’a pratiquement jamais été appliquée par le passé et lorsqu’elle le fut, cela ne donna que peu de résultat. Le gouvernement en a recherché la cause dans ‘la complexité des dispositions visées’. En outre, une procédure séparée n’est pas nécessaire non plus vu que deux autres procédures ou voies de recours existent qui permettent d’obtenir réparation pour déni de justice, à savoir la procédure des plaintes pour le pouvoir judiciaire pour motif de conduite désobligeante et – selon les termes employés par le gouvernement – ‘la possibilité générale de poursuivre l’Etat en dommages et intérêts, comme il ressort notamment de (…) l’arrêt de la Cour européenne des droits

79 Infra 3.
80 Le gouvernement fait référence ici à l’affaire du juge de canton (refusant de statuer) de Schagen: HR 8 avril 1929, NJ 1929, p. 874 et HR 21 octobre 1929, NJ 1929, p. 1681. Dans cette affaire, le déni de justice a été reconnu mais le juge en question n’a pas été condamné au paiement de dommages et intérêts vu qu’il n’a pas été possible de juger des dommages qui auraient été ainsi occasionnés aux requérants.
81 Dans le Mémoire informatif, il est fait référence à la procédure en vertu des articles 14a-14e RO (ancien). Cependant la procédure des plaintes concernant le pouvoir judiciaire est modifiée en même temps que la suppression de la procédure relative au déni de justice (voir article 26 RO et article XIII de la Loi sur l’organisation et l’administration des tribunaux).

La question qui vient directement à l’esprit consiste à savoir si les alternatives précitées sont en mesure de remplacer de façon satisfaisante l’ancienne procédure des articles 844-852 Rv (ancien) afin de réparer (les conséquences de) un futur déni de justice – vu son caractère particulier. En soumettant à une inspection et une réflexion plus profondes les deux alternatives, qui semblent bonnes de prime abord, on est bien forcé de conclure, avec une probabilité frisant la certitude, qu’aucune des deux n’est équipée pour, d’une part, taper sur les doigts d’un juge qui refuse de statuer et, d’autre part, pour réparer les dommages occasionnés suite au déni de justice, deux aspects que prévoyait l’ancienne procédure de déni de justice.

En ce qui concerne la procédure des plaintes, un problème se pose notamment au niveau de la disposition voulant qu’une plainte ne puisse concerner une ‘décision judiciaire’.83 On peut trouver divers arguments à cet égard, qui arrivent à la conclusion qu’une plainte pour déni de justice est une plainte qui concerne une décision judiciaire, ce qui a pour effet que de telles plaintes ne sont pas autorisables dans une procédure de plaintes. En premier lieu, on peut déduire de l’historique de la loi de l’article 42 alinéa 3 Wrhra que les dommages résultant du déni de justice sont considérés par le législateur comme des dommages résultant d’une sentence judiciaire abusive. En outre, le terme de ‘décision judiciaire’ dans le cadre de la procédure des plaintes a été interprété de tout temps de façon très large. On entend notamment en cela non seulement les décisions judiciaires contre lesquelles s’ouvrent (en principe) des voies de recours mais aussi les décisions des juges qui n’entrent pas dans le cadre d’une procédure judiciaire, des décisions qui sont prises en vertu de la politique judiciaire et des décisions qui présentent beaucoup de similitude avec l’acte juridictionnel en général.84

Ce que le gouvernement entend par la responsabilité de l’Etat ‘style Capuano’ reste très flou. Il semble tout d’abord que le gouvernement considère le déni de justice comme équivalent à un dépassement du délai raisonnable au sens de l’article 6 alinéa 1 CEDH dont il était question dans l’affaire Capuano, ce qui est fondamentalement erroné à mon sens. En effet, on peut en principe avoir déjà affaire à un déni de justice sans qu’un laps de

82 Kamerstukken II 1999/00, 26 855, nr. 3, p. 56.
83 Pour la procédure des plaintes interne, voir l’article 26 alinéa 4 RO, et pour la procédure des plaintes ‘externe’, voir l’article XII de la Loi sur l’organisation et l’administration des tribunaux selon l’article 14a alinéa 1 RO (ancien).
84 Voir notamment HR 6 janvier 1984, NJ 1984, 185, a.nt. WHH (Ombudsman 1984, p. 171-174, a.nt. G.P.I.M. Wuisman) et HR 28 avril 1989, NJ 1990, 463, a.nt. WMK. Dans le premier arrêt cité, une plainte concernant une décision prise d’office sans la compétence par un président du tribunal afin de ne plus joindre un avocat en tant que conseiller d’une prévenue a même été considérée comme une plainte qui n’entrait pas en considération pour un contrôle de constitutionnalité dans le cadre d’une procédure des plaintes, sous prétexte qu’il s’agirait d’une décision basée sur la politique judiciaire. Voir encore Van Bogaert 2005, p. 139-188.
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temps ne soit écoulé du fait que le juge refuse consciemment de rendre un jugement parce que, par exemple, il pense que les parties ont fait un usage abusif du droit de procédure en engageant une action.\textsuperscript{85} En outre, le juge qui refuse de rendre justice commet un manquement plus grave que le juge qui s’accorde plus de temps pour préparer sa sentence qu’il n’est raisonnement nécessaire. En second lieu, la référence à l’affaire \textit{Capuano} de la Cour strasbourgeoise soulève la question de la procédure à suivre. Le justiciable doit-il, dans le cadre d’une procédure strasbourgeoise, sur la base de l’article 6 alinéa 1 CEDH intenter une action en dommages et intérêts contre l’Etat? Ou le gouvernement estime-t-il souhaitable que la responsabilité de l’Etat résultant d’une sentence abusive - une responsabilité qui ne représente que peu de chose sinon rien aujourd’hui\textsuperscript{86} - soit en revanche étendue aux cas de transgression judiciaire du délai raisonnable? Étant donné que l’historique de la loi de l’article 26 Rv ne donne aucune autre explication à ce sujet, on ne peut donner qu’une réponse préliminaire à cette question.

Comme les Pays-Bas ne disposent pas d’un recours efficace (au sens de l’article 35 alinéa 1 CEDH) contre les transgressions judiciales du délai raisonnable (alias le déni de justice),\textsuperscript{87} on pourrait en conclure que le gouvernement, en faisant référence à l’affaire \textit{Capuano}, avait à l’esprit une procédure internationale auprès de la Cour strasbourgeoise plutôt d’une action en dommages et intérêts nationale. Si un citoyen souhaitait déposer une plainte auprès de la Cour européenne des droits de l’homme contre les Pays-Bas pour transgression du délai raisonnable ou déni de justice, cela poserait un problème aux Pays-Bas depuis l’affaire \textit{Kudła contre Pologne}\textsuperscript{88} du fait de l’absence d’une voie de recours nationale effective. Dans l’affaire \textit{Kudła}, la Cour de Strasbourg avait notamment rompu avec l’idée existant jusqu’alors qu’une plainte déposée en vertu de l’article 13 CEDH (\textit{droit à un recours effectif}) ne devait plus être examinée dès qu’une violation du délai raisonnable au sens de l’article 6 alinéa 1 CEDH était acceptée. Outre une action en vertu de l’article 6 alinéa 1 CEDH, il existe donc aussi maintenant une action en vertu de l’article 13 CEDH qui a des chances d’aboutir. Selon la Cour européenne, le fait de savoir si, dans le cadre du délai raisonnable, il est question d’une ‘effective remedy before a national authority’ au sens de l’article 13 CEDH dépend de la question de savoir si ‘the means available to the applicant (...) would have been ‘effective’ in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred’. Autrement dit, la présence d’un moyen soit préventif soit répressif suffit à satisfaire aux exigences de l’article 13 CEDH. Étant donné que ni l’un ni l’autre n’existent selon le droit des Pays-

\begin{itemize}
  \item \textsuperscript{85} Cfr. HR 8 avril 1929, \textit{NJ} 1929, p. 874 et HR 21 octobre 1929, \textit{NJ} 1929, p. 1681.
  \item \textsuperscript{86} \textit{Infra} 2.3.
  \item \textsuperscript{87} Van Bogaert 2005, p. 124-131.
  \item \textsuperscript{88} CEDH 26 octobre 2000, nr. 30210/96 (voir aussi \textit{NJ} 2001, 594).
\end{itemize}
Bas, le juge néerlandais ferait bien, par exemple, d’élargir la doctrine de l’acte juridictionnel abusif à des violations du délai raisonnable. La question consiste toutefois à savoir s’il le fera.

2.3. Responsabilité de l’État pour l’acte judiciaire

2.3.1. Non responsable à moins que ...

L’arrêt de la Cour de Cassation de 1971 dans l’affaire X contre l’État des Pays-Bas, où l’État a été déclaré responsable pour une décision (prétendue) abusive du juge de canton à Utrecht dans une question relative au droit du travail ne fait toujours pas autorité à ce jour. Il est déterminé dans cette affaire que l’État n’est pas fondamentalement responsable du jugement abusif en vertu du fait que cela serait inconciliable avec le système fermé des voies de recours (et, plus implicitement, qu’il s’agirait d’une atteinte illicite à l’autorité de la chose jugée). La Cour de Cassation a toutefois jugé qu’une exception à la règle de non-responsabilité était acceptable, notamment s’il s’avère que le juge, lors de la préparation de l’affaire, a violé des principes juridiques fondamentaux d’une telle manière qu’il n’est plus question d’un ‘traitement honnête et impartial de l’affaire’ (une norme qui, comme le dit le Hoge Raad, s’inspire de l’article 6 CEDH) et que la partie lésée au procès, en vue de limiter les dommages, a épuisé toutes les voies de recours contre la sentence judiciaire préjudiciable.\(^9\)

Autrement dit, seule une violation du principe du fair trial (procès équitable) comme inscrit dans l’article 6 alinéa 1 CEDH peut conduire à une action en dommages et intérêts fructueuse. Dès que la violation est acceptée et que la sentence dans laquelle s’est produite la violation aurait connu une autre issue si le juge avait effectivement respecté le principe du fair trial lors de la préparation de l’affaire, la responsabilité de l’État est établie. Que l’on puisse parler ici en fait d’une espèce de ‘responsabilité de risque’ ressort clairement d’un récent arrêt du Hoge Raad dans le cadre d’une procédure ‘d’un acte juridictionnel abusif’ concernant une sentence de la Cour européenne de Strasbourg.\(^9\)

La Cour européenne, dans son arrêt du 23 avril 1997 rendu dans le cadre de l’affaire M. c.s. contre Pays-Bas, avait constaté la violation de l’article 6 alinéa 1 jo. alinéa 3 sub d CEDH, où les actions pénales néerlandaises des plaignants s’appuyaient de façon décisive (‘to a decisive extent’) sur des déclarations de témoignage anonymes.\(^9\) Lors de cette sentence, M. c.s. – malgré la réparation équitable en vertu de l’article 41 CEDH – a intenté une action en dommages et intérêts contre l’État des Pays-Bas pour acte juridictionnel abusif, vu qu’une révision de l’affaire pénale pour sentence de

\(^{89}\) HR 3 décembre 1971, NJ 1972, 137, a.nt. GJS.
\(^{90}\) HR 18 mars 2005, NJ 2005, 201, a.nt. EAA.
condamnation de la CEDH n’était pas (encore) possible à l’époque. Dans la procédure nationale ‘d’acte juridictionnel abusif’, l’Etat a été jugé responsable sans autre examen quant à la gravité de la violation du principe du *fair trial* pour les dommages résultant des sentences judiciaries de condamnation. Vu que, de l’avis du *Hoge Raad*, la présomption d’innocence s’oppose à ce que le juge civil engage une enquête pour savoir si le juge pénal serait aussi arrivé à une condamnation sans la preuve obtenue contrairement à la Convention, il a été accepté pratiquement tel quel, en raison de la violation de la convention constatée par la CEDH, qu’un bon fondement faisait défaut pour la détention subie et des dommages et intérêts avaient été accordés par voie de conséquence.

Les procédures ‘d’acte juridictionnel abusif’ comme celle de M. c.s. ne se présenteront cependant plus à l’avenir. En effet, pour ce qui concerne les actes juridictionnels pénaux abusifs en violation de la CEDH, il existe depuis le 1er janvier 2003 un motif de révision séparé dans le cas où la Cour européenne des droits de l’homme constate une violation de la CEDH par le juge pénal néerlandais. La décision pénale peut être revue dans ce cas, en vertu de l’article 457 alinéa 1 sub 3° Sv. Si le prononcé concerné est ensuite annulé dans le cadre de la procédure de révision sans qu’une peine ou une mesure ne soit imposée, à la demande de l’ancienne partie condamnée, des dommages et intérêts sont accordés équitablement en vertu des articles 89-93 Sv (article 481 Sv).92

Une autre tendance générale commence à se dessiner dans le monde juridique néerlandais en ce qui concerne la problématique de l’acte juridictionnel abusif, qui met l’accent de plus en plus sur la réparation juridique formelle par l’ouverture d’une voie de recours supplémentaire telle qu’une procédure de révision ou de révocation et moins sur l’obtention d’une réparation juridique matérielle par l’octroi de dommages et intérêts.93 En ce qui concerne le droit civil et le droit administratif, le gouvernement a annoncé que, tant pour le droit de procédure civile que pour le droit de procédure administrative, on examinera dans quelle mesure une procédure de révocation ou, respectivement, de révision est nécessaire en cas de violations judiciaires de la CEDH.94

La discussion concernant notamment la révision des décisions des organes administratifs et, dans le prolongement de celle-ci, des sentences du juge administratif s’est enflammée aux Pays-Bas en 2004, particulièrement à l’occasion de l’arrêt de la Cour de justice des Communautés européennes.

94 *Kamerstukken II* 1999/00, 26 855, nr. 5, p. 77-78 et *Kamerstukken II* 2000/01, 27 726, nr. 3, p. 11 et nr. 5, p. 16.
(CJCE) dans l’affaire *Kühne & Heitz*.95 Cet arrêt a fait que la discussion concernant la réparation juridique formelle ne soit plus menée seulement par rapport aux violations de la CEDH mais aussi par rapport aux violations (judiciaires) du droit communautaire. En outre, fin 2003, l’affaire Köbler96 assurait déjà le retentissement nécessaire concernant la responsabilité de l’État pour violations judiciaires du droit communautaire, de sorte que la discussion sur la réparation matérielle par rapport à la réparation formelle s’est aiguisée.

Depuis le 12 août 2005, il semble qu’une réponse, quoique provisoire, soit donnée à la question pressante de savoir si un nouveau fondement de révocation ou de révision sera introduit dans le droit de procédure civile et le droit de procédure administrative pour cause de violations judiciaires de la CEDH (et du droit communautaire). Le Ministre de la Justice a notamment envoyé une lettre au Président de la Chambre des députés lui disant que les préparatifs à l’introduction de ce fondement étaient clôturés.97 Pour le droit civil, la réouverture de l’affaire juridique selon le ministre est, en effet, trop difficile pour la partie adverse de la partie lésée et les tiers éventuellement concernés par l’affaire civile vu qu’ils se trouveraient trop longtemps dans l’incertitude juridique en ce cas.98 Pour ce qui concerne le droit administratif, une révision des sentences judiciaires serait inutile vu qu’il est possible d’obtenir une révision juridique par la décision récusée qui se trouve au fondement de la procédure judiciaire en vertu de l’article 46 Awb par une reconsideration de l’organe administratif. En outre, comme le dit le Ministre, en raison des fautes du juge administratif, une action pour agissement abusif peut, en effet, être intentée auprès du juge civil pour acte juridictionnel abusif.99

2.3.2. L’influence de la Cour de Justice luxembourgeoise (l’affaire Köbler)

Comme on l’a dit, l’affaire Köbler100 a provoqué quelque agitation aux Pays-Bas parce que cet arrêt de la Cour du Luxembourg pourrait bien faire office de catalyseur à un assouplissement de la responsabilité de l’État pour ce qui concerne les décisions judiciaires abusives en général. Dans l’affaire *Köbler contre la République d’Autriche*, la Cour de Justice a dû pour la première fois se

97 Kamerstukken II 2004/05, 29 279, nr. 28.
98 Kamerstukken II 2004/05, 29 279, nr. 28, p. 4.
99 Kamerstukken II 2004/05, 29 279, nr. 28, p. 7.
100 CJCE 30 septembre 2003, affaire C-224/01, Ph. 2001, C212/118.
pencher explicitement sur la question de savoir dans quelles circonstances un Etat membre est responsable des violations du droit communautaire commises par des instances judiciaires. Que les Etats membres pouvaient déjà être responsables des violations judiciaires du droit communautaire se trouvait déjà établi, en principe, depuis l'arrêt Francovich\textsuperscript{101} et en toute certitude depuis l'arrêt Brasserie du Pêcheur.\textsuperscript{102} Cette jurisprudence a été confirmée ensuite aussi fin 2003, dans l'arrêt Köbler.

Les critères que la Cour de Justice a également posés dans l’affaire Köbler pour juger de la responsabilité de l’Etat pour une violation judiciaire découlent de la jurisprudence Francovich et la confirment. Il est donc question d’une responsabilité de l’Etat pour les violations judiciaires du droit communautaire lorsque (a) la règle juridique enfreinte s’étend à l’octroi de droits à des particuliers; (b) il est question d’une violation qualifiée suffisante et (c) il existe un lien causal entre la violation de l’obligation incombant à l’Etat et les dommages subis par le justiciable.

La responsabilité Köbler connaît cependant une limitation: elle est notamment limitée aux violations du droit communautaire par des instances judiciaires qui rendent justice en dernière instance. En effet, des particuliers ne peuvent faire valoir les droits accordés par le droit communautaire qu’après d’un juge de dernière instance vu que celui-ci est tenu, en vertu du troisième alinéa de l’article 234 du Traité CE, de s’adresser à la CJCE en principe dès qu’une question de droit communautaire se pose à lui.\textsuperscript{103} Selon la théorie concrète la plus courante et partagée par la Cour luxembourgeoise elle-même, tous les juges contre les décisions desquels (dans des cas concrets) aucune voie de recours ordinaire ne s’ouvre plus sont tenus de procéder à un renvoi préjudiciel en vertu de l’article 234 Traite CE. Autrement dit, il s’agit non seulement du Hoge Raad, de l’ABRvS mais aussi des juges d’instances inférieures contre la sentence desquels aucun appel supérieur n’est possible parce que, par exemple, le seuil d’appelabilité n’est pas atteint.\textsuperscript{104}

La responsabilité pour violations judiciaires du droit communautaire est dès lors liée à la question de savoir si le juge national concerné a négligé son obligation en vertu de l’article 234 Traité CE de poser une demande préjudicielle à la CJCE. La violation de l’obligation de renvoi préjudiciel précitée n’est cependant absolument pas suffisante pour donner naissance à

\textsuperscript{101} Affaires jointes C-6 et 9/90, Francovich et Bonifaci, Jur. 1991, I-5357 (NJ 1994, 2).


\textsuperscript{103} Affaire C-224/01, Köbler, § 34-35.

une responsabilité de l’Etat. Les critères Cilfit\(^{105}\) relatifs à la problématique de l’\'acte clair\' et de l’\'acte éclairé\' jouent à ce titre un grand rôle. Lors de l’établissement de la nécessité du renvoi, les instances judiciaires nationales ont donc une certaine marge d’appréciation, ce qui, selon l’affaire Dillenkofer, a une influence sur le deuxième critère d’abus, à savoir l’exigence de la violation qualifiée suffisante.\(^{106}\) En outre, la gravité de la violation de la règle communautaire à appliquer joue bien entendu un rôle.

L’appréciation proprement dite du droit à des dommages et intérêts dans une situation Köbler doit se faire au niveau des Etats membres. Il est notamment établi par la jurisprudence que – comme la Cour du Luxembourg nous le rappelle aussi dans l’affaire Köbler –

‘en l’absence d’une réglementation communautaire, c’est à l’ordre juridique interne de chaque État membre qu’il appartient de désigner les juridictions compétentes et de régler les modalités procédurales des recours en justice destinés à assurer la pleine sauvegarde des droits que les justiciables tirent du droit communautaire’.\(^{107}\)

Cela signifie, pour les Pays-Bas, que le juge civil doit prendre connaissance, dans le cadre d’une procédure sur la base de l’article 6:162 BW, des actions en dommages et intérêts intentées contre l’Etat pour violations judiciaires du droit communautaire.\(^{108}\)

Au niveau national, un ‘schisme’ s’ouvre ainsi, pour ce qui concerne la responsabilité de l’Etat pour acte juridictionnel abusif, entre les violations judiciaires du droit national, par exemple, et celles du droit communautaire. Ce schisme permet ensuite de se poser légitimement la question de savoir si le critère national plus strict de ‘l’acte juridictionnel abusif’ de 1971 ne doit pas être adapté plus ‘à la Köbler’. Une telle adaptation permettrait éventuellement d’assurer la transparence du droit. Pour les Pays-Bas, cela impliquerait une assez grande conversion fondamentale étant donné qu’aux Pays-Bas, l’on part précisément de la non-responsabilité par rapport aux actes juridictionnels préjudiciables. Un réenrichissement ‘köblerien’ impliquerait donc une modification radicale du fondement néerlandais. C’est provisoirement à notre juge de faire un premier pas à cet égard, vu que le

\(^{105}\) Affaire 283/81, Cilfit I, Jur. 1982, 3415.


Ministre de la Justice ne voit pas de motif pour l’heure d’introduire une proposition de loi en réponse à l’arrêt Köbler.109

2.3.3. Le critère actuel d’acte juridictionnel abusif: une norme malheureuse

La traitement de la violation du principe d’un traitement ‘honnête et impartial de l’affaire’ comme norme pour établir la responsabilité convient mal, selon moi, et est pour le moins une norme malheureusement choisie - vu qu’elle ne tient pas compte de la nature de l’acte juridictionnel et de la réalité judiciaire. Un ‘acte juridictionnel abusif’ a trait aux décisions judiciaires qui sont contraires au droit ou, autrement dit, juridiquement incorrectes. Les décisions judiciaires peuvent être juridiquement incorrectes sans qu’il soit question d’une violation du principe du procès équitable, le *fair trial* précité, et inversement aussi. La violation du principe de *fair trial* doit avoir eu des conséquences pour la rectitude juridique de la sentence judiciaire si des dommages doivent en résulter pour les parties. Lorsqu’un juge se montre partial mais rend une sentence qui serait rendue par tout autre juge, mais impartial, il n’y aura aucune conséquence matérielle contraire pour les parties au procès. La partialité du juge pourrait alors être poursuivie par voie disciplinaire.

La question se pose cependant de savoir quand une sentence judiciaire peut être considérée comme juridiquement correcte. Le critère pour la rectitude juridique doit, à mon sens, être recherché par le juge lui-même. En effet, c’est alors le juge lui-même qui, en vertu de sa tâche de création juridique (initiallement faite à sa mesure et ensuite reconnue jusqu’à une certaine mesure par le législateur (pouvoir constituant)) – détermine ce qui est (non)abusif par application du droit qui est en vigueur à un moment donné en un lieu déterminé. Le juge doit toujours ‘retrouver’ le droit ou le ‘créer’ notamment par une interprétation de la loi et à l’aide de la jurisprudence et de la doctrine. Lorsqu’une doctrine juridique donnée n’est pas encore ou pas complètement cristallisée, il en résulte que le juge dispose dans une mesure plus ou moins importante d’un ‘espace de choix’ lors de l’exercice de sa tâche. Il va sans dire que cet espace de choix n’existe pas si, au sein de l’avocasserie, il n’existe pas (plus) la moindre discussion concernant la solution d’un problème juridique donné.

Le critère de ‘l’autre juge’ offre, selon moi, un résultat lors de l’établissement de la (non)rectitude d’une décision judiciaire. Autrement dit, un autre juge moyen, placé dans les mêmes circonstances, aurait-il décidé de la même manière? Lorsque le juge en question s’écarte de la doctrine dominante (si elle existe), il s’agit alors d’une forte indication qu’il est question d’une décision judiciaire incorrecte et qu’il faut, selon moi, permettre dans tous les cas la possibilité d’une responsabilité de l’Etat.

Lorsqu’il est réellement question d’une décision judiciaire incorrecte, une responsabilité personnelle du juge ne serait pas non plus inconvenante dans la mesure où il s’agit ordinairement dans un tel cas d’un juge incapable ou inattentif.110

3. La responsabilité pénale

Selon le droit néerlandais, les juges peuvent être, en principe, poursuivis en droit pénal ordinaire pour des faits délictueux commis tant dans le cadre de l’exercice de la fonction qu’en dehors de celui-ci; alors, il n’existe pas un privilège de juridiction ou une sorte d’immunité dont bénéficie le juge.

En comparaison avec le Code pénal (Cp) français de 1811 qui a été en vigueur aux Pays-Bas pendant soixante-quinze ans environ suite au rattachement à la France en 1810, notre Code pénal (Wetboek van Strafrecht – Sr) actuel de 1886 contient un catalogue très limité de malversations. Le Mémoire informatif du Projet gouvernemental d’origine (Oorspronkelijk Regeerings-Onwerp – O.R.O.) au Titre XXX, intitulé Ambtsmisdrijven (malversations) (à présent le Titre XXVIII du Code pénal), a déclaré que la portée de ce titre par rapport au Code pénal français de 1811 et des projets antérieurs pour un Code pénal néerlandais devait être élaguée vu que ‘la répression de négligences et d’agissements incorrects commis par des fonctionnaires dans l’exercice de leur fonction n’appartient que partiellement au champ d’application de la législation pénale’. De l’avis du gouvernement d’alors, une grande part des malversations antérieures devait être notamment cédée à la ‘discipline’.111

Il en résulte maintenant qu’une seule malversation est explicitement dirigée sur le juge, à savoir celle mentionnée dans l’article 364 Sr. Cet article stipule que ce que l’on appelle la ‘corruption passive’ commise par des juges est punissable; en d’autres mots, il déclare punissable le juge qui accepte un cadeau, une promesse ou un service de parties ou de tiers, ‘sachant ou étant censé savoir que cela lui est fait, offert ou prêté afin [en premier lieu – VVB] d’exercer de son influence sur la décision d’une affaire qui lui a été confiée’ (alinéa 1) ou, en deuxième lieu, ‘d’obtenir une condamnation dans une affaire pénale’ (alinéa 3).112 En outre, le juge qui demande des cadeaux, des promesses et des services en vue d’exercer de son influence sur une affaire qui est soumise à son jugement ou pour qu’il condamne le prévenu dans une affaire pénale est également punissable (article 364 alinéas 2 ou 4 Sr).

L’article 364 Sr (anc. 178 Sr) est – comme nous le lisons chez Sikkema – né du souhait de protéger la confiance publique dans l’intégrité et l’impartialité de la juridiction.113 Cette confiance peut être également ternie

111 Smidt 1882, p. 45.
d’autres manières si, par exemple, une affaire est soumise au jugement d’un juge dans laquelle un parent du juge a également un intérêt. Néanmoins de telles formes de partialité (apparente) ne donnent plus lieu aujourd’hui à un fait délictueux.

Sous le Code pénal français jadis en vigueur, il en allait autrement. En vertu de l’article 183 Cp, toute forme pratiquement de partialité (notamment) judiciaire était déclarée punissable; il y est notamment déterminé que les juges ‘qui se sont prononcés pour ou contre quelqu’un [c’est-à-dire une partie – VVB] par faveur ou inimitié’ commettent une malversation et sont sanctionnés d’une ‘privation de leurs droits civiques’.114 Dans le Projet gouvernemental d’origine se trouvait, en outre, une disposition comparable à l’article 183 Cp, qui n’a pas été reprise par le Code pénale final et définitif. La disposition ici visée était l’article 410 O.R.O. qui stipulait ce qui suit:

> ‘Le membre du pouvoir judiciaire qui, sachant qu’il existe contre lui quelque motif de récusation, néglige d’en faire part à l’autorité désignée par la loi est puni d’un emprisonnement de six mois au plus ou d’une amende de trois cents florins au maximum’.

L’article 410 O.R.O. a déclaré donc, du moins indirectement, punissable non seulement la partialité judiciaire mais aussi l’apparence de partialité pourvu que le juge fût au courant de ce fait et n’en ait fait part à l’autorité désignée. Selon le jugement de la Chambre des députés, cette disposition devait toutefois être supprimée vu qu’il était question de sanctionner ici quelque chose ‘que toutes les autres législations laissent à la discrétion et à la conscience professionnelle du juge’. En outre, selon l’opinion de la Chambre des députés, le risque de partialité existait aussi dans les cas qui ne donnent pas lieu à une récusation et la nécessité d’une disposition telle que l’article 410 ‘ne s’est jamais fait sentir’. En outre, les parties qui ont le droit de récusation peuvent avoir une telle confiance dans le juge qu’elles veulent renoncer à leur droit de récusation. Cette possibilité deviendrait cependant illusoire avec l’existence d’une disposition pénale telle que l’article 410.

Considérant l’article 13 Wet AB, à savoir qu’un juge peut être poursuivi pour déni de justice, il est, en outre, étrange que notre Code pénal ne comporte pas (plus) de disposition pénale spéciale qui déclare délictueux le déni de justice. Jusqu’en 1886, l’interdiction du déni de justice de l’article 13 Wet AB – héritière et copie conforme de l’article 4 Code Napoléon – trouvait son pendant pénal dans l’article 185 Cp où il était stipulé que:

> ‘tout juge ou tribunal (...), qui, sous quelque prétexte que ce soit, même du silence, ou de l’obscurité de la loi, aura dénié de rendre la justice, qu’il doit aux parties, après en avoir été requis, et qui aura persévéré dans son déni, après avertissement ou injonction de ses supérieurs, pourra être poursuivi, et sera

114 Article 183 Cp: ‘Tout juge ou administrateur qui se sera décidé par faveur pour une partie ou par inimitié contre elle, sera coupable de forfaiture et puni de dégradation civique’.
puné d’une amende de deux cents francs au moins et de cinq cents francs au plus, et de l’interdiction de l’exercice des fonctions publiques depuis cinq ans jusqu’à vingtième.

Du fait que l’article 185 Cp, contrairement à l’article 13 Wet AB, parle de déni de justice sous quelque prétexte que ce soit a amené Van Eyk à en déduire que les cas cités dans l’article 13 Wet AB n’étaient pas visés de manière limitative et ne serraient donc que d’exemples. Le Hoge Raad s’est également rangé à cet avis, comme il ressortait par exemple de l’arrêt du 30 juin 1869 (W3274). Dans l’affaire précitée, le prévenu G.J.M. avait refusé en tant que membre du tribunal d’arrondissement à B. de siéger dans une juridiction en cours pour d’autres membres du tribunal et où il siégeait jusqu’alors. Le président de dudit tribunal avait souhaité que G.J.M. y siège parce que l’un des juges qui siégeait dans l’affaire avait dû s’absenter et était resté absent sans motif légal. La question qui s’est posée alors consistait à savoir s’il était question de déni de justice au sens de l’article 185 Cp vu que ce refus ne constituait pas un fondement pour des dommages et intérêts en vertu de l’article 844 Rv (ancien). Selon le Hoge Raad, ce dernier élément ne constituait pas un obstacle à la condamnation du juge en question étant donné que, dans l’article 185 Cp, on parlait de toutes les formes de déni de justice, dont le prétexte aussi.

Malgré le fait que le Projet gouvernemental d’origine comportait encore une disposition ayant trait au déni de justice, du moins le refus ou la négligence intentionnelle d’un fonctionnaire à respecter une obligation qui lui est imposée par ou en vertu de la loi (cfr. article 392 O.R.O.), cette disposition n’a pas été reprise non plus dans le code définitif en raison du motif déjà mentionné précédemment que de telles dispositions relevaient du droit disciplinaire.

Bien que, comme on l’a dit, une seule disposition pénale explicite subsiste en matière de faits délictueux commis par des juges dans l’exercice de leur fonction, cela ne doit pas signifier pour autant que les juges ne peuvent être poursuivis que pour corruption passive (article 364 Sr). La question de savoir si les juges peuvent être poursuivis pénallement pour abus de pouvoir (article 365 Sr), par exemple, dépend de la question de savoir si le terme de ‘fonctionnaire’ (au sens du Code pénal) s’étend aux fonctionnaires judiciaires chargés d’actes juridictionnels.

Le Code pénal ne nous donne pas de réponse claire à ce sujet; il ne comporte notamment pas de définition du terme de fonctionnaire vu que ceci, comme nous le lisons dans le Mémoire informatif, ‘n’est pas à sa place dans le code pénal’, car, comme le disait le Ministre de la Justice Modderman au cours des délibérations à la Chambre des députés le 29 octobre 1880, ‘un Code ne peut être une doctrine’. Le Titre IX du premier tome du Code pénal, intitulé Beteekenis van sommige in het wetboek voorkomende uitdrukkingen (signification de certaines expressions apparaissant dans le Code) et où l’on

116 Smidt 1882, p. 55.
trouve une description des termes ‘fonctionnaire’ et ‘juge’ (article 84 Sr), ne vise seulement, selon Modderman, qu’à ‘indiquer la signification technique de ces expressions qui ont, dans ce projet, soit une signification plus large soit une signification plus étroite qu’ailleurs ou qui sont ambigües ailleurs’. L’article. 84 Sr, où le concept de ‘fonctionnaire’ est décrit ne donne dès lors pas de définition mais étend ce concept (comme il est utilisé dans la langue de tous les jours et/ou dans d’autres lois).

L’article 84 alinéa 2 Sr dit en premier lieu que ‘par fonctionnaires et par juges’ il faut entendre arbitres et en second lieu que ‘par juges’, il faut également comprendre ‘ceux qui exercent un pouvoir de droit administratif’. La formulation ‘par fonctionnaires et par juges’ laisserait entendre que nous avons affaire à deux dimensions différentes. La mention séparée des juges dans l’article 364 Sr pourrait confirmer aussi cette impression; la pénalisation de la corruption passive par des ‘fonctionnaires’ est aussi, en outre, reprise dans deux dispositions séparées (articles 362 et 363 Sr). Cependant, il existe plusieurs points de repère tant dans (l’historique de) la loi que dans la jurisprudence, qui indiquent une direction opposée.

En premier lieu, à en croire la jurisprudence du Hoge Raad, par ‘fonctionnaire’ au sens du Code pénal, il faut généralement entendre celui qui ‘est désigné par le pouvoir public compétent à une fonction publique pour exécuter la tâche de l’Etat ou de ses organes’. Il faut donc aussi comprendre en cela les juges puisqu’ils sont désignés par l’autorité publique et exercent une partie de la tâche de l’Etat.

En second lieu, il peut être fait référence à l’article 392 O.R.O. déjà cité, où a été déclaré punissable le ‘fonctionnaire’ qui refuse ou néglige intentionnellement de respecter une obligation qui lui est imposée par ou en vertu de la loi. Cet article s’adresse à tous les fonctionnaires, dont notamment le juge. Bien que l’article 392 O.R.O. n’ait pas été repris dans le code final, on peut en déduire que, dans tous les cas, le concept de fonctionnaire tel qu’il est utilisé dans l’O.R.O. ne se limitait pas seulement, par exemple, aux fonctionnaires du pouvoir exécutif. Vu qu’il n’apparaît pas dans la genèse ultérieure de notre actuel Code pénal que la suppression de l’article 392 O.R.O. entraîne une modification de l’interprétation du concept de fonctionnaire, on peut en conclure que les juges aussi peuvent être poursuivis en vertu, par exemple, de l’article 365 Sr, relatif à l’abus de pouvoir.

118 Demeersseman 1985, p. 484-485.
121 Smidt 1882, p. 54-55. Il ressort au vu du Mémoire informatif et du Rapport de la Chambre des députés avec réponse gouvernementale concernant l’article 392 O.R.O. que le terme de ‘fonctionnaire’ ne recouvrait pas seulement ce que l’on appelle les ‘fonctionnaires administratifs’ mais aussi les fonctionnaires du ministère public, les juges et les fonctionnaires investis d’un ‘pouvoir administratif’.
Enfin, le Hoge Raad a déclaré encore que les juges sont des fonctionnaires au sens de l’article 267 sub 2° Sr (offense faite à un fonctionnaire pendant ou en relation avec l’exercice légal de son service) et de l’article 249 alinéa 2 sub 1° Sr (acte de débauche commis par un fonctionnaire avec une personne assujettie à son autorité). Bien que ces malversations ne soient pas rangées sous le titre XXVIII Malversations, il s’agit néanmoins, selon les deux arguments précédents, d’une forte indication que le concept de fonctionnaire du titre précis doit être compris de la même manière.122

Bref, on peut conclure que le concept de ‘juge’ – auquel n’appartiennent (selon toute vraisemblance) que les membres de la magistrature en fonction – fait partie du concept de ‘fonctionnaire’ au sens du Code pénal. Il s’ensuit que les juges peuvent en principe être poursuivis sur la base de toutes les malversations où le terme de ‘fonctionnaire’ est utilisé. Il n’existe cependant aucune certitude à ce sujet, comme on l’a dit; en effet, pour autant que j’ai pu l’examiner, aucun juge ne s’est fait encore condamner pour malversation.

Les fonctionnaires – et donc aussi les juges – peuvent être condamnés pour avoir commis une malversation à une amende ou une peine d’emprisonnement. En outre, ils peuvent également être démis de leur fonction en vertu des articles 28 jo. 29 Sr. La démission de leur fonction n’est possible, en vertu de l’article 29 Sr, qu’en cas de condamnation pour malversation mais aussi pour tout autre méfait par lequel le coupable a violé une obligation spéciale ou lorsqu’il a fait usage du pouvoir, des possibilités et des moyens que lui offrait sa fonction. En outre, dans de tels cas, en vertu de l’article 44 Sr, la sanction établie sur le fait peut, à l’exception des amendes, être majorée d’un tiers. Enfin, le Deuxième tome du Code pénal, mentionne encore un certain nombre de méfaits spécifiques où la démission de la fonction est reprise explicitement au titre de sanction, comme dans l’article 118 Sr (offense intentionnelle du chef ou d’un membre du gouvernement d’un État ami).

Lorsqu’un juge commet un fait répréhensible en dehors de l’exercice de sa fonction, la démission de la fonction par le juge pénal n’est pas possible. Dans ce cas pourtant, il peut être licencié par le Hoge Raad dans le cadre d’une procédure disciplinaire mais uniquement s’il est condamné par sentence judiciaire devenue irrévocable pour un méfait ou qu’une mesure lui est imposée par une telle sentence qui a pour conséquence la privation de liberté (article 46m Wrra).

4. La responsabilité disciplinaire

Selon l’article 1 alinéa 2 sub a et sub b de la loi Wrra, la direction du tribunal est désignée comme l’autorité fonctionnelle par rapport aux fonctionnaires

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Les juges néerlandais : indépendant et irresponsable

Les juges néerlandais qui sont actifs auprès de ce tribunal. Cette direction est constituée par le président, les présidents du secteur et un membre non judiciaire (article 15 RO). Le président et les présidents de secteur sont des fonctionnaires judiciaires d’une juridiction contentieuse; le membre non judiciaire est un fonctionnaire de la justice qui, suivant le quatrième alinéa de l’article 15 RO, porte le titre de responsable de la gestion. Suite aux dispositions de l’article 116 alinéa 4 GW, la direction n’est pas compétente à l’égard des fonctionnaires judiciaires d’une juridiction contentieuse (et nommés à vie) s’agissant des questions de contrôle de l’exercice de la fonction. En effet, pour des raisons d’indépendance de la justice, seuls des juges peuvent se juger mutuellement et un membre non judiciaire figure dans la direction du tribunal.\(^\text{123}\) L’autorité fonctionnelle pour les membres chargés de compétence juridictionnelle du Hoge Raad équivaut d’ailleurs à un fonctionnaire judiciaire chargé de compétence juridictionnelle, à savoir le président du Hoge Raad (article 1 alinéa 2 sub c Wrra); le Hoge Raad, depuis la réorganisation sur grande échelle de la fin des années 90 du siècle dernier, n’est pas placé sous la direction d’une administration.

Le contrôle officiel visé à l’article 116 alinéa 4 est à présent régis par le législateur dans l’article 46a Wrra (entretiens d’évaluation) et dans les articles 46c-46e Wrra (mesures disciplinaires).

L’article 46a Wrra stipule que l’autorité fonctionnelle doit régulièrement accorder son attention à l’exécution des tâches par les fonctionnaires judiciaires, et cela au moyen d’entretiens d’évaluation. Ces entretiens ont lieu lorsque l’autorité de fonction le juge souhaitable ou à la demande du fonctionnaire judiciaire lui-même. Cet entretien doit faire l’objet d’un rapport écrit, établi par l’autorité fonctionnelle concernée, et le fonctionnaire évalué doit avoir l’occasion de donner son point de vue sur le rapport. Ce point de vue doit également figurer dans le rapport. En vertu de l’alinéa 4 de l’article précité, l’autorité fonctionnelle relative aux fonctionnaires judiciaires nommés à vie est constituée par l’administration de la justice moins le membre non judiciaire.

En outre, des mesures disciplinaires peuvent être imposées aux fonctionnaires judiciaires précités, à savoir l’avertissement écrit et le licenciement (articles 46c-46e Wrra). Un avertissement écrit peut être imposé, notamment si la dignité de la fonction, les occupations ou les obligations de la fonction sont négligées et si des dispositions interdisant l’exercice d’une certaine profession sont enfreintes (article 46d alinéa 1 Wrra). Cette mesure est imposée aux fonctionnaires concernés par le président des tribunaux respectifs (article 46d alinéa 1 Wrra). La mesure disciplinaire de licenciement ne peut être imposée que par le seul Hoge Raad (article 46d alinéa 2 Wrra), notamment si le fonctionnaire judiciaire en question cause par ses agissements ou sa négligence un préjudice grave à la bonne marche des

affaires de la juridiction contentieuse qui lui a été confiée (article 46c alinéa 2 Wrra).

A côté du contrôle visé dans l’article 116 alinéa 4 GW, l’article 117 alinéa 3 GW stipule que les membres du pouvoir judiciaire chargés d’une juridiction contentieuse peuvent être suspendus et licenciés par un tribunal appartenant au pouvoir judiciaire. Sur la base de l’article 46o alinéa 1 Wrra, cette mesure est prise par le Hoge Raad sur la demande du procureur général au Hoge Raad. Le procureur général peut introduire cette demande d’office ou à la demande de l’autorité fonctionnelle, à savoir les présidents des tribunaux respectifs (article 46o alinéa 2 Wrra). La suspension s’applique si le fonctionnaire judiciaire en question se trouve en détention provisoire et s’il a été condamné pour un délit par une décision de justice qui n’est pas encore irrévocable ou si, lors d’une telle décision, une mesure est prise qui a pour conséquence une privation de liberté (article 46f Wrra). Le licenciement peut avoir lieu dans certaines conditions en raison par exemple d’une incapacité de longue durée pour maladie (article 46i Wrra), de l’acceptation d’une fonction ou d’un emploi qui est incompatible avec la fonction de juge (article 46l Wrra) et en cas de condamnation irrévocable en raison d’un délit (article 46m Wrra).

Pour conclure, un juge peut aussi être licencié à sa propre demande. Il est également licencié dès qu’il a atteint l’âge de soixante-dix ans. Dans ces deux cas, toutefois, la démission n’intervient pas du fait du Hoge Raad, mais du gouvernement par arrêté royal (article 117 alinéa 2 GW jo. article 46h Wrra).
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1. **Sociological Background**

1.1. *Please describe if access to justice is a social issue in your system. Do newspapers deal with it? Do TV shows? Is it an issue in political campaigns? Is there a different platform for different parties in this matter?*

The right of access to justice is important for lawyers and is directly related to Article 6 ECHR. It plays a lesser role for persons seeking justice, nor is it something they are interested in. The reason is that, generally speaking, access to justice can be realised in a relatively simple way. First of all, the geographical distance to the courts is limited, secondly, there are few financial barriers, and lastly, the distance to the judiciary is also limited in the sense that judges also take part in ‘normal’ social life.

When the papers and (national or regional) TV pay attention to litigation and legal decisions, it is often related to criminal cases. However, decisions on civil law or administrative law are sometimes paid attention to as well. As a rule, these are usually decisions that are ‘talked-about’ in the sense that many people, on a national or local level, are interested because it may affect issues such as the construction of a road or the eviction of a building. In short: these are matters that are geared to people’s perception of their environment.

An example of a decision that was extensively dealt with in the media was one in which it was decided that if the tenant of an accommodation leaves the house in a poor condition on the termination of the lease, the landlord is not required to send a notice of default to the tenant involved first (who may have done a moonlight flit whilst being in arrear with his rent). The landlord may immediately proceed to have the repairs carried out at the tenant’s expense and recover these costs from the tenant later. This means that tenants must leave their accommodation in good condition on termination of the lease and, if they fail to do so, the landlord does not have to leave the property vacant in order to track down the tenant (which will usually be a time-consuming affair) to enable him to do the repairs himself (which, as a rule, will be less expensive than employing a third party to do so).
Another example is provided by the Dexia cases. Subsidiaries of this group persuaded people to borrow money and subsequently invested these funds in leasing shares. The product was marketed under the name ‘profit tripler’. Then the share prices fell and it was no longer a matter of profit, but of loss. Several courts have now decided that the information was inadequate and that married investors would also have needed their spouse’s signature under the contract according to Article 1:88 Dutch Civil Code.

Technical legal matters, however, are seldom or never discussed in the media. When the Supreme Court gave judgement late 2004 on the issue of whether the overdraft facility can be subjected to provisional attachment, it did not attract any attention, although this decision had major implications for private citizens as well as companies. Nearly all Dutch people have agreed with their bank that their bank account may have a temporary deficit (up to a certain amount, often € 1,000). This enables the bank to process payment orders even when the monthly salary has not been paid yet, which encourages the smooth processing of money transfers. From a legal point of view, this is a loan agreement and if the Supreme Court had ruled that the overdraft facility could be subjected to provisional attachment, the creditor could have demanded payment of the part of the agreed overdraft that had not been used yet.

TV stations do pay attention to tracking down criminals and seek to solve criminal cases but there is no weekly (or monthly) TV programme that discusses the most important decisions of the civil or administrative courts. Access to justice is not, or hardly ever, an issue in election campaigns and there are no voters who think it important enough in a political party’s manifesto to let their vote be swayed by it. Other publications, such as websites or free local papers, are not used to inform the public at large. Lawyers can be informed on important rulings through a government website and specialised websites of legal publishers in particular.

1 HR (Supreme Court) 27 November 1998, NJ 1999, 380 (Van der Meer v Beter Wonen).
2 See for decisions with a different outcome the special issue of NJ Feitenrechtspraak of 14 August 2000, NJF 2004, nos. 400-446.
4 See <http://www.rechtspraak.nl>. This site does not only include recent decisions of all courts, it also gives information on case law, the actions brought before the court and additional jobs of judges. There is also an English version of this website: <http://www.rechtspraak.nl/information+in+english>. <http://www.overheid.nl> gives information on rules.
5 See <http://www.jol.nl> of publisher Kluwer and <http://www.jwb.nl>. These websites weekly publish Supreme Court decisions, including a summary and key words.
1.2. Is there a stigma in suing in your society? Is there a stigma in being sued? Does the principle that someone is innocent until proven guilty shelter the criminal defendant from the social stigma of prosecution?

Anyone in the Netherlands who brings an action or who is involved in one is not considerably stigmatised. It is not a disgrace to be involved in a legal action, because only when the court has given its ruling is it possible to see who was in the right. Furthermore, as a rule, it is not in the interest of either of the parties to publish the fact that there are proceedings pending, as that would jeopardise any chance of settlement (in a civil procedure). If it would become publicly known that proceedings are pending, it could result in the loss of face of one (or both) parties if their own stakes in the proceedings appear to have been only partly realised.

Only in special cases is it made public that there is an action pending in civil or administrative cases. Sometimes it is a union that is hoping to persuade the employer to accept certain labour conditions or refrain from an intended dismissal, in which case the proceedings are actually aimed at showing the other party in a bad light. Sometimes a consumer organisation is hoping that others will start to have justified misgivings about a certain course of action (such as the inclusion of certain clauses in general terms and conditions).

Advocates in talked-about criminal cases are the ones that often seek publicity. As a rule, they then state that their client is innocent or that it is the other party who is primarily to blame. It is less common for the public prosecutor to seek publicity, which means, for example, that there are no weekly press releases on who is prosecuted and what for. The public prosecuting service will also exercise restraint in its publications to the press before a hearing. (Complete) names will not be given, and, as a rule, the press will only receive a summary of the charges. Only in very special cases will the prosecuting officer seek publicity in order to create a more balanced picture, often as a response to statements made by the suspect’s advocate.

Only in very special cases, the prosecuting officer will take the initiative to seek publicity. Examples of this are cases involving terror suspects, the escape of a detainee under a hospital order who has murdered someone, or other cases that cause upheaval.6

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6 An example of this is the so-called Schiedam park murder case. On 22 June 2000 a ten-year old girl was raped and murdered in the Beatrix park in Schiedam. Her eleven years’ old friend was stabbed with a knife and barely survived an attempt to strangle him. September 2000 saw the apprehension of a 31-year old man from Vlaardingen Kees B. Initially, he confessed, only to withdraw that statement later on. In 2001, the District Court of Rotterdam finds him guilty and sentences him to 18 years’ imprisonment and detention under a hospital order, in accordance with the prosecuting officer’s demand. This conviction was confirmed in appeal in 2002 and the appeal for cassation before the Supreme Court was dismissed in 2003. In
It is true that the point of departure in criminal cases is that someone is innocent until he is proven guilty, but there are always people who think that there is no smoke without fire. Sometimes the suspect is acquitted because the facts cannot be proven and the result may be that the impression sticks that the person involved did it anyway. On the other hand, there are media campaigns aimed at protesting someone’s innocence. The Schiedam park murder mentioned above, and the so-called Putten murder case are examples of this.7

This adage of being innocent until the contrary has been proven does not apply in civil or administrative cases, as they concern an action that is brought (with the onus of the proof on the claimant) or the application of a permit.

1.3. Do you have data showing what percentage of people sue or is sued in your society?

The Netherlands have a population of about 16,300,000.8 In 2004, there were about 130,000 convictions in criminal cases by courts in first instance. These included 90,640 convictions in defended cases and 42,580 judgements by default.

The figures for the same year in civil cases are as follows: The canton department of courts9 heard 460,000 actions starting with a summons and 218,100 cases starting with a petition, whereas 382,300 judgments and 215,000

September 2004 the case was reopened as the 25-years’ old Wik H., who was apprehended in July 2004 on suspicion of rape, declared to have something to do with the case. DNA results of December 2005 indicate that it is very probably that Wik H. was at the scene of the crime. Kees H’s sentence was suspended and he was released. The Rotterdam District Court sentenced Wik H. to the maximum term of imprisonment of 20 years and compulsory treatment in a hospital in April 2005. The Appeal Court of The Hague sentenced Wik H. in November 2005 on appeal to a term of imprisonment of 18 years and compulsory treatment in a hospital. In the action against Wik H. it was the prosecuting officer who sought publicity to make clear what the current state of affairs was, now that this had turned into a case of a miscarriage of justice.

7 In January 1994, a young woman was raped and murdered, resulting in the apprehension of four suspects in February 2004. Two of them were convicted by the court in January 1995, after which they were convicted to a ten year term of imprisonment in appeal. In March 1999, a former chief superintendent of police levelled eight points of criticism against the policy inquiry and wrote a book about the case. When the persons involved served 2/3 of their sentence, they were released in September 2000. In June 2001, the Supreme Court granted the request for a review of the case and the case was reopened. This course of action resulted in their acquittal in April 2002 and the award of compensation totalling € 1,800,000, which is five times the usual amount for the time someone spent in detention.

8 These data come from the Central Statistical Office; see <http://www.cbs.nl>.

9 These single member courts hear, summarily speaking, actions with respect to claims not exceeding € 5,000 lease and employment cases and procedures explicitly laid down by the legislator.
decisions (beschikkingen) were given. The civil law departments of the courts that hear the other actions in first instance\textsuperscript{10} heard 50,700 cases that started with a summons and 150,200 cases starting with a petition. The courts gave 53,700 judgements and 135,200 decisions (beschikkingen). The administrative law sections of the courts issued a total of 22,184 rulings in 2003 by virtue of the General Administrative Law Act.

There are no data available on the number of persons involved in a criminal procedure (some have multiple convictions) or the number of plaintiffs or defendants (debt collecting agencies and mail order companies conduct quite a number of procedures, while some people just leave their bills unpaid as a result of which they have to face several creditors).

1.4. Is there a ‘litigation explosion’ issue in your system? Is the state of civil and/or criminal justice considered efficient? Is there an issue of delays in justice? Can you quantify the delay?

When looking at the number of civil cases that is brought before the court there does not seem to be a major increase in the number of court cases that could be qualified as an explosion. The conclusion must be that in 2004 a total of nearly 770,000 civil cases were processed and that there was a particular increase in the number of rulings in canton department cases (+20% compared to 2003).

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court, canton department</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Summons cases</td>
<td>316,100</td>
<td>311,900</td>
<td>386,000</td>
<td>460,000</td>
</tr>
<tr>
<td>Petition cases</td>
<td>156,900</td>
<td>191,500</td>
<td>211,100</td>
<td>218,100</td>
</tr>
<tr>
<td>Court, civil department</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Summons cases</td>
<td>49,300</td>
<td>44,800</td>
<td>46,600</td>
<td>50,700</td>
</tr>
<tr>
<td>Petition cases</td>
<td>137,600</td>
<td>133,800</td>
<td>140,900</td>
<td>150,200</td>
</tr>
</tbody>
</table>

The increase can be primarily explained by the growth of debt collection,\textsuperscript{11} labour law (due to the deteriorated economic situation), family law cases in the canton department, a rise in the insolvency cases (due to the deteriorated economic situation) and the number of orders for the placing under supervision of psychiatric patients. The number of default cases in the canton department rose, e.g., by more than 100,000 during this period. Since 1980, the number of rulings in civil law cases has nearly quadrupled. In

\textsuperscript{10} The competence of this court includes actions with an indefinite value and financial claims exceeding € 5000 (not relating to being labour or lease), divorce, the placing under supervision/authority of minors, insolvency and the hospitalization or extension (these orders are given, in principle, for two years) of the placing under supervision of psychiatric patients.

\textsuperscript{11} By debt collecting agencies, housing associations, telecom companies, mail order companies and insurance companies.
comparison to 2003, the increase is more than 12%. However, the number of advocates rose from 3,726 in 1980 to 13,500 now and that growth is nearly comparable. The figures for criminal cases are as follows:

<table>
<thead>
<tr>
<th>Recorded criminal cases</th>
<th>concluded by the public prosecutor</th>
<th>by the court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canton department</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>179,200</td>
<td>94,700</td>
</tr>
<tr>
<td>2002</td>
<td>219,400</td>
<td>89,300</td>
</tr>
<tr>
<td>2003</td>
<td>273,500</td>
<td>130,100</td>
</tr>
<tr>
<td>2004</td>
<td>300,900</td>
<td>140,100</td>
</tr>
<tr>
<td>Court cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>236,000</td>
<td>115,500</td>
</tr>
<tr>
<td>2002</td>
<td>251,300</td>
<td>120,700</td>
</tr>
<tr>
<td>2003</td>
<td>270,300</td>
<td>128,700</td>
</tr>
<tr>
<td>2004</td>
<td>274,000</td>
<td>127,70</td>
</tr>
</tbody>
</table>

Here too, the fact that there has been a major increase in the number of advocates applies. Furthermore, investigation methods have improved. There has been a substantive increase in the number of speeding incidents that are detected due to the introduction of speed zone devices and there are more speed controls. Anyone who does not pay in time will eventually be convicted by the court, while any objectors will also have to appear in court. The result is that if the number of offences rises, so will the number of cases brought before the court.

13 These include dismissal and transactions. The police may also give transaction orders for traffic offences in particular.
14 At two places it is assessed what cars are driving there. Subsequently, the speed is calculated by looking at the difference in time. If it is too high, (e.g. 110 km per hour instead of the permitted 100 km) a payment slip will follow soon. In 1995 the result was 3,263,800 cases, which increased in 2000 to 7,794,000; 2001: 9,203,000; 2002: 9,537,100; 2003: 10,570,000 up to a number of 10,372,700 in 2004.
Decisions in administrative cases can be categorised as follows:\(^{15}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Court(^{16})</th>
<th>CRvB(^{17})</th>
<th>Appeal courts(^{18})</th>
<th>CBB(^{19})</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>28,600</td>
<td>4,700</td>
<td>7,900</td>
<td>800</td>
</tr>
<tr>
<td>2001</td>
<td>29,300</td>
<td>5,100</td>
<td>8,400</td>
<td>900</td>
</tr>
<tr>
<td>2002</td>
<td>29,600</td>
<td>5,500</td>
<td>10,600</td>
<td>1,000</td>
</tr>
<tr>
<td>2003</td>
<td>32,600</td>
<td>5,300</td>
<td>12,100</td>
<td>1,100</td>
</tr>
</tbody>
</table>

Apart from the rise in the number of advocates, the economic situation deteriorated. An effort was made to decrease the number of people who are unable to work by re-evaluating them\(^{20}\) and a commendable number of citizens refused to accept the assessment notice imposed on them.

2. **Costs of Justice**

2.1. Please describe the structure of legal fees in your system. Is contingency fee available? Is advertising of legal services available? Is there a loser-pays-all system? Are there discretionary limits to the loser-pays-all-system? Are advances usually required by advocates?

Anyone who wants to bring an action before the court must pay the so-called court fee. The amount to be paid depends on the nature of the case but may not lead to stopping anyone bringing an action because of financial considerations. That is why anyone whose income is below a certain level will pay only half or a quarter of that amount.\(^{21}\) According to Article 8.41

\(^{15}\) The 2004 figures were not known yet.

\(^{16}\) Administrative department. As a rule, this is the court of first instance. The court’s competence includes cases involving civil servants, social security issues and welfare and construction cases, but also cases with respect to the admittance of foreigners to and staying in the Netherlands.

\(^{17}\) Law court in first (and sometimes final) instance, but also an appeal court for cases from the administrative law department, that decides on social security and civil servants cases in particular.

\(^{18}\) Tax courts. These were the courts in first instance until 1 January 2005 for disputes with respect to taxes, income tax, corporate income tax, road tax, property tax, customs matters etc.

\(^{19}\) The Appeal Court for the Industry usually decides disputes in first instance with respect to economic administrative law and appeal cases on decisions or acts of a public business body.

\(^{20}\) Previously, someone could be declared unfit to work because it resulted in entitlement to a benefit until reaching retirement, whereas the employment benefit would only apply for a certain period of time after which it was assessed whether someone’s assets were sufficient, and if not, he would be eligible for a follow-up benefit.

\(^{21}\) See Article 17 paragraph 1 Act on Rates in Civil Cases. From 1 January 2006 the following income limits apply: ¼ of the court fee must be paid by anyone who makes
General Administrative Law Act, a comparable arrangement applies to administrative law cases. Anyone involved in a criminal procedure does not have to pay the court fee.

Anyone whose income remains below a certain limit, which is € 2,071 per month will be eligible for so-called assignments: legal aid paid for by virtue of the Legal Aid Act. It means that in such a case the Dutch state pays a substantial part of the expenses incurred with litigation. The person involved must, however, pay a contribution of his own, which is means-tested. This is the built-in guarantee that people must question themselves on whether it is wise to bring action, while at the same time access to justice is, in principle, open to everyone.

Anyone who does not qualify for legal aid because his income or assets are too high must pay the advocate’s fee himself. Until 1997, the Dutch Bar Association recommended a rate that differentiated between the experience of the advocate; trainees (up to three years of experience), those with four to five years of experience and, the basis, advocates with long-term experience. There was a different hourly rate for each category. The amount of the hourly rate depended (also) on the urgency of the matter, the required expertise, the nature of the case and its interest. The basic rate was € 115 at the time. Now, these rates are no longer published as it was considered to be adverse to competition, but there are still many law firms who use them. At most law firms, the rates fluctuate between € 150 and € 200 as a basic rate, but will be higher for the big, commercial firms. Furthermore, it is sometimes possible

less than € 1,477 and ½ by people who are entitled to legal aid, but whose income is nonetheless higher. If the court fee exceeds € 436, it will be deducted in the cases mentioned here, apart form an amount of €110 and € 221 respectively.

The court fee is € 37 according to Article 8:41 paragraph 3 under a, if a natural person appeals against a decision, e.g. with respect to a benefit because of his permanent inability to work. This is due to a statutory provision by virtue of which a natural person is insured for his incapacity to work by the State Pension for Invalids or a decision taken by virtue of the Act on Rent Subsidy. The Article further states under b that the fee amounts to € 136 if a natural person appeals against a decision other than the ones referred to under a, unless statutorily provided otherwise. Furthermore the article under c. appoints a fee of € 273 if the appeal is not instituted by a natural person. See also Articles 80 Act Council of State, 22 Appeals Act and 24 Act Administrative Courts Public Business Bodies.

See Article 12 paragraph 2 Act on Legal Aid. Legal aid will not be granted if the chance of winning the litigation seems to be nil, the cost incurred with the proceedings are not reasonable compared to the interest at stake in the case, or if the mandatory counsel is not required and the appellant can reasonably be held to represent himself. See also Article 3 Decision Legal Aid and Assignment Criteria. Furthermore, Article 4 Decision lays down that the interest must be at least 20% of the net monthly income of the appellant with a minimum of € 180.

An example by way of explanation. Suppose the hourly basic rate is € 185 exclusive of VAT. If the advocate in charge of the case has three years or less practical experience, the basic rate will be subjected to a factor, which will be 0.7 for the first year, 0.8 for the second year and 0.9 for the third year. If the advocate in charge of the case has more than 10 years of experience, the basic rate will be multiplied by no
to negotiate the rates. If you have many cases to be conducted, you can insist on a rebate. Nor is it uncommon to arrange for a fixed rate or that the advocate agrees with his client to have two different rates: a lower rate when the goal is not met and the higher rate when it is. Debt collection is usually subjected to a certain percentage that decreases if the amount of the debt increases. Basically, it means that any rate is possible as long as it is not ‘no cure, no pay’ and that debt collection cases may only be rewarded with a percentage of the proceeds by way of a fee. The Dutch Bar Association wanted to experiment with no cure, no pay, but they were stopped from doing so by the Minister of Justice in March 2005. The Minister felt that a proper lawyer’s practice cannot go together with the method of ‘no cure, no pay’, as it would mean that advocates would have a financial interest in the cases they worked on and that there would be a risk that advocates would only take on cases with a high success rate or cases with a substantial financial interest. According to the Minister, this conflict of interest must be avoided at all cost in a proper lawyer’s practice. Initiatives taken by an advocate must always be in his client’s interest. Furthermore, the ‘no cure, no pay’ method is counteractive to the government’s policy to prevent a claim culture from developing and the policy to encourage dealing with bodily injuries in a faster, less expensive, and less aggravating way.

The Minister’s statement met some criticism, with the argument that advocates may have an interest in a case. Who checks whether an advocate has spent 9 or 11 hours on a case? Moreover, the prohibition does not apply to other providers of legal aid such as personal injury firms that assist people who suffered, e.g., a traffic accident.

Law firms may advertise, and do so on a regular basis. It depends on the target group in which magazines the adverts are placed. Some law firms mainly aim at medium and small sized businesses, and advertise in magazines for entrepreneurs. Other firms try to attract customers by adverts in e.g., magazines of sports clubs. Some bigger firms also have ads in national

more than 1.1 and for 20 years no more than 1.2. Furthermore there may be a factor related to the interest of the case.

a. an interest less than € 5,000 the factor will be 0,8
b. an interest between € 5,000 and € 100,000 the factor will be 1
c. an interest between € 100,000 and € 250,000 the factor will be 1,25
d. an interest between € 250,000 and € 500,000 the factor will be 1,5
e. an interest between € 500,000 and € 5,000,000 the factor will be 2
f. if the amount exceeds € 5,000,000 the factor will be 2,5
g. if the value involved in the case cannot be assessed, the factor will be 1
h. cases of great urgency may be subjected to a factor of 1,5

Furthermore, there may be a factor related to the interest of the case.

25 An example is provided by insurance companies that employ a law firm to take on 100 cases annually.
26 The first € 3,250 is subjected to 15%, the remainder up to € 6,500 to 10%, the entire surplus up to € 16,250 8%, and any amount exceeding that 3%.
magazines. Furthermore, large firms often act as sponsors, not only for legal activities, but in other fields too (such as sports clubs, museums etc), in order to enhance familiarity with their name.28

There is no rule in civil law that states that the party who has lost a case must pay all expenses of the other party. Although Article 237 paragraph 1 Code on Civil Procedures lays down that the costs of a party against whom the court has rendered judgment for the payment, can be entirely or partly compensated between spouses, registered partners, other life companions, blood relatives in a direct line of descent, brothers and sisters, or in-laws in the same remove, and also if the court ruled against both parties on some issues. The court can also decide to make the party who made unnecessary expenses or caused them pay. In practice, however, the so-called Liquidation rate applies: an arrangement between the Dutch Bar Association and the judiciary based on fixed rates subject to, on the one hand, the interest involved in the case and, on the other hand, the number and nature of activities. This means that the costs cannot become too high if a party employs an extensive advocate or a not very experienced one who charges many hours.

Moreover, according to Article 240 Code on Civil Procedures, the costs for official acts performed by bailiffs will be charged according to the Decision on Rates for Official Acts, and the court has the discretion to moderate claims for the payment of costs by virtue of Article 242 paragraph 1 Code on Civil Procedures. According to Article 242 paragraph 2, this moderation principle does not apply to agreements aimed at the settlement of a dispute that already exists. In its judgement of 22 January 1993 (NJ 1993, 597 (WIB v Jongsma)), the Supreme Court assumed that parties may conclude an agreement with respect to the compensation of all legal costs, but courts have exercised restraint. In practice, it often happens that the party who has won the case in all respects has yet to bear part of his legal costs because the order to pay costs is based on the Liquidation Rate. However, his advocate will send a bill based on the number of hours spent on the case at the fee agreed.

In order to make clear that litigation is a serious affair, it often happens that the advocate demands an advance. This means that the advocate does not have to bear the costs incurred for starting a legal action; the cost for the summons and the court fee. An advocate may have up to 200 civil cases which means that he would be advancing a very big amount indeed. The advance also reduces the risk of having to collect the debt from clients. During the proceedings there will be interim invoices; sometimes monthly, sometimes after an activity related to the litigation. This promotes the client’s insight into the development of the costs and, moreover, it is more

28 An example of this is the sponsorship offered by the Amsterdam law firm Stibbe – aimed at the commercial market – for a special edition on the occasion of the 400th anniversary of the birth of the painter Rembrandt van Rijn.
convenient to make partial payments, than having to pay the entire amount at once.

According to Article 38 Code of Criminal Procedure, the principle of a free choice of counsel applies in criminal procedures. Anyone who remains under the income limit described above, however, will be entitled to the assignment of a lawyer. The Act on Legal Aid is generally applicable and is not restricted to civil and administrative law cases. Article 43 Act on Legal Aid states when the assignment of a lawyer in criminal cases is free, while Article 44 states which cases require the payment of a private contribution. The compensation norms laid down in the Decision Compensations Legal Aid: Article 5 et seq. apply to civil and administrative law cases and disciplinary actions, whereas Article 14 et seq. applies to criminal cases.

2.2. *Are fees regulated in your system? Can advocates contractually go beyond the maximum or below the minimum?*

An advocate can demand the amount agreed from a paying client. During the first interview, arrangements are made on the fee to be paid. It may be that the advocate has an hourly rate of € 150, but if it is a matter of great urgency with a large interest, the amount may be higher. According to reports, the rate can be up to € 500 per hour for urgent intellectual property cases. An advocate can also charge a lower fee than he would usually do. There can be several reasons for this. The client may not be very well-off, it can be a case that generates a great deal of publicity (which means new clients) or the advocate likes the case and thinks it merits being conducted in the interest of society. Several large firms have a ‘pro bono’ policy. Of course the advocate must pay attention to whether the costs of his own office can be paid from the proceeds of the other cases that are conducted. If the client qualifies for paid legal aid according to the Act on Legal Aid, the compensation paid by the state is fixed and it is not possible to declare any more. Claims for a smaller amount may be submitted and according to reports there are advocates who do not collect the amount that must be paid by their client.

2.3. *Could you quantify the costs of litigation? Use whatever method you prefer to indicate how expensive it is to litigate in your system e.g. comparing the cost of advocates to that of other professionals (doctors, accountants, notaries etc.)*

The point of assumption for the remuneration of advocates and civil notaries is that their standard income is a net income comparable to that of a judge in

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30 This amount must be paid to the advocate directly and will be deducted from the compensation granted by the state.
Haarlem, which means that their annual income will amount to approximately € 86,000. This does not take into account the extra costs for the exercise of the practice, commercial risk, saving for retirement etc.  

It is difficult to compare their situation to other professional groups. The point of assumption for medical consultants is 1,476 billable hours. This should lead to a standard income of approximately € 118,000, and includes the costs for the practice and a compensation for irregular hours to a turnover to be achieved from € 190,000 (with a 6% bonus for unsocial hours) to € 200,000 (with 14%). This means an hourly rate relevant to their income of approximately € 90. The hourly rate for GP’s is lower; their working weeks are longer and more numerous, which results in an income that is between 65% and 70% of that. The total costs for the judiciary in the Netherlands will be around € 770 million in 2006 according to the budget of the Ministry of Justice. We now spend about 42 billion on health care, which is about 10% of the Gross National Product.

2.4. How much does a very simple law-suit cost for a plaintiff? How much would a non contested car accident cost? How much for a non contested divorce? How much does it cost to evict a tenant? How much to sue a manufacturer for a non working dishwasher?

1. The costs for a non-contested car accident are as follows:
   - Court fee € 244.
   - Service of the summons (approximately)) € 85.
   - Discussion of the case(introduction) 1 – 2 hours x € 180 (in these examples the point of assumption is an hourly rate of € 180).
   - Reading the file, making the summons, preparing the memorandum of pleading 8 hours x € 180.
   - Hearing (travelling time, completion of the case) 2 hours x € 180 Total (rounded off) € 2,250.

2. The costs for a non-contested divorce are as follows:
   - Court fee € 192.
   - Discussion of the case (introduction) 1 – 2 hours x € 180.
   - Reading the file, drafting the petition and preparing the memorandum of pleading 6 hours x € 180 Hearing (travelling time, completion of the case) 2 hours x € 180.
   Total: € 1,800.

According to a publication of the Ministry of Home affairs, it appears that the income level is more or less comparable to that of the level of scale 15 (there are 18 state salary scales), for example that of an army colonel. Elsevier Carrière of June 2005 gives an overview of the income of 257 professions, but is restricted to employees.

This explains why GP’s went on strike late 2005; they think their income is too low compared to consultants.

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32 This explains why GP’s went on strike late 2005; they think their income is too low compared to consultants.
3. The costs for the eviction of a tenant are
- Court fee (depending whether the landlord is a private person or not) € 103 / € 276.
- Discussion of the case (introduction) 2-3 hours x € 180.
- Reading file, drafting the petition and preparing the memorandum of pleading 10 hours x € 180.
- Hearing (travelling time, completion of the case) 2 hours x € 180.
Total: € 2,300.

4. The costs for summoning a manufacturer for a defective dishwasher
- Court fee € 244.
- Service of the writ (approximately) € 85.
- Discussion of the case (introduction) 1 – 2 hours x € 180.
- Reading file, drafting the summons, preparing the memorandum of pleading 10 hours x € 180.
- Hearing (travelling time, completing the case) 3 hours x € 180.
Total (rounded off): € 3,000.

2.5. How much is the fact of being sued a burden on the defendant? Are there insurance schemes available? Are they commonly used? How expensive are they if compared, for example, to basic car accident insurance?

Those who are involved in litigation, may invoke the Act on Legal Aid if necessary. Moreover, it is possible to take out a legal expenses insurance. The cost for a private person (with a family) are between € 100 (standard) and € 200 (extended) per year. Legal expenses insurers point out in their advertisements that a regular court case may set you back around € 3,600 and that the premium is comparable to the hourly rate of an advocate. There are around 1.3 million people in the Netherlands who have taken out such an insurance.

The premium for a car insurance is based on age, number of years of driving experience, number of years of driving without an accident, place of residence, man or woman, the annual number of kilometres that is driven, the type of fuel, the car’s security system, the car’s replacement value and current value and whether it is a third party insurance only (compulsory) or a comprehensive car insurance policy. I pay a premium (for third party insurance only) between € 356 and € 503 and (comprehensive) with a policy excess of € 150 between € 828 and € 1,286 for my Chrysler Voyager.
2.6. Is pro-bono legal practice used in your system? Is it encouraged by tax deduction schemes? Are there public interest law firms? How are these firms funded? Are trade unions involved in offering subsidized legal services to their members? Do law schools offer legal clinics open to the public? Are consumers groups, environmental groups and other organizations providing legal services? Are religious groups, churches or organizations involved in offering subsidized legal services?

The pro-bono system is rare in the Netherlands, as about 50% of the population can benefit from the Act on Legal Aid. Those who exceed the income limit are deemed to be able to pay an advocate’s fee and additional cost. Only in rare cases will the pro-bono system come up. Some of the criteria are:

- the case must have a certain social relevance or precedent value. These are cases of which the (financial) interest is relatively modest, but that do represent a social issue or a precedent of some importance. Furthermore, it must be impossible for the party involved to have the case handled on a commercial basis by a law firm.
- the case cannot be adequately handled on the basis of an assignment, as the existing legal aid system does not enable social legal aid service centres to provide any services in this case.
- the law firm concerned is able to create an added value due to its specialist expertise and experience. Examples of this are complex cases in the field of civil or administrative law or human rights.
- there is no issue of conflict of interests with the existing clients of the law firm or groups of clients.

There are no tax facilities that enable law firms to take on pro-bono cases with a profit.

Unions, too, provide legal aid with an emphasis on labour and rent cases, not in the least because these cases are brought before the canton department of the court, which means that the mandatory representation by an advocate does not apply. The ANWB (Royal Dutch Touring Club), which has 3.9 million members, is another organisation that provides legal aid to its members. It sells car and travel insurances in addition to legal aid insurances. There are also consumer organisations that offer legal aid, among which the best known and biggest is the Consumentenbond. This organisation offers help to its members, in particular with respect to defective products.

Law Faculties of universities hardly display any activities in the provision of structural legal advice in the way of legal first aid posts. The university in Maastricht has the Advocatenpraktijk University Maastricht, where students work who are in the last phase of their studies. Most universities award credit points to students who work in so-called
‘wetswinkels’ (law centres). This construction provides many advantages for universities: there is no need to create traineeships and the administrative fuss is limited. Church organisations as such do not provide legal advice or assistance in legal procedures.

2.7. Where would someone of the lower or lower-middle class who is sued go as a first reaction to get advice?

As a rule, the advice will be to look into the possibility of obtaining legal aid from a union, consumer organisation, legal centre or the Act on Legal Aid and to see whether the interest of the case warrants litigation. Would it not be less straining upon a person to buy a new TV set after it breaks down? This would prevent someone from being annoyed, he/she could enjoy the product again and would not run the risk of having to pay (part of) the other parties’ cost if he/she were to lose.

2.8. Can someone who is prosecuted and turns out to be innocent recover his costs, fees and expenses? Can he/she sue to be compensated for his/her losses?

The point of assumption is that not all costs are compensated. According to Article 237 Code on Civil Procedures, the other party will be ordered to pay the costs of litigation, but in practice the actual costs appear to be much higher, as a result of which the party involved has to accept some financial losses. This issue is often debated and several writers think that such a person should be compensated fully, such that he/she reaches the same position as if there has been no legal dispute. According to case law, however, involving someone in a legal procedure cannot be, in principle, qualified as tort, unless there are additional circumstances such as the knowledge that litigating is completely unnecessary or without a chance of success.

33 These are organisations that are staffed by students who deal with often occurring and relatively simple legal problems or who refer people to the proper body that can provide assistance. As a rule, the students are supported by a few advocates. The problems and/or questions are often related to:
- labour law,
- social security,
- accommodations and rent law,
- consumer law,
- family law and,
- criminal law.

3. **Institutions**

3.1. **What percentage of the GDP is spent on justice in your system? Has it increased or decreased in the last twenty years?**

The government has spent about € 5.5 billion annually on legal protection and safety over the last years. The GDP rose between 2001 and 2004 from € 447.7 billion in 2001, € 462.2 billion in 2002, € 476.3 billion in 2003 to € 488.6 billion in 2004. It is expected to rise with 1.3% in 2005 to about € 494 billion. Taking everything together, it means that around 1% of the GDP is spent on law in the broad sense of the word. When we single out the administration of justice, we see that € 770 million or € 47 per head of the population is paid for the administration of justice. The expenditure for the administration of justice has gone up slightly in comparison to the Gross Domestic Product. In 2004, of every € 100 earned, nearly € 0.17 were spent on the administration of justice, while this was € 0.14 in 2000. The part of the expenditure for the administration of justice that is directly paid through court fees has also risen, from 17% in 2000 to 19% in 2004. These two rises are related to rate increases in 1992 and 2002.

3.2. **How much does it cost to initiate a litigation in a standard general jurisdiction costs? How much for using a court of general jurisdiction for each step of litigation? Is it subsidized or is it paid by the users? Is it more or less expensive in terms of costs than going to a public hospital for a general check up?**

A standard court case will easily set you back € 1,000. If the claim amounts to € 2,000, the court fee is € 192. Add at least 4 hours billed by the advocate for a total of € 700 and other costs (such as the service of the summons) of € 100. If the financial interest of the case is € 10,000, the court fee will be € 291. If the conduct of the proceedings involves the hearing of witnesses, the advocate will have to draw up an additional statement, which will result in an extra 10 to 15 hours being spent or € 1,750 to € 2,625. This means that the costs will easily exceed € 3,000.

The court’s internal costs are compensated on the basis of the so-called Lamicie-norms. Every activity that is undertaken in the judiciary organisation is awarded with a number of (hours and) minutes. This enables an overview of what a court can or must do and the funds available to it.

As mentioned before, part of the expenditure for the administration of justice is paid through court fees by the persons seeking justice, which was 17% in 2000 and 19% in 2004. Once the case is pending and the court fee is paid, there are no extra charges for any subsequent steps (hearing of

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35 In 2001: € 4,975,000; in 2002: € 5,239,000 in 2003: € 5,757,000 in 2004: € 5,543,000 and in 2005 about € 5,334,000.
witnesses, one or more statements). If a third party is employed in the course of the proceedings, such as an expert, the parties or party doing so must pay for the expenses incurred with it. Eventually, this amount is considered as part of the final sentence and it is decided whether it will be included in the order to pay costs. The same applies to the costs incurred by witnesses who have to make a statement; in first instance the party who has called them has to pay, but if the court finds in favour of this party, the costs will (within reasonable boundaries) be included in the order to the other party. All and all, it may be concluded that an annual check-up by a GP is much cheaper (and takes considerably less time): for an orientating general physical examination you would be charged € 74.50 in 2005, while a more extensive periodical examination would have cost you € 111.50.36

3.3. Are small claims courts available in your system? How much does it cost to litigate there? Is the presence of an advocate required? If not, do you have data on the percentage of individuals choosing to be represented by one?

There is no special procedure for small claims in the Netherlands. When civil procedures were reformed on 1 January 2002, the choice was made to retain as few specific procedures with different rules in the Code of Civil Procedures as possible. However, there are the summary proceedings for the collection of debts: an action can be brought before the president of the court, who can give interim orders, and, if no defence is put forward, the court renders judgement within 14 days (often sooner).37 Bodies such as telecom companies, mail order companies and public utilities, summon dozens of debtors who have not paid their bill(s) simultaneously on a date and time agreed with the president of the court. In practice, only some (two or three debtors) will attend the hearing. If possible, the court considers whether the defence is well-founded. This would mean that the case will be heard on the merits as any disputed case. If the defendant does not attend the hearing, the case is considered as a default procedure. This means that the court has to test whether the claim is evidently unlawful or unfounded. In practice, these cases are not heard by the court, but (under the court’s responsibility) they are dealt with by a staff member of the court’s office.

Today, data such as the name, address and residence of the defendant and the nature of the claim are electronically exchanged, leading to a substantial reduction of the likelihood of errors being made. The costs charged for a default procedure are the same as those for summary proceedings, such as the court fee of € 527. In addition, since representation by counsel is mandatory, the costs for an advocate must be paid. As these are

36 This amount may go up if there are blood tests and the like.
37 This has been the fixed case law since HR 29 March 1985, NJ 1986, 84 (M’Barek v Van der Vloodt).
often standard cases that are prepared by the company, there are often special tariff arrangements.

3.4. What percentage of decisions is appealed? What percentage of filed civil cases is settled?

The courts of appeal received in 2001 5,281, in 2002 6,494, in 2003 7,373 and in 2004 7,588 cases that started with a summons and 4,057, 3,961, 4,566 and 5,283 cases that started with a petition, respectively. When we compare that with the number of rulings given by district courts in these years, it appears that about 2% of the final sentences and 3% of the final decisions (beschikkingen) were appealed against. Over the period 2001-2004, 29,200, 30,400, 32,000, 34,600, respectively, final sentences were given and 121,200, 123,100, 126,400 and 135,200, respectively, final decisions (beschikkingen) were given.38

According to reports, about one third of the summonses serviced by bailiffs do not result in a procedure before the court because the parties come to a payment arrangement. The defendant meets his obligations, or the plaintiff recognises that bringing the action would be unjustified as the defendant has met all his obligations already. It is a bit different with petitions, since, once the petitioner has started the litigation by submission of the petition, it can no longer be withdrawn when the defendant is willing to come to an amicable settlement.

3.5. Are ADR schemes diffused in your system? Are they voluntary, semi-voluntary or mandatory? Do advocates participate in mediation procedures? Do other professionals? What schooling did they receive?

ADR can be considered in a broad and a narrow sense. Mediation is qualified as ADR in a narrow sense, dispute resolution without the courts is ADR in a broad sense, which includes binding advice (Art. 7:900 Dutch Civil Code) and arbitration (Art. 1020 et seq. Code on Civil Procedures).

According to Article 17 of the Constitution, no-one can be kept from a state court. There is a constitutional right to bring an action before a (state) court. That does not prevent parties to take their dispute before another court or body, something that happens when the subject matter is specialised.

38 Until 1 January 2002, an appeal against a decision from a cantonal court was lodged before the district court. From that date onwards, the cantonal courts have become part of the district courts and an appeal is now lodged before the appeal court. The general limit for appeal is € 1,750, claims of a lower amount cannot be appealed against. Sometimes there is a prohibition of appeal as the legislator decided that the court must cut the Gordian knot. An example of this is the compensation awarded by the court on the dissolution of an employment contract by virtue of Article 7:685 Dutch Civil Law Code.
Since 1949, the Netherlands has known the *Nederlands Arbitrage Instituut* (Netherlands Arbitration Institute), an independent foundation that organises arbitration procedures. The NAI board includes members from the bar, the judiciary, science and also Chambers of Commerce. The NAI does not give any rulings itself. It has a panel of about 400 expert arbitrators that are assigned per case. A procedure takes about nine months. Furthermore, there is the *Nederlandse Raad van Arbitrage voor de Bouwbedrijven* (Council of Arbitration for the Building Industry) and the *Stichting Arbitrage-Instituut Bouwkunst* (AIBk) (Foundation Arbitration Institute Architecture), which deal with disputes between architects and their clients, arising from contracts they have concluded subject to the Standard Conditions Legal relationship Client-Architect 1997. And finally there is the WIPO, which is the arbitration institute for disputes with respect to nl-domain names.

Furthermore, there is the possibility of binding advice, which has always enjoyed great popularity in consumer cases in the Netherlands. Over 30 years ago, the *Stichting Geschillencommissie voor Consumentenzaken* (SGC, Foundation for Dispute Committees for Consumer Cases) was founded. It aims at providing a cheap, fast and simple way for dispute resolution for businesses and consumers. At the moment, there are 33 committees active in the field of banking affairs, child care, estate agencies, public utilities, mail services, travelling, telecommunication, textile cleaning services, removals and hospitals. Every committee has three members: the chair (a lawyer), a member nominated by the *Consumentenbond* and one by the trade organisation. This composition means that the committee’s expertise is very broad. All committees are recognised by the government, which means that a fair procedure and impartial decisions are guaranteed. Trade organisations give a guarantee for the execution of the decision: if the business does not execute the decision, the industry organisation will cover the consumer’s expenses. The proceedings last five months on average.

Since 1 April 2005, courts may refer cases to mediation. Referral to mediation is meant as the provision of an extra service by the judiciary to the persons seeking justice. This is done because it is recognised that mediation can offer a decision that is more durable and of higher quality than a court’s decision. Referral to mediation may take place in civil law, family law, administrative law and tax law disputes before district courts as well as appeal courts. Referral will only take place in cases that are considered

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40 See <http://www.ibr.nl>.

41 See <http://www.arbitrageinstituutbouwkunst.org>.

42 Binding advice is a form of dispute settlement whereby parties agree to accept the decision of a third party. This decision is binding and is considered to be part of their agreement, which means that non-performance of the advice can lead to a claim to observe the contract as opposed to arbitration where the decision results in a writ of execution.

43 See <http://www.sgc.nl>.
suitable. If parties cannot reach an agreement in the mediation, they can still bring the dispute before the court. The first hours with the mediator are free of charge, the costs of any subsequent meetings must be borne by both parties. Mediation is free of charge for parties that already have an assigned advocate. Parties that do not have an advocate yet but who are entitled to one according to the Act on Legal Aid may qualify for a mediation assignment.

The judiciary has had a few years of experience with referral to and efficiency of mediation. From 2000 until now, there have been 5 courts, namely those of Amsterdam, Arnhem, Assen, Utrecht and Zwolle that refer to mediation. A WODC (Scientific Centre for Research and Documentation) evaluation report states that parties come to a complete solution of their dispute in 61% of the cases. It also appears that parties are satisfied with the duration, course and results of the mediation. Parties and their advocates particularly liked the professional skills of the mediators, even in cases where the mediation did not yield any results. Nearly all parties state, after a successful mediation, that they would opt for mediation again in future.

The referral facility with the courts will be gradually introduced from 1 April 2005. It is expected that all district courts and appeal courts will have an information desk for mediation in 2007. Mediators are often (in more than half of the cases) advocates, but some mediators have a different professional background: tax lawyers, bailiffs and civil law notaries, but also psychologists, educationists and medical doctors act as such.

There are about 4,400 NMI mediators. The Nederlands Mediation Instituut (NMI, Netherlands Mediation Institute) manages the NMI Register for Mediators. On 10 November 2005 it recorded 1,065 certified mediators (27%) and 2,913 NMI mediators. After taking a 6 days’ course with a training institute recognised by the NMI, a person may call himself a mediator. In order to safeguard quality requirements, additional requirements have been set since 1 January 2003 (such as compulsory refresher courses, a compulsory knowledge test and a minimum number of mediations annually). The number of mediators is expected to go down in the future as many of the mediators may have followed the six days’ course but have not or hardly worked as such and there are only a few mediators whose turnover is sufficient to enable them to make it their (main) source of income. So, 343 requests for mediation were submitted to the NMI in 2003 and 305 in 2004. Moreover, only a limited number of mediations that is executed by the NMI is actually recorded. NMI registered mediators did state, however, that they were involved in 3,696 mediations in 2003 and 4,602 in 2004.

The mediations that were conducted can be divided in the following categories: family 57.7%, work 25.9%, business 8%, environment 3.7%,

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44 These figures can be found on the website www.nmi-mediation.nl. Others who did not take the NMI course can act as mediator since the title ‘mediator’ is not protected. The title ‘NMI registered mediator’ is.

45 During the period until 10 November 2005 the number went down by 507.
government 1.7%, health 1.4%, education 1.5% and others 0.1%. The duration of the mediations is as follows:

<table>
<thead>
<tr>
<th>Weeks</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 5</td>
<td>39.7</td>
</tr>
<tr>
<td>5 – 10</td>
<td>24.2</td>
</tr>
<tr>
<td>10 – 15</td>
<td>14.2</td>
</tr>
<tr>
<td>15 – 20</td>
<td>8.4</td>
</tr>
<tr>
<td>20 – 30</td>
<td>7.0</td>
</tr>
<tr>
<td>30 – 50</td>
<td>3.8</td>
</tr>
<tr>
<td>&gt;50</td>
<td>2.4</td>
</tr>
<tr>
<td>Unknown</td>
<td>0.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

This means that most mediations are completed within a quarter of a year. Litigation that is not too complicated before a court may take up to 8 months at least.

The number of hours that is spent on the discussions with the parties in a mediation is as follows: 46

<table>
<thead>
<tr>
<th>Hours</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 5</td>
<td>34.9</td>
</tr>
<tr>
<td>5 – 10</td>
<td>35.8</td>
</tr>
<tr>
<td>10 – 15</td>
<td>12.9</td>
</tr>
<tr>
<td>15 – 20</td>
<td>6.7</td>
</tr>
<tr>
<td>20 – 30</td>
<td>2.4</td>
</tr>
<tr>
<td>30 – 50</td>
<td>2.8</td>
</tr>
<tr>
<td>&gt;50</td>
<td>3.4</td>
</tr>
<tr>
<td>Unknown</td>
<td>1.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

The following table gives an overview of the results of the mediations recorded by the NMI. A mediation that is completed with a written agreement can be qualified as a successful mediation. A mediation can, however, also be a success without such a written completion document. An example of this is a reconciliation, which makes a contract of settlement unnecessary. There are also mediations that lead to a partial agreement and that are, in that sense, a partial success.

46 Other activities that may be undertaken by the mediator, such as the preparation, making reports of the discussions or drafting a contract of settlement, have been left out here.
A W. Jongbloed

Results

<table>
<thead>
<tr>
<th></th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Successful with a written completion document</td>
<td>64.2</td>
</tr>
<tr>
<td>Successful without a written completion document</td>
<td>7.9</td>
</tr>
<tr>
<td>Partial success with a written completion document</td>
<td>1.2</td>
</tr>
<tr>
<td>Not successful</td>
<td>20.9</td>
</tr>
<tr>
<td>Unknown</td>
<td>5.7</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
</tr>
</tbody>
</table>

A NMI Mediator is trained in directing and supporting mediation processes. A NMI registration requires, as a rule, that the mediator has successfully completed a mediation training/study programme recognised by the NMI. It has recognised a number of institutes whose basic training programme includes the required parts for the recognition. This basic programme includes those components that every registered NMI mediator must have taken in any case. Several study programmes take it a step further and are more inclusive. Some also target special professional groups, such as psychologists or lawyers.

3.6. Are ADR clauses included in standard contracts with banks, Insurance Companies, Utilities providers etc? If such clauses are included in standard contracts can consumers sue anyway?

Arbitration and mediation clauses hardly occur in contracts between consumers and banks, insurance companies and public utilities. They do often feature, however, in contracts between companies.

It is important to note that Article 6:236 Dutch Civil Code lists several general conditions which are unreasonably burdensome if used in a contract between a user and a natural person. Article 6:236(n) DCC mentions the clause that dispute settlement should take place before another body than the court of one or more arbitrators, unless the terms and conditions allow the other party a term of at least a month after the user has invoked the provision in a letter to him to opt for the proceedings to be conducted before the statutorily competent court.

3.7. Is arbitration used for the more important civil cases in your system? Is it used also for cases with mediocre importance? How much does it cost to initiate an arbitration procedure before a Chamber of Commerce? Is an arbitration procedure significantly shorter than an ordinary procedure?

Arbitration is used for cases that require specific expertise or when parties desire rather speedy proceedings. An example of this is the arbitration clause that was included in the construction contracts for the construction of a
tunnel under the Westerschelde,\textsuperscript{47} which was opened on 14 March 2003. The same applies to the high-speed rail-link, which will connect the Netherlands to the European net of high-speed rail-links.

The Dutch Chambers of Commerce do not, unlike e.g. the International Chamber of Commerce in Paris, London or Stockholm, occupy themselves with arbitration. They refer to\textsuperscript{48} the Netherlands Arbitration Institute, in which they participate.

3.8. \textit{Are there other informal mechanisms by which disputes are settled? Is there a role for extended family networks, churches or political parties?}

The Netherlands is a country very much geared towards harmony and consensus. Mediation, for example, has Dutch roots. This is why there are many organisations that are concerned with dispute resolution; from the Direction Energy Inspection (with respect to the liberalization of the energy market) to the Arbitration Board for the Bulb Trade and the arbitration commission for the Nederlandse Voetbalbond (Dutch Football Association).\textsuperscript{49}

Ecclesiastical organisations, political parties and unions do not occupy themselves with dispute settlement.

4. \textbf{Structure of the Procedure}

4.1. \textit{Who is the main fact-finder in your system? Is it the judge or the advocate?}

According to the law (Art. 149 paragraph 1 Code on Civil Procedures), in civil proceedings, the court may only base its decision on the facts or rights it has taken note of or that have been stated and established in accordance with the statutory rules on the submission of evidence in the course of the proceedings. Facts or rights stated by one party, that have not been or not sufficiently been contested, must be accepted by the court as established, subject to its power to demand evidence as often as acceptance of the parties’ statements were to lead to a legal consequence parties are not free to determine.

Facts or circumstances that are generally known, including general rules of experience, may underlie a court’s ruling, regardless of whether they have been stated and they need not be proven, according to Article 149 paragraph 2 Code on Civil Procedures. Article 150 lays down that the onus of

\textsuperscript{47} The Westerscheldetunnel was drilled in order to create a tunnel of 6.6 km-length. Most tunnels in Europe are built in hard, rock-like substance. Never before a tunnel this long and deep going through relatively soft types of soil such as sand and clay was built in Europe. The deepest point is 60 m below sea level.

\textsuperscript{48} See <http://www.kvk.nl/artikel/artikel.asp?artikelID=39408#arb>.

\textsuperscript{49} See Van Bladel 2002.
proof of facts and rights is on the party that invokes the legal consequences of those facts or rights, unless there is a special rule of some kind or that reasonableness and fairness require a different onus of proof.

This means that it is up to the advocate to collect the necessary data in a procedure, after which the court will base its decision on the facts and circumstances submitted to it. This can also be concluded from Article 25 Code on Civil Procedure: the court has an ex officio duty to apply the law to the facts presented.

4.2. What are the rights of victims in the criminal process? Is criminal litigation used as a substitute for civil litigation?

Victims of a criminal offence, can be a party in the criminal procedure by virtue of Articles 51a et seq. Code on Criminal Procedure to claim damages as the aggrieved party. It concerns people who have suffered direct damage as a result of a criminal offence and demand compensation, which must be easy to assess. If the assessment of damages is too complicated, the only thing left to do by the victim is taking his action before the civil law courts. The legislator had in mind, in particular, cases such as ones in which the litigant was involved in a fight (against his will) and suffered damages as a result: broken glasses, torn clothes etc., or someone who wants to recover damages from a burglar as a result of a broken lock and a damaged front door. It would not be very realistic to lay down that these cases should be brought before a civil law court. You can also think of someone who claims compensation for his wrecked car from someone who caused the accident under the influence of alcohol. This course of action is not available if the injured party has become disabled as a result of a car accident, because then there may be discussions on the degree of his disability, the possibility that his situation may improve in the future, the amount of the victim’s annual income and the possibility to still generate income etc. Sometimes, the prosecuting officer also decides to reduce his claim or demand a conditional sentence if the victim is compensated. In a way, one could say that it is criminal administration of justice instead of civil administration of justice.

4.3. Can victims prosecute crimes?

No, the public prosecution service has the monopoly over prosecution through the prosecuting officer (see Art. 9 Code on Criminal Procedure). He may dismiss cases which means that he does not have the duty to prosecute all criminal cases. A party who is directly interested, however, can complain about the decision not to prosecute before the appeal court by virtue of Articles 12 et seq. Code on Criminal Procedure. If the appeal court thinks that the prosecution must be conducted, it will issue an order to this end.

In practice, anyone who has suffered damage will want to act as a party in the procedure. In that case, the prosecuting officer will make arrangements
to enable him to recover the damage. This is also because, according to Article 161 Code on Civil Procedure, a final judgement in a disputed case in which a Dutch court declared it proven that someone has committed an offence is regarded as compelling evidence to conclude that damages have been suffered.

According to Articles 167 and 266 Dutch Code on Criminal Procedure, the aggrieved party must be informed about whether a prosecution is conducted or not. If the offender is not prosecuted, the aggrieved party will have to make his objections known and try to convince the prosecuting officer otherwise.

4.4. Can court fees be waved based on low income? In the affirmative, how low should one’s income be?

4.5. Is a procedure in forma pauperis available? What course of action should the plaintiff take in order to get recognized as being poor?

Yes, the procedure laid down in the Act on Legal Aid is available for that. Anyone who wants to bring an action before a civil court or who wants to be involved as a party must pay a so-called court fee. The amount to be paid depends on the nature of the case but it may not prevent someone from instituting an action because of financial considerations. That is why anyone whose income is below a certain level will pay only half or a quarter of the court fee. According to Article 25 paragraph 1 Act on Legal Aid, the mayor of the place of residence issues a certificate with respect to the financial resources of the party involved, which may then be subjected to a check by the national tax authorities, the Social Insurance Institute, the Implementation Organisation for Employees’ Insurances, the municipal services department and the citizens department of the municipalities.

4.6. Is ADR incorporated in the ordinary procedure? Are there mandatory attempts to conciliation? Are alleged victims of crimes encouraged/required to mediate with alleged perpetrators?

From 1 April 2005, mediation has become part of regular court proceedings. The court can order to try and settle the matter by mediation in cases that are obviously suitable for it. For criminal law cases there is the victim-offender mediation. It can be described as bringing together, on a voluntary basis, offender and victim, under the direction of a trained mediator enabling the

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50 See Article 17 paragraph 1 Act on Rates in Civil Cases. From 1 January 2006, the following income limits apply: ¼ for anyone who makes less than € 1,477 and ½ of anyone who is entitled to legal aid, but whose income is higher. If the court fee exceeds € 436 it will be deducted in the cases mentioned here, apart form an amount of € 110 and € 221, respectively.
offender to come to grips with his guilt and the victim to cope with his grief. It is a process that enables an interested victim to engage into a discussion with the offender about the offence in a safe an structured setting under the supervision of a mediator. Studies have shown that victim-offender mediations receive very high ratings from clients who participated in it. Furthermore, in a very large number of cases, the payment for compensation is actually made.

5. Legal Aid Programs

5.1. Are legal aid schemes available in your system?

Yes, the Act on Legal Aid was created for this purpose and is based on Article 18 paragraph 2 of the Constitution, which lays down the right of access to justice. Article 34 paragraph 1 of that Act lays down that anyone in a single household whose monthly income is € 1,450 or less, or anyone in a joint household with a monthly income of no more than € 2,701 is entitled to legal aid. According to the second paragraph, legal aid will not be granted if the assets of the person seeking justice are at least € 7,300 if he is single, or € 10,500 in all other cases. Paragraph 5 says:

'The assessment of the income and assets of a person seeking justice will, unless there is a case of conflicting interests, also include the income and assets of:

a. the spouse or registered partner of the person seeking justice, unless they are separated,
b. the same sex or different sex person with whom the person seeking justice has a joint household on a permanent basis, unless the relation between this person and the person seeking justice can be qualified as a blood relative in the first or second degree'.

5.2. Are free advocates provided for poor litigants?

Those who qualify for the Act on Legal aid may be granted the so-called assignment. This will be granted after their income has been subjected to a means test. The person seeking justice must, however, pay for some of the costs himself. In this respect, the Act on Legal Aid says in Article 35 paragraph 1: ‘The person seeking justice must pay € 13.50 when legal aid is granted by virtue of Article 19 first paragraph under b (which means seeing someone at the legal aid foundation in order to seek advice). Furthermore, paragraph 2 states that the private contribution of a person seeking justice is means-tested and that it must be paid when he is granted an assignment by

51 See also ECHR 9 October 1979, NJ 1980, 376, Airey.
way of legal aid, which is then succeeded by the amounts laid down in paragraph 3. The private contribution mentioned in paragraph 2 is:

a. for those whose monthly income does not exceed the social security norm: € 90;
b. for those whose income exceeds the social security norm, but is no more than € 1,220, it will be: € 142;
c. for those whose income exceeds € 1,220 and is no more than € 1,290 it will be: € 210;
d. for those whose income exceeds € 1,290 and is no more than € 1,345 it will be: € 277;
e. for those whose income exceeds € 1,345 and is no more than € 1,413 it will be: € 343;
f. for those whose income exceeds € 1,413 and is no more than € 1,477 it will be: € 399;
g. for those whose income exceeds € 1,477 and is no more than € 1,535 it will be: € 462;
h. for those whose income exceeds € 1,535 and is no more than € 1,601 it will be: € 520;
i. for those whose income exceeds € 1,601 and is no more than € 1,670 it will be: € 587;
j. for those whose income exceeds € 1,670 and is no more than € 1,733 it will be: € 638;
k. for those whose income exceeds € 1,733 and is no more than € 1,794 it will be: € 709;
l. for those whose income exceeds € 1,794 and is no more than € 2,071 it will be: € 775.

In addition to that, paragraph 4 states that if the requester is single, the amounts mentioned in the third paragraph will be reduced by 30%.

5.3. Are free advocates provided only for defendants or also for plaintiffs?

Anyone who meets the financial conditions may apply for an assignment and it is irrelevant whether the person involved acts as a plaintiff or a defendant or whether it regards an action that begins with a petition or a summons.

5.4. Are free advocates available also in civil cases or only in criminal cases?

5.5. Are free advocates available in administrative cases?

Yes, the Act on Legal Aid applies to civil as well as administrative law and criminal law proceedings.
5.6. **How are advocates compensated in legal aid cases? Are their fees significantly reduced compared to ordinary fees?**

The remuneration for advocates is governed by the Decision on Compensation Legal Aid. According to Article 3 paragraph 1 of this Decision, the basic rate is € 99.10. This basic rate is multiplied by a factor established by the Ministry of Justice and depends on the nature of the case. This means that, if the basic rate is 8, an advocate will receive 8 times the basic rate, or $8 \times 99.10 = € 792.80$. The factors are laid down in an appendix to the Decision on Compensation Legal Aid and they are as follows:

**Private law cases**
- **labour law**
  - labour law general
  - permit to give notice
  - dissolution employment contact
- **family law**
  - Divorce
  - divorce, joint petition
  - alimony/livelihood
  - parental authority/arrangements concerning parental access
  - division of the estate/succession law
  - Others
- **contract law**
- **rent law**
  - rent law general
  - Act on Rent of Accommodation
  - maintenance by the landlord
- **property**
- **Other cases civil law**

**Administrative law cases**
- **administrative cases general**
- **compensation victims of prosecution**
- **aliens law general**
- **asylum**
  - Intention
  - Objection
  - Appeal
- **civil servants law**

**Criminal law cases**
- **criminal law suspects**
  - cases that are heard or would have been heard in first instance by the cantonal department
  - juvenile cases
  - driving under influence
  - cases with respect to crimes that are heard or would have been heard in first instance by a single judge
cases that are heard or would have been heard in first instance by multiple judges

- criminal law non-suspects
  Extradition Act
  Act on the transfer of the Execution of Criminal Convictions
  Act on Special Admittance to a Psychiatric Hospital
custody of aliens
detention during the government’s pleasure
disputes/complaints detainees
Claim from aggrieved party
complaint non-prosecution
Claim for dispossession
execution of conditional sentence
other criminal law cases

5.7. In case of reduced compensation, can advocates refuse to serve poor clients?

An advocate who wants to be eligible for assignments based on the Act of Legal Aid must be registered as such and meet certain conditions (see, for example, Art. 13 et seq. Act on Legal Aid) and he must handle a minimum number of affairs related to the field of law. Moreover, there is a maximum to the number of assignment cases an advocate can take on. In addition to that, the law firm must run its operations and the cases efficiently. That is why an advocate who faces a request for legal aid will not refuse. There are about 6,500 advocates who participate and that is about half of the number of advocates.

5.8. How much does the government spend on legal aid programs? Has the budget allocated to these programs increased or decreased in recent times?

The government wants the access to justice to increase or remain the same. The budget for 2006 of the Ministry of Justice tells us that in 2004 € 403,970,000 was spent on adequate access to justice and that this amount will rise to € 428,623,000 in 2005. In 2006 the amount is estimated at € 408,476,000 and for the consecutive years about € 408,475,000. This amount has not changed considerably over the last years. Councils for Legal Aid also receive funds for their accommodation, staff expenses etc. That amount has been fluctuating around € 377,750,000 in the 2004-2010 period.52

52 Report of parliamentary proceedings 30300, Chapter VI, no. 2, p. 41.
5.9. Can you briefly describe the way in which such a program, if at all available, works in your system?

It is about allocating funds that benefit those who are entitled to legal aid by virtue of the Act on Legal Aid and the Councils for Legal Aid (popularly known as: legal aid centres) in order to enable them to continue doing their duties.
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CONTROL AND LIABILITY OF CREDIT RATING AGENCIES UNDER NETHERLANDS LAW

H.A. de Savornin Lohman & M.G. van ’t Westeinde

1. Introduction

This article deals with credit ratings, credit rating agencies (‘CRAs’), the control of CRAs and the liability of CRAs in the Netherlands. The article is limited to the rating activities of CRAs and does not deal with their ancillary activities such as consultancy services and the issuing of public statements other than credit ratings, and it does not deal with criminal liability.

CRAs play an important role in the Dutch capital market. The three most important CRAs are two American companies; Moody’s Investors Service Inc. (‘Moody’s’) and Standard & Poor’s Corporation (‘Standard & Poor’s’), and one English company, Fitch Ratings Ltd. (‘Fitch’). These CRAs have been around since the beginning of the twentieth century. The three CRAs are not established in the Netherlands through a subsidiary or a branch. They operate on the Dutch market mainly from London and sometimes from New York. There are no Dutch CRAs.

Both the Code of Conduct of the International Organization of Securities Commissions (‘IOSCO’) of December 2004 and the advice of the Committee of European Securities Regulators (‘CESR’) of March 2005 define a credit rating as:

‘An opinion regarding the creditworthiness of an entity, a credit commitment, a debt or debt-like security or an issuer of such obligations, expressed using an established and defined ranking system. Credit ratings are not recommendations to purchase or sell any security’.

A rating expresses the opinion of CRAs on the creditworthiness of a borrower and the risk that the borrower will not be able to repay a debt. The smooth functioning of global financial markets depends in part upon reliable

1 We are grateful to J. Edward Goff, attorney at law in Philadelphia, USA, for his critical comments and his helpful suggestions. We also thank our colleague Maria A.J. Pereira for her valuable contribution to this article.

2 Criminal liability may arise in case of fraudulent misrepresentation or violation of the insider trading rules.

3 Both these documents will be discussed below.
assessments of investment risks, and ratings influence the provision of capital in those markets. A high rating can give companies access to the capital market. The higher the rating, the better the terms for the borrower. At the same time, ratings play a useful role in the financial decision making of institutional and small investors. Moody’s, Standard & Poor’s and Fitch distinguish twenty-one different ratings, around half of them investment grade and the other half non investment grade.

Where the issuing company participates in the rating process, CRAs will spend weeks or even months analyzing data, work methods and interviewing company management. Although CRAs have a responsibility to perform their rating with due care, the choice concerning the investments to be undertaken remains with the investor. There are some aspects which may influence investment decisions that the CRAs do not take into account. They do not, for example, take into account the reasonableness of the issue price, possibilities for capital gains, the liquidity in the secondary market, the risk of prepayment by the issuer or exchange risks. Sometimes CRAs allow issuers to veto the rating, if they object to the conclusion of the report.

The ratings are revaluated annually, or more often, if there is reason to do so. A given rating is based on the information available at a particular point in time. As time goes by, many things change, affecting the debt servicing capabilities of the issuer. It is therefore essential, that as a part of their investor service, CRAs monitor all outstanding debt issues rated by them. In the context of emerging developments, the CRAs often put issuers under credit watch and upgrade or downgrade the ratings when necessary. For example CRAs can amend their ratings when there are revenue shortfalls, declining profits, distribution of dividends, regulatory changes, share issues or merger prospects. Normally, the decision to downgrade or upgrade the rating is taken after intensive interaction with the issuer.

A distinction can be made between solicited ratings (where the rating is based on a request of the bank or company and it participates in the rating process) and unsolicited ratings (where that is not the case). We are not aware of unsolicited ratings occurring in the Netherlands.

In the Netherlands, the ‘credit rating scene’ can be divided into two different categories:

1. the annual rating of banks, other financial institutions, and industrial companies; and
2. the rating of notes to be issued or loans.

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4 Paragraph 78 of CESR’s advice shows that the distinction between a solicited rating and an unsolicited rating is not always clear.

5 Contrary to what is the case in Spain, Italy, France and Sweden, the rating of regional and local governments has not been requested in the Netherlands (see Van Woerden 1997, p. 10).
With respect to category (2), notes to be listed on Euronext are frequently rated and, to a lesser extent, private loans. For a bank or a company it may be particularly interesting to obtain a rating for notes where it does not itself have a rating or where it does not have a high rating. The rating of notes almost always takes place in case of securitizations. In the case of a securitization, a company or a bank sells part of its receivables to a special purpose vehicle. The issuing of notes by that special purpose vehicle finances the purchase price. The interest to be paid on the notes is influenced by the rating. The rating of the notes will be based on the quality of the portfolio of receivables. For instance, if the receivables are secured, the notes will obtain a higher rating, thus enabling the special purpose vehicle to obtain a lower interest rate on the notes issued by it. Ratings are usually requested from two of the three prestigious CRAs.

Recent affairs such as Enron and WorldCom made it clear that not only directors and auditors play a role in corporate scandals, but that CRAs may also be implicated. Enron and WorldCom were rated investment grade by Moody’s and Standard & Poor’s three months before they went bankrupt. In the United States investors have filed claims against Moody’s and Standard & Poor’s in both cases. These affairs have triggered the discussion about the role of CRAs and other issues of financial reform.

2. Regulatory Aspects

2.1. General

To date, CRAs have not been subject to supervision in the Netherlands. The Authority for the Financial Markets (Autoriteit Financiële Markten) (the ‘AFM’) is responsible for supervising the operation of the financial markets in the Netherlands. This means that the AFM supervises the conduct of the entire financial market sector, in particular with regard to savings, investments, insurance and loans. In 2002 the AFM became the successor of the Securities Board of the Netherlands (Stichting Toezicht Effectenverkeer), which supervised all participants in the securities trade. The establishment of the AFM is a result of the policy of the Ministry of Finance to replace sector-based supervision by function-based supervision, which is divided into prudential supervision and supervision of market conduct. Prudential supervision addresses the question of whether participants in the financial markets can rely on their contracting parties to meet their financial obligations. The Dutch Central Bank (De Nederlandsche Bank) is responsible for prudential supervision. The supervision of market conduct focuses on the question of whether the participants in the financial markets are handled properly and whether they have accurate information. This supervision is the responsibility of the AFM.

6 Nofsinger & Kim 2004, p. 65.
There are no Dutch laws, regulations or rules specifically dealing with CRAs or credit ratings. There is no case law, the literature is scarce and there has hardly been any media attention. Following the recent financial scandals and in the context of the discussion on the Corporate Governance Code and the revision of the laws governing the financial markets, CRAs have, however, received some attention from the government and the AFM.

On March 1, 2004, the Ministers of Finance, Justice, and Economic Affairs sent a letter which briefly considered CRAs to the Second Chamber of Parliament. This letter was the government’s reaction to the new Corporate Governance Code for listed companies, which had been published by the Committee Tabaksblat on December 9, 2003. The letter stated that the CRAs had become the subject of discussion due to the recent bookkeeping scandals. Some critics had argued that the bad financial situation of the companies involved could have been signalled beforehand by the CRAs. But, as the letter stated, at the same time it is possible that the CRAs were also victims of the fraudulent practices. In addition, the system for compensation of CRAs is under discussion because of the potential for conflicts of interest. The letter further noted that initiatives were being taken at the international level (drawing up rules of conduct by IOSCO) and at the European level (drawing up recommendations by the European Commission, CESR and the European Banking Committee on the transparency of CRAs and the question whether it is necessary to implement rules). The provisional view of the government is that the functioning of the market offers sufficient guarantees for prudent behaviour of CRAs. If the quality of the rating were inadequate or if CRAs were too frequently involved in scandals, their own position would be undermined. In that case the market and the investors would attach little or no importance to the ratings. Before taking a definitive view on the issue regarding the possible regulation of CRAs, the government wishes to await the results of the examination of the European Commission, CESR and the European Banking Committee. This issue requires a European view because CRAs are not established in all member states of the EU whereas they do exercise influence in each member state.

Since CRAs are not subject to supervision in the Netherlands and because the CRAs that are active on the Dutch market are foreign, the

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7 There is one exception. There is a provision making reference to credit rating and CRAs. A company that has received a credit rating for itself or for securities issued by it from one of the CRAs recognized by the Dutch Central Bank is deemed to be a professional market party pursuant to a provision contained in a regulation based on the Act on the Supervision of the Credit Act (Wet Toezicht Kredietwet). An entity that borrows money exclusively from professional market parties is exempt from the licence requirement. The provision is especially relevant for special purpose vehicles in securitization transactions.

developments at the international and the European level are very important. The IOSCO Code of Conduct and the advice of CESR are especially relevant.

2.2. **IOSCO Code of Conduct**

IOSCO is an international financial market supervisory organization, which consists of 181 members. These members are the various supervisory authorities of countries all over the world, including the Dutch AFM.

On September 25, 2003, the IOSCO Technical Committee issued a Statement of Principles Regarding the Activities of CRAs. This Statement of Principles laid out high level objectives that CRAs, regulators, issuers and other market participants should strive towards in order to protect the integrity and analytical independence of the credit rating process. The Statement of Principles includes the reduction of asymmetry of information in the marketplace, independence of CRAs, the avoidance of conflicts of interest, transparency with respect to the activities of CRAs, and maintenance of the confidentiality of non-public information. The focus of this Statement of Principles was on objectives rather than on methods or standards. This Statement of Principles made clear that the manner in which the principles are given effect will depend on local market circumstances and on each jurisdiction’s legal system. According to the Statement of Principles, mechanisms for implementing the principles may take the form of any combination of government regulation, regulation imposed by non-government statutory regulators, industry codes and internal rating agency policies and procedures.

On December 23, 2004, after consultation with the IOSCO members, CRAs, representatives of the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, issuers, and the public at large, IOSCO published its Code of Conduct Fundamentals for Credit Rating Agencies.

The IOSCO Code of Conduct is addressed to CRAs and contains practical measures that serve as a guide and framework for the implementation of objectives set out in the Statement of Principles. The essential purpose of the Code of Conduct is to promote investor protection by safeguarding the integrity of the rating process. The Code of Conduct can be broken down into three sections:

1. the quality and integrity of the rating process;
2. CRA independence and avoidance of conflicts of interest; and
3. CRA responsibilities towards the investing public and issuers.

This document can be downloaded from IOSCO’s On-Line Library at [http://www.osco.org](http://www.osco.org) (IOSCOPD 151).

This document can be downloaded from IOSCO’s On-Line Library at [http://www.osco.org](http://www.osco.org) (IOSCOPD 180).
IOSCO believes that there will be sufficient market pressure on CRAs to abide by the voluntary code and that further regulation is not necessary. The measures are not intended to be all inclusive. CRAs and regulators should consider whether additional measures may be necessary for a specific jurisdiction. In addition, the IOSCO Code of Conduct is not designed to be rigid or formalistic. CRAs have a degree of flexibility in how those measures are incorporated in the CRAs’ individual codes of conduct according to their specific legal and market circumstances. The IOSCO Code of Conduct proposes a comply or explain approach.

In the course of the year 2005 Moody’s, Standard & Poor’s and Fitch have each developed and published a code of conduct along the lines of the IOSCO Code of Conduct in order to create more transparency around their standard practice.

2.3. CESR’s Advice

The European Commission established CESR in June 2001. It has a coordinating and advisory role and works to ensure the implementation of community legislation in the member states. Each member state has one member on the committee. The members are the heads of the national public authorities competent in the field of securities (in the Netherlands the AFM).

On March 30, 2005 CESR published a technical advice to the European Commission on possible measures concerning CRAs.11 Pursuant to CESR’s advice, the substance agreed by the IOSCO Code of Conduct provides the right answers to the issues raised by the European Commission mandate. It is felt that the IOSCO Code of Conduct will improve the quality and integrity of the rating process and the transparency of CRAs’ operations. CESR supports a wait and see approach, where no registration system is set up at present. The effects of the IOSCO Code of Conduct are given time to work, as IOSCO and its members have committed to monitoring the implementation of the Code. In the case of failure of such self regulation, the need for statutory regulation will be reconsidered.

2.4. Subsequent Developments in the Netherlands

2.4.1. Reaction of the AFM and the Ministry of Finance

In April 2005, immediately after the publication of CESR’s advice, the AFM published a summary of the advice, which it endorses, on its website.12 In a report of August 2005 concerning task analysis the Ministry of Finance stated that in the field of supervision on the financial markets it takes a reserved stance towards the expansion of supervision. It promotes self-regulation.

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11 CESR/05-139b.
12 This document can be downloaded at <http://www.afm.nl>.
regulation where possible, referring to the Corporate Governance Code of the Committee Tabaksblat as an example. Without making reference to the IOSCO and the CESR, the Ministry of Finance explicitly stated that it sees no reason to introduce supervision by the government in the field of CRAs.\footnote{Ministerie van Financiën 2005, p. 20.}

2.4.2. Recent Legislative Developments

With respect to the supervision in the financial markets there have been some recent legislative developments. The question arises whether these developments apply to CRAs. For example, Article 47e of the Act on the Supervision of the Securities Trade (\textit{Wet toezicht effectenverkeer}) (\textit{Wte}) concerns investment advisors. This provision entered into force on October 1, 2005 and is based on an EU Directive of 2003.\footnote{European Commission Directive 2003/125 of December 22, 2003 implementing Directive 2003/16 EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.} Article 47e Wte contains publication and information requirements for persons who render investment recommendations to the public. The purpose of this provision is to prevent the misleading of the public. The legislative history of this provision explicitly states that CRAs fall outside the scope of Article 47e. This is in line with recital (10) of the EU Directive of 2003, which reads in relevant part:

\begin{quote}
'Credit rating agencies issue opinions on the creditworthiness of a particular issuer or financial instrument as of a given date. As such, these opinions do not constitute a recommendation within the meaning of this Directive'.\footnote{Recital 10 of this Directive continues to state that CRAs should consider adopting internal policies and procedures designed to ensure that credit ratings published by them are fairly presented and that they appropriately disclose any significant interests or conflicts of interest concerning the financial instruments or the issuers to which their credit ratings relate.}
\end{quote}

On January 1, 2006 the Dutch Financial Services Act (\textit{Wet financiële dienstverlening}): the \textit{Wfd}, entered into force. This Act changed the license obligations for many financial service providers and placed them under the supervision of the AFM. In order for CRAs to fall under the scope of this Act, the rating of CRAs would have to qualify as a ‘financial service’. Under Article 10 of the Wfd, providing a financial service in the Netherlands without having received a license from the AFM, is prohibited. A financial service is defined in Article 1 of the Wfd as offering a financial product, advising or acting as an intermediary with respect to the offering of a financial product to a consumer. A financial product is defined as a checking account, securities, electronic money, credit, a saving account, insurance, and an investment object. A credit rating does not qualify as a financial product...
within the meaning of the Wfd and therefore rendering a rating does not qualify as offering a financial product. Furthermore, it is clear that a CRA does not act as an intermediary in any way. Then the question remains, whether rendering a rating must be deemed to be advising within the meaning of the Wfd. Pursuant to Article 1, Wfd the term ‘advising’ means: ‘The recommending of one or more specific financial products to a specific consumer’.

Since a credit rating is not a recommendation, and certainly not a recommendation to a specific consumer, a credit rating does not fall under the term ‘advising’ within the meaning of the Wfd.

The Netherlands has an elaborate system of supervision on financial institutions (e.g. banks, insurance companies and investment funds). The Ministry of Finance is working on a substantial revision of the legislation concerning this supervision, whereby eight statutes will be replaced by one single statute called the Act on the Financial Supervision (Wet op het financieel toezicht): the ‘Wft’. The Wte and the Wfd are among these eight statutes. A (revised) legislative proposal for the Wft was submitted to the Second Chamber of Parliament on October 19, 2005. The explanatory note to Article 5:64 Wft (which is very similar to Art. 47e Wte) also states that CRAs fall outside its scope.

Where CRAs may obtain price sensitive information in the process of preparing their rating, the Dutch insider trading rules may become relevant. These rules were amended on October 1, 2005. However, in view of the fact that these rules apply to all persons who are active in the financial markets, we will not discuss them rules here.

The foregoing leads to the conclusion that in the Netherlands the effects of the IOSCO Code of Conduct are given time to work and if there is reason to believe that the CRAs do not comply with this Code of Conduct, the government can still decide to take legislative action.

3. Liability of CRAs

3.1. General

The liability of CRAs can be distinguished between contractual liability vis-à-vis the issuing company and non-contractual liability.

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16 Kamerstukken II 2005/06, 29 708, nr 19.
17 Kamerstukken II 2005/06, 29 708, nr 19, p. 609.
18 Sections 45a up to and including 46a Wte.
19 We will not discuss the contractual liability where a bank or an investor (e.g. a pension fund) has requested and relied on a rating and where a subscriber of a newsletter has relied on a rating in a newsletter and wishes to take action based on the subscription agreement. In the first two examples contributory negligence will be an important element. In the third example the question arises whether the subscription agreement creates sufficient privity to allow a claim out of contract.
With respect to non-contractual liability, a distinction can be made between the rating of notes and the annual rating of companies, and between solicited and unsolicited ratings. Also one can distinguish between liability vis-à-vis investors and liability to the issuer and other interested parties such as competitors. Liability vis-à-vis investors may become relevant in particular where the company is bankrupt and the creditors do not find recourse with the company.

In the Netherlands there is no case law on the liability of CRAs. In addition, we have found only one legal article on this topic. 20 When faced with CRA liability, Dutch courts will probably make a comparison with the liability of banks for a prospectus or a fairness opinion, the liability of auditors for their opinions on the annual accounts and the liability of journalists and other persons who make statements in the media. 21 The courts may also be inspired by the much more developed US, English and German case law and literature in this respect.

However, it is improbable that case law on CRA liability will develop very much in the Netherlands in the near future. As will be discussed below there are inherent limitations on the jurisdiction of Dutch courts and to the extent that there is jurisdiction, investors or other plaintiffs may prefer to take action outside the Netherlands. Furthermore, it is questionable to what extent the Dutch courts would apply Dutch law.

3.2. Private International Law

We understand that most contracts of the reputable CRAs contain a forum clause pursuant to which the New York or London courts have jurisdiction. A contractual choice of a Dutch court would be extremely rare, even where the issuing company is Dutch. In the absence of a forum clause, it will probably be the New York or English Courts that have jurisdiction, because New York or London are the places where the CRAs are based (not having a branch in the Netherlands) and will probably be the places where the obligations of the CRAs must and have been performed. For a defendant CRA in New York this conclusion arises from Article 6 of the Dutch Code of Civil Procedure whereas for the defendant CRA in London this is based on Articles 2 and 5 of the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. 22 If a Dutch court would assume jurisdiction, that court would probably face a choice of law clause for New York or English law. In the absence of a choice of law clause,

20 Bertrams 1998, p. 341. This article pays special attention to the standard of care to be observed by CRAs.
21 Legal opinions are less suitable for a comparison because these are generally not published, but issued to a limited group of persons. In addition, there is no published case law and the literature on the liability for legal opinions under Netherlands law is scarce.
the Dutch court would most likely hold New York or English law applicable in any event, based on Article 4 of the EC Convention on the law applicable to contractual obligations.\textsuperscript{23} Pursuant to that provision the law of the country where the party who is to affect the characteristic performance under the contract (i.e. the party other than the party that makes a payment under the contract) has its central administration, applies.

Non-contractual liability under Dutch law would be based on the general tort provision or the more specific tort provision relating to misleading advertising. Where the defendant is a CRA established in New York article 6 of the Code of Civil Procedure will apply whereas, if the defendant is a CRA established in London, article 5 of the above-mentioned EU regulation will apply. Both provisions are more or less similar. Pursuant to these provisions the Dutch courts have jurisdiction over tort actions if either the event that has caused the damage or the damage itself has occurred in the Netherlands. Based on these provisions the Dutch courts would probably assume jurisdiction if the issuing company is established in the Netherlands, because in that case the event that has caused the damage will probably be deemed to have taken place in the Netherlands. The mere fact that an investor who suffers financial damage is domiciled in the Netherlands does not mean that the damage has occurred in that same country, and is in itself insufficient to create forum in the Netherlands.\textsuperscript{24}

Pursuant to Article 3 of the Dutch Act on Law of Conflicts on Torts, a Dutch court, in the event that it assumes jurisdiction, would probably apply Dutch tort law, if the investors are domiciled in the Netherlands.

3.3. \textit{Contractual Liability}

To an important extent the contractual liability of CRAs is determined by the contract existing between the CRA and the issuing company.

If Dutch law applies to the contract between the CRA and the issuing company, the contract would be qualified as a service contract (\textit{overeenkomst van opdracht}), and would be governed by Articles 400 through 413 of Book 7 of the Dutch Civil Code ('DCC'). These provisions do not contain rules that are relevant for the contractual liability of CRAs.\textsuperscript{25}

We can think of two situations where a CRA could be held liable based on contract:

\begin{itemize}
\item \textsuperscript{23} EC Convention on the law applicable to contractual obligations of June 19, 1980, Rome.
\item \textsuperscript{24} European Court of Justice June 10, 2004, C-168/02, \textit{Jur.} 2004, p. 1-6009 (\textit{Kronhofer v Maier et al.}).
\item \textsuperscript{25} Section 7:404 DCC provides that if it is the intention of the parties that a specific employee must perform the services, that person is personally jointly and severally liable with the contracting party for damage resulting from a breach of contract. In view of the nature of the contract with a CRA this provision will not be applicable.
\end{itemize}
CONTROL AND LIABILITY OF CREDIT RATING AGENCIES UNDER NETHERLANDS LAW

1. the situation where the company has received too low a rating, a downgrading or a refusal to upgrade;
2. the situation where the company is held liable by investors and makes a cross claim against the CRA.

If a company receives too low a rating, its access to the capital market may be limited and it may go bankrupt or pay excess interest on its debts. It is difficult to think up circumstances where too low a rating would result in liability of the CRA. The issuing company will have sufficient information to convince the CRA to render a fair rating, and if it does not succeed in convincing the CRA it can engage one of the other reputable CRAs. If the company does not succeed in obtaining a higher rating from the other CRAs either, it may be difficult to convince a court that the rating was too low. Similar considerations apply in the case of downgrading or refusal to upgrade.

Contractual liability may also arise where the issuing company is held liable by investors based on too high a rating, and where the company subsequently makes a cross claim against the CRA. In practice, this is not a likely scenario either. The CRA may raise as a defence that the company has purposely withheld relevant information. Furthermore, it will be difficult for the company to show damages. The company will be held liable if it is unable to repay the interest and principal. Had the rating been lower, the interest would have been higher, and in that case it would still have been more difficult to repay the investors, and that the company would not have obtained the financing at all. The situation where investors would claim, that they would have agreed upon a higher interest had they known the far lower rating, seems rather academic. In that case it will also be difficult to show damage caused by the CRA.

In addition, the contracts of Standard & Poor’s and Moody’s contain far reaching exoneration and indemnification clauses. They stipulate that the ratings are mere statements of opinion, that there is no warranty or liability with respect to the rating and that the rating is based on information provided by the client. The defence that the rating was a mere statement of opinion and no recommendation to buy, sell or hold the securities will probably not be effective but, in many circumstances, an exoneration clause will.

Generally, an exoneration is permitted under Dutch contract law. The limits, however, are found in the principle of reasonableness and fairness, which in exceptional circumstances can prevent a party from relying on a clause in a contract. Whether or not the principle of reasonableness and fairness prevents a party from relying on an exoneration clause depends on all the circumstances of the case such as the extent to which the exonerated party has been negligent, the nature and seriousness of the interests at stake, the nature and the further contents of the contract, the relative bargaining strength of the parties, the mutual relationship between the parties, the manner in which the clause came into existence and the extent to which the
3.4. Non-contractual Liability

3.4.1. General

The normal basis for non-contractual liability is tort. Dutch law contains tort provisions of a general nature in Article 162 et seq. of Book 6 DCC. From Articles 6:162 and 6:163 five requirements for liability in tort can be distilled: (1) a tortuous act; (2) imputability of the tortuous act to the tortfeasor; (3) damage; (4) causal connection between the act and the damage; and (5) relativity.

Article 162 distinguishes three categories of tort:

1. an infringement of another person’s rights (e.g. an intellectual property right or another ownership right);
2. an act or failure to act in violation of a statutory duty; and
3. an act or failure to act in violation of the unwritten requirements of proper societal conduct.

For the liability of CRAs only categories (b) and (c) seem relevant. Article 6:163, which contains the relativity requirement, provides that there is no obligation to pay damages if the rule that is violated is not intended to protect against the damage suffered by the injured party. The question whether or not an act of failure to act is in violation of the unwritten requirements of proper societal conduct (in other words: a breach of a standard of care) and whether or not the other requirements for liability in tort have been met depends on all the circumstances of the case. As a result the doctrine and case law on tort are very casuistic.

3.4.2. Rating in a Prospectus relating to a Note Issue

The most probable scenario of liability of CRAs seems to be the non-contractual liability vis-à-vis investors, where the CRA has rendered too high a rating with respect to an issue of notes. The credit rating is usually published in a prospectus.

We believe that when a Dutch court will be confronted with a claim by investors against a CRA, in particular when the claim is made in connection

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26 HR (Dutch Supreme Court) 19 May 1967, NJ 1967, 261 (Saladin v HBU); this decision was followed by a number of other Supreme Court decisions, in which additional relevant circumstances were discussed.

27 As far as category (2) is concerned only Section 6:194 DCC, to be discussed below, seems relevant.

28 A comparison may be made with the US doctrine of the foreseeable plaintiff.
with a note issue, the court will be strongly inspired by the case law and literature about the liability of a lead bank for a misleading prospectus and the liability of a bank for a misleading fairness opinion, for the following reasons:

1. the banks operate in the same market as CRAs, the capital market, where the requirements for transparency, provision of information and protection of investors are pre-eminent;
2. although there is no obligation to involve a bank in the issue of securities or to obtain a fairness opinion in a public offer, it is practically impossible not to involve a bank; the same goes for CRAs;
3. although there is no statutory or regulatory obligation to do so, both the banks and the CRAs have a duty to perform an examination of documents and other information relating to the company;
4. for the performance of their tasks the banks – as well as the CRAs, – are heavily dependent on a proper provision of information by the company; and
5. as is the case for credit ratings of CRAs, the statements of banks are contained in a prospectus.

A more specific basis for liability vis-à-vis investors in the context of a note issue under Dutch law could be Article 194 of Book 6 DCC. This provision is a *lex specialis* of the general tort provision and concerns misleading advertisement. Its purpose is to provide protection to consumers. The relevant part of Article 6:194 reads:

‘A person who makes public or allows to be made public a statement regarding goods or services which he, or the person on whose behalf he acts, offers in the conduct of a profession or business, acts unlawfully if this statement is misleading in one or more of the following respects, for example as to

(a) the nature, composition, quantity, quality, characteristics or possibilities for use;

(d) the price or its method of calculation;

(g) the conditions under which goods are supplied, services are rendered or payment is made;

(h) the extent, content or duration of the warranty;

...’

Article 6:195 shifts the burden of proof to the detriment of the person who has determined or co-determined or has caused to be determined or co-determined the content and the presentation of the statement in whole or in part with respect to two factors (1) the accuracy and completeness of the facts contained in the statement; and (2) imputability.
Case law has firmly established that Articles 6:194 and 6:195 can serve as the basis for liability of the issuing company and the accompanying bank to investors for a misleading prospectus. In the past decades the Supreme Court rendered three decisions on prospectus liability. In all three cases a bank was involved as a party.

The milestone case for the prospectus liability of banks is the decision of the Supreme Court of 1994 in the Co op case. That case related to the issue of bonds. The investors filed a claim against lead bank ABN AMRO based on Articles 6:194 and 6:195. An important reproach towards ABN AMRO was that the annual accounts of 1986 and 1987 (which formed part of the prospectus) had not consolidated 214 affiliated companies, which had debts of more than DM 1.5 billion. The Court of Appeals of Amsterdam held that the relevant inquiry concerns the duty of care that a bank must observe vis-à-vis the average investor. The bank argued that it had not made the misleading annual accounts public because those accounts had already been made public before the issue of the prospectus. The Court of Appeals rejected that argument and held that the term ‘making public’ must be broadly interpreted and that there exists no such ‘rule of exhaustion’. The Supreme Court also rejected the defence of the bank that it had relied exclusively on the unqualified auditors’ opinion relating to the relevant annual accounts. To what extent a bank is allowed to rely on an auditors’ opinion depends on the circumstances of the case.

In another important decision the Supreme Court considered prospectus liability in the 1998 Boterenbrood case. In that case private investors claimed that a bank was liable based on Articles 6:194 and 6:195 because the prospectus of an investment fund (in Canadian real estate) did not mention that the participants (partners) in the fund (a Canadian limited partnership under the laws of Alberta) who had sold their participation to the fund could still be held liable by the fund up to the amount of the sales price. The Court of Appeals of Amsterdam overturned the decision of the District Court and held that the prospectus was not misleading because the liability of an exiting partner of the Canadian fund would not materially deviate from the liability of an exiting partner of a Dutch partnership. The Supreme Court reversed the decision of the Court of Appeals. It held that the bank had the burden of proving that this continuing liability after exit was so customary that there was no need to make mention of this relevant fact in the prospectus. It also held that the prospectus must contain complete information that is not misleading and that the incomplete or misleading character cannot be taken away by the possibility for the investors to seek further information.

The more recent DAF case of 2001 concerned a negative pledge in a prospectus. The bondholders of DAF NV (represented by NTM) claimed that the negative pledge related to the assets of the entire DAF group based on a broad interpretation of the negative pledge, thereby relying on the reasonable intentions and expectations of the parties, whereas the trustees held the view that the negative pledge was limited to the assets of the top holding company DAF NV only, thereby relying on the strict wording of the relevant clause. The Supreme Court reversed the decision of the Court of Appeals of Amsterdam, and held that contrary to the general rule of contract interpretation, in the case of bond provisions contained in a prospectus the wording is generally decisive. The Supreme Court referred the matter to the Court of Appeals of The Hague. That Court rejected the claims of the bondholders following the narrow interpretation of the negative pledge clause. The Court held that it is not necessary for an investor to have read the prospectus in order to invoke Article 6:194. In addition, it ruled that the relevant inquiry should focus on the average investor notwithstanding the fact that the majority of the investors were professionals. The Court also held that the bank could reduce its liability by taking corrective measures. After a certain date it had become clear to the market that the bank held the narrow view.

The liability for fairness opinions may also be a source of inspiration for the liability for credit ratings. A fairness opinion of a bank is often included in a prospectus for the offer on listed shares, and has as its’ purpose, to give the management board of the target comfort about the price. In the Netherlands there is no case law on liability for fairness opinions, but there are two legal authors who have paid attention to this topic: J.M. Van Dijk in an article in 1998 and S. Parijs in a recent dissertation. According to both authors Article 6:194 is the legal basis for liability of a fairness opinion, not only to the management board as the addressee of the opinion, but also to the existing shareholders who are invited to sell their shares. They agree that a fairness opinion contains statements within the meaning of that provision, that the bank makes these statements public or allows the statements to be made public, and that shares are goods within the meaning of Article 6:194.

A CRA will be liable under Articles 6:194 and 6:195 if the following requirements have been met:

1. the CRA must make a statement public or allow a statement to be made public;

34 Parijs 2005; this dissertation has been written in English.
2. the CRA must act for a person who offers goods or services in the conduct of a profession or business;
3. the statement must be misleading;
4. the misrepresentation must be imputable to the CRA;
5. the investors must have suffered damage;
6. there must be a causal connection between the damage and the misleading statement; and
7. there must be relativity between the misrepresentation and the damage as suffered by the investors.

There can be no doubt that a credit rating is a statement within the meaning of Article 6:194. In our view the CRA makes it’s rating public or allows it to be made public. The Dutch wording of Article 6:194 ‘laten openbaar maken’ is not unequivocal. It can mean ‘to cause to be made public’, but it can also mean, ‘to allow to be made public’. In our view the correct interpretation would be ‘allow to be made public’. The parliamentary documents, though not specifically dealing with the distinction between ‘causing’ and ‘allowing’ to be made public, promote a broad interpretation of publishing and state that it is sufficient that the public could have access to the information. 35 It is not necessary that the claiming investors have indeed acquainted themselves with the statement. The Supreme Court in the Co-op case and the District Court of Amsterdam in the Boterenbrood case36 also propagated, though in different contexts, a broad interpretation of publishing. In the context of the discussion about the fairness opinion both Van Dijk and Parijs hold the broad view that the term ‘laten openbaar maken’ means, ‘allowing to be made public’.37 Another argument for the broad view on ‘laten openbaar maken’ is that Article 6:195 uses the active word ‘doen’ (which undoubtedly means ‘to cause’) instead of ‘laten’ (which can mean either ‘to cause’ or ‘to allow’). Whether a CRA publishes the rating on its website or in newsletters, there can be no doubt that it makes the rating public.

It is clear for these prospectus ratings that a CRA acts for a person who offers goods or services in the conduct of a business. All three Supreme Court cases and all legal authors have confirmed that securities (including notes) qualify as ‘goods’ within the meaning of Article 6:194.

A statement can be misleading if it is incorrect or incomplete. Concerning ratings, the reproach will almost always be that it is incorrect. The statement must concern a material fact. This requirement is fulfilled because they are investors who make their decision to invest in notes are heavily influenced by the credit rating. We can imagine that a CRA has some discretion. For example, it may be difficult for an investor to show that rating

BBB is incorrect but that instead rating BBB - is correct. The criterion is the average investor. The question whether there is mis-representation will also be influenced by the high professional level that can be expected from a CRA.

The misrepresentation must be imputable to the CRA. This means that it must be due to negligence or be for the risk or account of the CRA. Since misleading information without negligence is for the risk and account of the issuing company, it is decisive whether or not the CRA has been negligent. The CRA must perform a proper examination of the information provided to it. The IOSCO Code of Conduct hardly contains any clear guidelines for a proper examination. A defence may be that the company provided incorrect information or withheld relevant information from the CRA, but the CRA should always be suspicious and be able to smell a rat. It is possible that the CRA has performed a proper examination but subsequently has drawn the wrong conclusion. Probably, as a general rule, a CRA cannot exclusively rely on the opinion of auditors on the annual accounts. The duty of care may be higher because a high professional level is expected from the CRA, the issuing companies are often forced to obtain a rating and the three top companies enjoy an oligopoly.

An investor who does not receive repayment on his note can in most cases easily show damage. Causal connection between the damage and the publishing of misleading information must also be shown. With respect to prospectus liability the general view is that this hurdle is not very big. Even if the investor has not read the prospectus there may a causal connection, because the inaccuracy of the rating may create a positive market sentiment concerning the offer, which may influence investors to purchase notes.

The relativity requirement will be easily satisfied. The purpose of Article 6:194 is to protect consumers and other persons to whom goods have been offered under misrepresentation. The Supreme Court decisions in the Coop and DAF cases and the decision of the District Court in the Boterenbrood case confirm that investors in securities enjoy the protection of Articles 6:194.

Now that in the context of a note issue the CRA falls within the scope of Article 6:194, it is highly probable that it fulfils the requirement of Article 6:195: the CRA will be deemed to have determined or co-determined the part of the prospectus that relates to the credit rating. The CRA is usually involved in the drafting of the prospectus or at least in drafting those pages of the prospectus that concern the rating. This means that the CRA will have the burden of proving that the information (concerning the rating) was

38 This was decided for the prospectus of lead bank ABN AMRO in HR 2 December 1994, NJ 1996, 246 (ABN AMRO v The Association for the representation of the interests of bondholders of Coopag Finance BV).
correct and that it has not been negligent. The CRA may even publish the rating directly on its website.

Finally, the question arises what the CRAs’ liability is with respect to a failure to downgrade or an unjustified upgrading with respect to the issue of notes. The legal basis for such liability will no longer be Article 6:194 but Article 6:162 because this upgrading and downgrading will be done after the notes have been offered and sold by the issuer. Probably the relativity requirement will be fulfilled as far as investors are concerned. However, negligence will be hard to prove, although the court may under certain circumstances shift the burden of proof to the CRA on the basis of reasonableness. In addition, it may be difficult to show damage and causal connection.

3.4.3. Solicited Rating of the Company

Now that we have dealt with the most probable scenario for liability for a credit rating, i.e. the issue of notes, the question arises of what the exposure to liability is in case of a solicited rating of the company itself, which, in principle, takes place on an annual basis. In such a case, Article 6:194 will not apply, because such a rating does not concern a statement regarding goods or services that are offered. In this situation the general tort provision contained in Article 6:162 should be the basis. Causal connection and relativity may be a problem for the investor.

Solicited credit ratings bear some resemblance to accountants’ opinions on the annual accounts. Both ratings and accountants’ opinions are published statements of an independent and objective expert, paid by the company. Concerns of confidentiality and conflicts of interest play a role. To a large extent both ratings and accountants’ opinions are based on information provided by the company and are rendered for the benefit of third parties to a large extent. Both CRAs and accountants lend their reputation in rendering an opinion concerning the financial situation of the company. Actual and potential stakeholders of the company attach importance to ratings and accountants’ opinions.

As to the standard of care an accountant must exercise the reasonable care of a competent person within his profession. To what extent third parties such as existing and future shareholders, noteholders and other creditors can hold accountants liable based on negligence with respect to their opinions has not been clearly defined by case law. In an interesting article E.A. de Jong provides a summary of the case law on third party liability of accountants for their opinions.

41 For example District Court of Rotterdam 19 November 1998, JOR 1999, 31 (Van der Vorst v Sistermans).
42 De Jong 2003, page 600; see also Koolmees 2005, p. 457.
There is one relevant Supreme Court decision in a somewhat different context.\[^4^3\] In this case the accountant rendered an opinion on the value of a contribution in kind in the context of an incorporation of a company. Shortly after its incorporation, the company went bankrupt. The trustee in bankruptcy held the accountant liable because he had assigned too high a value to the assets contributed by the founders. According to the Supreme Court, in view of the statutory provision that requires the accountant’s opinion, the accountant’s opinion with regard to the contribution in kind must be regarded as a safeguard for shareholders and other third parties. The Court of Appeals had ruled that rendering a faulty opinion does not only constitute a breach of contract to the company, but also a tort vis-à-vis the collectivity of creditors.

There is case law of lower courts that shed some light on the duty of care vis-à-vis third parties with respect to accountants’ opinion on the annual accounts. Although the decisions are not always consistent the general rule may be derived that there is liability to a third party where it was foreseeable for the accountant that the third party would rely on the opinion without itself conducting an examination. The accountant may avoid liability based on contributory negligence where the third party is an expert.\[^4^4\]

Dutch legal authors often refer to the famous \textit{Caparo} case of the English House of Lords.\[^4^5\] When deciding a case on accountant’s liability, the Dutch Supreme Court will probably take this English decision on accounts’ liability into consideration. The House of Lords set out three criteria:

1. the reliance upon the accountant’s opinion must be reasonably foreseeable;
2. there must be sufficient proximity between plaintiff and the accountant; and
3. it must be just and reasonable under the circumstances to impose a duty of care on the accountant.

Although solicited ratings show resemblance with accountants’ opinions there are also some differences. Accountants play a more central role than CRAs. All companies, except those exempted, must appoint an accountant. He has a public task and is governed by statutes and professional rules and

\[^4^3\] HR 6 December 2002, NJ 2003, 63 (\textit{Goedé]{e v Arts}).

\[^4^5\] \textit{Caparo Industries v Dickman} [1990] 1 All ER 568.
guidelines. Pursuant to one of these rules, an accountant must inform the management board in writing of a reasonable suspicion of fraud, and if the management board is involved in the fraud, he must inform the supervisory board. An accountant has a more active involvement in the company’s affairs. As a result, the exposure to liability of an accountant will be higher than that of a CRA. There are also some other factors that CRAs propagate in their codes of conduct (e.g. no expert status, no duty to verify, no statement of fact) which may further decrease the risk of liability. These factors will be discussed below under limitation of liability.

Other factors which may influence the liability of a CRA will be the expertise of the user of the rating, the lapse of time between the rating and the relevant transaction of the plaintiff and the nature of the plaintiff. As a general rule, due to the relativity requirement a noteholder will have a stronger claim based on a negligent credit rating than a shareholder.

3.4.4. Unsolicited Rating

In the case of an unsolicited rating, it may occur that the company feels that the rating is too low or unjustifiably lowered, and that as a result it must pay too high an interest on notes or its shares must suffer a loss of points on the stock exchange. In such a case the company may consider bringing action against the CRA based on defamation, which is governed by the general tort provision of Article 6:162. In this respect the standard of care for making public statements in the media and newsletters becomes relevant. There exists much case law on this topic in the Netherlands.

The liability is dependent on a weighing of the interests of the plaintiff, the defendant, and the public interest. As a general rule, there is liability if the defamatory statement is incorrect and the perpetrator knew or should have known this. The public interest plays a role with respect to statements in the media. The public interest is imbedded in the freedom of speech guaranteed by the Dutch Constitution and the European Convention for Human Rights. Where there is a personal opinion the courts will be more hesitant to hold a statement unlawful than in case of a statement (or suggestion) of facts. Pursuant to the Supreme Court, whether or not a public statement is lawful depends on all the circumstances of the case, such as the nature of the statements, the seriousness of the consequences of the publication for the injured party and the extent to which the statements were supported by facts available at the time of the publication. The Supreme Court also held that the nature of the medium is relevant (television is more pervasive than newspapers) as well as the image of impartiality and

47 Asser–Hartkamp 2002, paragraph 239.
expertise that the person who makes the statement enjoys with the public.\(^{49}\) In this case the Supreme Court held that the nature and purpose of the television program 'Ombudsman' created the impression with the public that the statements in the program originate from an impartial institution which is active in the public interest. Therefore, the public would assume that statements, qualifications and accusations made in this program were correct and well founded more readily than for those made in the media in general. As a result, the producers of this program must observe a higher duty of care than is normally required in journalism. A more recent decision of the Court of Appeals of Amsterdam is in line with this Supreme Court decision. In that case Lakeman had published statements in a professional journal about a doubtful payment by DASA to the CEO of aircraft company Fokker in connection with the sale of Fokker to DASA. Lakeman had made clear that his statements were based on rumours and on an anonymous letter in his possession. Lakeman had not consulted with Fokker, the CEO or DASA before issuing his statements. The Court of Appeals ruled that such consultation would have been desirable. The Court of Appeals ruled that Lakeman is a well known figure in the world of companies and multinationals to whose publications in a professional journal will be attached more importance than to a small article in the newspaper of an average journalist. As a result, a higher degree of care is expected from him in taking into account the interests of DASA.\(^{50}\) Nevertheless, the Court of Appeals held that Lakeman had complied with the required standard of care. Where the unsolicited rating is too high or too low (or where the CRA fails to downgrade or upgrade such a rating) investors or other market parties who rely on it may suffer damage and bring a claim against the CRA. Such a claim cannot be based on Article 6:194 because the CRA has not acted on behalf of the company, and, in addition, where ratings of the company are concerned, has not rendered a statement regarding an offer of goods or services. It will be difficult to bring a successful claim on the basis of Article 162, especially where the CRA has made clear that the rating was unsolicited.\(^ {51}\) It is improbable that causal connection and relativity will be established. A solid defence for the CRA may be that the user of the information should have verified the information by examining more official documents or by consulting a professional advisor. We are not aware of any case law concerning liability of persons for public statements of a commercial nature based on the general tort provision.

\(^{49}\) HR 27 January 1984, NJ 1984, 803 (Leading Succes People v VARA).
\(^{50}\) Court of Appeals of Amsterdam 30 May 1996, Mediaforum 1996-9, p. B 109 (Lakeman v DASA).
\(^{51}\) Measure 3.9 of the IOSCO Code of Conduct provides for disclosure of whether the issuer has requested a credit rating and whether the issuer has participated in the rating process. The CRA should disclose its policies and procedures regarding unsolicited ratings.
3.4.5. Limitation of Liability and Contributory Negligence

The general view is that an exclusion from liability based on Article 6:194 and Article 6:162 has no effect. However, it will be possible to limit the duty of care to a certain extent, in particular by limiting the scope of the opinion. As the banks do in their fairness opinions, CRAs have included in their respective codes of conduct a number of provisions that serve this purpose. For instance, they state that the ratings are based on public information and information provided by the company, and that they have not verified this information, that the ratings do not constitute an investment, financial or other advice, that the ratings are valid only as of the day of the rating, that they are not experts, that the ratings are mere opinions and not recommendations to purchase, sell or hold securities, and that the ratings are not statements of fact. These disclaimers will decrease the exposure to liability to a certain extent. However, some of them will have only a limited effect.

In our view, the reservation that the rating is not a recommendation to buy, sell or hold securities, and the disclaimer of expert status will not be very effective, and the fact that a rating is labelled an opinion is not conclusive if there are materially false factual components. The disclaimers will be less effective if they are simply included in the codes of conduct than if they are actually included in the rating itself.

Another circumstance that may decrease the liability of the CRA is contributory negligence of the user of the rating. Article 6:101 DCC provides that if the damage can be imputed to the injured person himself, the obligation to pay damages is apportioned between the injured person and the tortfeasor pro rata parte the degree the damage can be imputed to each of these persons. For instance, if the CRA assigns a high credit rating, but recent annual accounts clearly show that the company is near bankruptcy, contributory negligence will reduce the liability of the CRA to a certain degree, in particular where the user of the rating is a professional party.

3.4.6. Liability vis-à-vis Competitors

One could also think of a situation where, should a CRA give too high a rating on notes issued by a company, the competitor of that company would file a claim against the CRA. The basis for such a claim could be Article 6:194. The relativity requirement will probably be fulfilled, because the purpose of Article 6:194 is not only to protect consumers, but also to protect competitors. However, damage and causal connection will constitute a problem. In the

52 Van Dijk 1998, p. 321; Parijs 2005, p. 172; this rule can also be derived from the decision of the HR 2 December 1994, NJ 1996, 246 (ABN AMRO v The Association for the representation of the interests of bondholders of Coopag Finance BV.).
case of an annual rating of the company, a claim will probably be based on Article 6:162. Here, in addition to the damage and causal connection requirements, the relativity requirement may constitute a problem.

4. Conclusion

CRAs are not subject to supervision in the Netherlands. Presently, there are no plans to create such supervision. The effects of the IOSCO Code of Conduct will be given time to work. If the CRAs do not abide by these rules, the Dutch government may take action.

The risk of contractual liability seems remote. The largest exposure to liability of CRAs exists in the case of publication of a rating in a prospectus in the context of a notes issue. This liability vis-à-vis investors is governed by Articles 6:194 and 6:195 DCC. Except for the unlikely liability pursuant to these provisions vis-à-vis competitors of the issuer, non-contractual liability in other cases will be based on the general tort provision of Article 6:162 et seq. DCC. This provision may give rise to liability of investors in case of unjustified upgrading or failure to downgrade notes. The exposure to liability for the rating of a company will generally be lower than for a rating of notes in a prospectus. The risk that unsolicited ratings will lead to liability is even more remote, provided that the CRA makes clear that the rating is unsolicited.
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1. Framework

This first part aims at providing a sketch of the substantive and institutional framework, and policy context, in which vertical restraints are being assessed.

1.1. Substantive Framework

What are the general Provisions of National Competition Law applicable to vertical restraints?

*Competition Act*

Article 6(1) of the Dutch Competition Act (DCA) is the Dutch equivalent of article 81(1) EC Treaty and prohibits agreements that have as their object or effect to restrict competition on the Dutch market or a part thereof (‘cartel prohibition’).

Under article 6(3) DCA, agreements which contribute to improving production or distribution of goods or to promoting technical or economic progress, allow consumers a fair share of the resulting benefit, do not impose restrictions which are not indispensable, nor eliminate competition in respect of a substantial part of the products or services in question, are exempted from the cartel prohibition (legal exemption identical to article 81(3) EC-treaty).

*Are some sectors of the industry made subject to specific provisions (retail, telecoms, utilities, healthcare, etc.)? If so, what are these sectors and what are the provisions applicable thereto? How do these sector-specific provisions interact with general provisions?*

*Retail sector*

Under the block exemption for cooperation in the retail sector *(besluit samenwerkingsvereenkomsten detailhandel)*, the following restrictions in franchise agreements (and similar agreements) in the retail sector are exempted from the cartel prohibition:
a. an obligation to respect maximum prices prescribed by the franchisor/supplier in the course of advertising campaigns for a maximum duration of 8 weeks, provided these prices do not apply to more than 5% of the product range supplied by the franchisor/supplier to the retailer, and

b. an obligation of the retailer to purchase (max.) 60% of the product range of the retailer from the franchisor/supplier, provided the duration of this obligation does not exceed 10 years, the obligation is entered into in connection with credit provided by the franchisor/supplier to the retailer or a lease agreement between the franchisor/supplier and the retailer, and the sale conditions for such products are not less favourable than those applied with respect to third parties.

**Publishing sector**

Under the Act on fixed book prices (*Wet op de vaste boekenprijs*), publishers must fix the resale prices of Dutch language books and music publications sold for the first time in the Netherlands. Resellers of books are under a legal obligation to apply these prices vis-à-vis end-users, subject to certain exemptions. Even though the result of this Act is vertical resale price maintenance, the cartel prohibition does not apply as it results from obligations imposed under the Act.

**Liberalised sectors**

Certain (liberalised) sectors are subject to specific regulation. The regulation mainly focuses on obligations to promote the development of competition and to prevent the abuse of market power (e.g. price regulation and (sometimes) access obligations). Although this regulation in principle does not provide for specific competition rules regarding vertical agreements, it often affects vertical agreements entered into by the parties active in the respective sectors. Some examples of sector specific rules that affect vertical agreements are briefly discussed below.

**Telecom**

The Telecommunications Act (*Telecommunicatiewet*), which is based on the EU-telecommunications directives, provides for sector-specific rules for the telecommunications sector. OPTA, the telecommunications and post regulator can impose obligations on parties with significant market power (‘SMP’) on telecommunications markets. Such obligations can regard both wholesale markets (e.g. access and pricing obligations with respect to infrastructure or services) and retail markets (e.g. pricing obligations).

**Post**

The Postal Act (*Postwet*), which is based on the EU-postal directives and the secondary legislation based on that Act provides for sector specific rules in the postal sector, among which certain access and pricing obligations for the incumbent postal operator.
Utilities
The Gas Act (Gaswet) and the Electricity Act (Elektriciteitswet) provide *inter alia* for regulated network access and for purchasing obligations for the manager of the national gas network with respect to gas extracted from Dutch gas fields.

Healthcare
The proposal for the Act on Market Regulation Healthcare (Wet marktordenig gezondheidszorg) provides that the healthcare regulator (to be established) will *inter alia* have the power to provide for specific rules with respect to agreements regarding healthcare (e.g. conditions, tariffs) in order to promote competition in the healthcare sector.

Sectors which are subject to sector-specific regulation and supervision by sector-specific market regulators, also remain subject to the general competition rules set out in the DCA. To the extent that the sector-specific regulations include competition rules, the sector-specific rules have precedence over the DCA. It should be noted, however, that in a decision regarding the telecommunications sector, the Dutch Competition Authority (Nederlandse Mededingingsautoriteit; ‘NMa’) held that the fact that regulation is intended to promote competition does not automatically mean that such regulation provides for sector-specific competition rules which have precedence over the DCA.1

1.2. Institutional Framework

What national administrative and/or judicial authorities are competent, in first and second instance, for enforcing vertical restraints control?

The managing board of the NMa (Raad van Bestuur van de Nederlandse Mededingingsautoriteit) is entrusted with enforcing the DCA and is therefore competent to enforce vertical restraints control. Appeal from its decisions may be brought before the District Court of Rotterdam (Arrondissementsrechtbank Rotterdam), and subsequent appeal in last instance is possible to the Trade and Industry Appeals Court (College van Beroep voor het Bedrijfsleven).

In addition to administrative enforcement, the competition rules may be enforced by private parties in civil proceedings. However, civil enforcement is not dealt with in this report.

When more than one authority is competent, how are powers allocated and coordinated?

The NMa has exclusive jurisdiction to enforce the DCA. Therefore under the DCA concurrent jurisdiction with respect to vertical restraints control cannot exist.

1 Decision of 8 September 2000 in Case 275 (Libertel).
The NMa has entered into cooperation protocols with several sector-specific regulators. Concurrent jurisdiction may occur with such regulators in the area of market definition and with respect to dominance issues. These protocols provide for exchange of information, mutual consultation and cooperation. In cases where concurrent jurisdiction may occur, in principle the sector-specific authority will have priority to act on the basis of the sector-specific legislation.

1.3. **Policy Context**

When administrative authorities are competent, does their current approach to vertical restraints reveal the existence of policy choices vis-à-vis vertical restraints? If so, which ones?

The DCA is based on the EU competition rules and is construed and applied in accordance with the decision practice of the European Commission and the judgments of the European Courts of Justice. In its decisions with respect to vertical agreements, the NMa usually refers to the EU-block exemption on vertical agreements (the ‘Block Exemption’\(^2\)) and the European Commission guidelines on vertical restraints\(^3\) (the ‘Guidelines’) and applies the principles set out in these documents.

Does their approach also reveal the existence of priorities? For example, have administrative authorities recently studied (e.g. in a report), or focused on, specific types of vertical restraints?

Recent studies and reports by the NMa have not focused specifically on (certain types of) vertical restraints, although certain reports have discussed vertical restraints.

The NMa published a report dealing with buying power, in which the effects of buying power on vertical restraints are briefly discussed.\(^4\) The report states – referring to the Guidelines – that buying power is likely to increase the negative effects on competition with respect to vertical restraints from the ‘limited distribution’ and ‘market partitioning’ groups, such as ‘exclusive distribution’ and ‘selective distribution’.\(^5\) According to the NMa, exclusive distribution in combination with buying power leads to an increased risk of cartels, in particular when the exclusive distribution arrangements are imposed by purchasers established in different areas upon one or more suppliers. Buying power may manifest itself with respect to selective distribution in particular through the use of selection criteria that

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\(^3\) OJ C 291/1, of 13 October 2000.

\(^4\) NMa 2004, Para. 105-112.

\(^5\) Para. 125 of the Guidelines also mentions exclusive supply.
are aimed at imposing restrictions to the distribution channel that benefit in particular the purchasers with buying power.

In addition, together with the Central Plan Bureau, the NMa recently published an analysis of competition in the markets for life insurance which concludes that competition in the life insurance markets is weak. It is assumed that better functioning of financial advisors may improve competition, and the report suggests as a policy option to regulate contract terms between life insurance firms and financial advisors (e.g. prohibition on terms that induce an advisor to do business primarily with certain life insurers).

In reaction to a price war in the food retail sector in the Netherlands the government has commissioned research on price regulation, and in particular a prohibition on sales below the purchase price, in other European countries and the desirability of such regulation in the Netherlands. On the basis of the results of the research, it was decided not to establish such rules.

2. **Horizontal Aspects**

This second part aims at giving an overview of substantive and procedural conditions in which vertical restraints are assessed by national authorities. The questions asked relate, first, to vertical restraints that are deemed to be pro- or anticompetitive, second, to vertical restraints that may be found pro- or anticompetitive and, third, to the assessment of this second category by national authorities.

2.1. **Presumptions**

2.1.1. Vertical Restraints deemed Legal

**Are some vertical restraints deemed to be legal per se? If so, which ones?**

Vertical restraints that fall within the scope of the Block Exemption are legal per se. Outside the scope of the Block Exemption, a selective distribution system that meets the criteria set out in the case-law of the European Court of Justice with respect to selective distribution, is deemed legal per se. Other vertical restraints are not legal per se, although vertical restraints which do not qualify as ‘hardcore restrictions’ are deemed not to have as their object a restriction of competition. Therefore, when assessing such non-hardcore restrictions the NMa investigates whether these may have appreciable restrictions of competition as their effect.

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6 CPB & NMa 2005.
7 Decision of 9 February 2000 in Case 1122 (Breitling watches).
Is this per se rule absolute or modified? If modified, to what extent and under which conditions?

See above.

Are some vertical restraints formerly deemed legal per se now made subject to a rule of reason? If so, which ones?

No, a rule of reason does not exist under Dutch competition law.

2.1.2. Vertical Restraints deemed Illegal

Are some vertical restraints deemed to be illegal per se? If so, which ones?

The approach taken by the NMa is similar (if not identical) to that of the European Commission. Resale price maintenance and market partitioning are therefore in principle deemed illegal per se ('hardcore restrictions').

Is this per se rule absolute or modified? If modified, to what extent and under which conditions?

Maximum or recommended resale prices and a prohibition on active sales in the exclusive territory of other distributors are not deemed illegal per se. Even with respect to vertical restraints that are deemed to restrict competition by their nature, the cartel prohibition does not apply when the parties can demonstrate that the restrictions have no appreciable effect on competition, or that the conditions for the legal exemption are met.

Are some vertical restraints formerly deemed illegal per se now made subject to a rule of reason, or even legal per se? If so, which ones?

The block exemption for the retail sector (exempting limited purchasing obligations and maximum pricing arrangements) suggests that maximum prices and purchasing obligations were deemed illegal per se before the entry into force of the Block Exemption and the Guidelines.

2.2. Proof

2.2.1. Standard of Proof

2.2.1.1. Anticompetitive Effects

What standard of proof of the anticompetitive effects attributed to a vertical restraint is imposed on the undertaking which complains about it before the competent authority? Is the standard of proof the same where this authority is administrative and where it is judicial?

The NMa (as an administrative authority) has a wide discretionary power whether or not to investigate complaints, which does not depend on the
evidence submitted by a complainant. An appeal by an interested third party against an exemption or negative clearance decision must be sufficiently substantiated, failing which the NMa can dismiss the appeal on the single ground that it was not sufficiently substantiated.8

What standard of proof of the anticompetitive effects attributed to a vertical restraint is imposed on the authority competent for investigating and prosecuting it? Is the standard of proof the same where this authority is administrative and where it is judicial?

It should be noted that hardcore restrictions are deemed to violate the cartel prohibition regardless of their effects. As regards the assessment of anticompetitive effects, the NMa has a wide discretionary power and there is no statutory standard of proof to be met by the NMa. The NMa is bound in general to certain general principles of sound administration (algemene beginselen van behoorlijk bestuur), such as the requirements of due care, proper preparation and the obligation to provide proper and consistent grounds for a decision. On appeal, the courts assess whether the NMa has applied the principles of sound administration correctly and whether it has substantiated its decisions so as to make (e.g.) the anticompetitive effects sufficiently plausible (voldoende aannemelijk).

2.2.1.2. Pro-competitive Effects

What standard of proof of the pro-competitive effects attributed to a vertical restraint is imposed on the undertaking author of this vertical restraint? Are potential effects treated differently from actual effects?

No rule of reason exists under the DCA and pro-competitive effects are only taken into account in the assessment whether the conditions for an individual (now the legal) exemption are met. Before the introduction of the legal exemption, an undertaking that requested an individual exemption with the NMa, had to substantiate sufficiently its request (that the conditions for an exemption were met) so as to enable the NMa to carry out the investigation necessary to assess the request.9 A pending proposal to amend the DCA provides that the undertaking invoking the legal exemption of Article 6(3) DCA must prove that the conditions for such exemption are fulfilled. There is no statutory standard of proof to be met by the undertakings, authors of vertical restraints, but the NMa has indicated that ‘parties must make plausible’ (aannemelijk maken) that the conditions for an exemption are met.10

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8 Decision of 20 December 2001 in Case 2110 (Basismedia).
9 District Court Rotterdam, judgment of 16 May 2001 (MEDED 99/2584 – SIMO).
What degree of causal link must the undertaking author of a vertical restraint prove between this vertical restraint and the pro-competitive effect expected from it (direct or indirect; probable or possible)? Are certain types of markets treated differently (emerging markets, innovative markets, etc.)?

In order to benefit from the legal exemption, it must be probable that all conditions for applicability of the legal exemption are met.

2.2.2. Type of Evidence

2.2.2.1. Evidence submitted by the Parties

Is the undertaking author of a vertical restraint allowed to submit any type of evidence? Is the rule different where the competent authority is administrative and where it is judicial?

Undertakings are free to submit any type of evidence to the NMa, and on appeal, to the court.

Is the submission of certain types of evidence, i.e. industrial evidence (internal document of the undertaking or of a trade association) and/or economic evidence (market study, expertise, economic model, etc.) made subject to certain conditions? If so, what are these types of evidence and under which conditions are they admissible?

Submission of evidence is in principle not subject to conditions depending on the type of evidence. The degree in which the NMa (or on appeal, the court), will take such evidence into account in its assessment may vary depending on the type of evidence.

Are third parties allowed to ask to intervene in the proceedings to represent an individual or collective interest? If so, are they granted access to the evidence in the file? Are they allowed to submit their own evidence?

The participation of third parties is only relevant in infringement procedures, as the possibility to request an individual exemption from the NMa no longer exists. Third parties that have an interest ‘of their own’ which is ‘objectively determinable’, ‘current’, ‘personal’, and ‘directly related to the case’ (it appears that only complainants are deemed to qualify as such), have access to the file (with the exception of information deemed confidential) and can submit written and oral statements and supporting documents.
2.2.2.2. Evidence requested by the Authority

What are the main investigative powers enabling the national authorities to complement and evaluate evidence submitted by the parties? Are these powers different where the authority is administrative or judicial?

The NMa has wide powers of investigation, and the General Administrative Law Act (Algemene Wet bestuursrecht) provides for a general duty to cooperate with the NMa in its investigations. The NMa can request (both written and oral) information from relevant market parties (e.g. customers, suppliers, competitors, the authors of the vertical restraint, etc.), visit the premises of such parties and inspect and copy books and records (including digitally stored files). In addition, the NMa may engage third party experts (e.g. IT-experts and/or economists) to assist it in its investigations. On appeal, the court in principle must decide on the basis of the file submitted to it, although it can and does ask questions during oral hearings.

In particular, are they vested with the power and the means to carry out their own inspection? How is this power used in practice?

Yes (see above). The NMa employs officials with investigative power and IT-experts, and has its own detective force. The power to actually carry out unannounced inspections at business premises, is generally used only when investigating hardcore violations of the DCA (e.g. horizontal price cartels). With respect to less serious infringements, the NMa may suffice with written questions and possibly an announced visit.

Are they empowered to order an independent expertise? If so, according to which procedure and under which conditions is the independent expert selected? How is this power used in practice?

Yes. No specific procedure and/or conditions that apply to the selection of an expert have been published.

Are they empowered to consult third parties? How do they use it in practice?

The NMa is empowered to ask written and oral questions to third parties who are under a duty to cooperate. The NMa frequently uses this power in the assessment of cases, by sending questionnaires to relevant market parties.
2.2.3. Substance of Evidence

2.2.3.1. Anticompetitive Effects

How is market power pre-existing to the vertical restraints assessed in practice? In particular, how are countervailing powers taken into account (market power of actual or potential competitors; of resellers; of end-users; barriers to entry; regulatory framework; etc.)?

In the limited cases available to date, the NMa has taken into account (in cases dealing with exclusive dealing arrangements) the market share of the parties involved, the number of competitors and their overall size and market shares (level of market concentration), the market share of the customers and their countervailing power (e.g. evidence that the supplier has not been able to exert pressure on a customer to enter into a contract), the level of product differentiation and the availability of substitutes, the existence or absence of barriers to entry (e.g. as a result of cumulative effects of long term purchasing obligations entered into by the supplier involved and its competitors, alternative distribution methods, customer loyalty etc.), the level of potential competition, excessive prices or competitive pricing (e.g. discounts granted to customers may provide evidence of the competitive circumstances in which the contract was concluded and of the availability of alternatives to the customer), the extent to which the supplier has been able to impose onerous contract conditions upon purchasers, etc.\(^\text{11}\) A high market share may be offset by evidence (on the basis of market activity and development in the past) of actual competition, loss of market share in the past, switching behaviour of customers, the inability to increase prices, market entry by new competitors, etc.\(^\text{12}\)

How is the increase in market power caused by the vertical restraints assessed in practice?

In cases dealing with exclusive dealing arrangements, the NMa has investigated whether these lead (or have led) to foreclosure effects by creating entry barriers (e.g. by looking at actual market entry despite the existence of vertical restraints).\(^\text{13}\) In this investigation, the NMa has taken into account inter alia the duration of the exclusivity, possibilities for the purchaser to terminate the agreement on relatively short notice, the tied market share resulting from the contract involved, the availability of

\(^{11}\) E.g. decision of 28 May 2002 in case 2036 (Heineken), para. 88 and onwards, decision of 1 September 2003 in case 1941 (Waterbedrijf Europort), para. 63 and onwards, and decision of 21 December 2001 in case 757 (Chilly and Basilicum), para. 94 and onwards, decision of 11 August 2000 in case 1405 (Metro), para. 77 and onwards.

\(^{12}\) Case 2036 (Heineken).

\(^{13}\) Case 1405 (Metro), para. 78.
alternative distribution methods to competitors,\textsuperscript{14} and high discounts that cannot be matched by new entrants (in view of significant development costs, short period in which recoupment of investments must take place and the importance of economies of scale).\textsuperscript{15}

**Must market power become superior to a given threshold to be caught (minimum/appreciable power)? If so, how is this threshold measured?**

The NMa has acknowledged that as the market position becomes stronger, appreciable anticompetitive effects become more likely. However, other than the 30% threshold set out in the Block Exemption and the 15% market share in the Commission De Minimis notice, there are no fixed market share thresholds that must be met for an appreciable restriction to exist.

**Are there successive thresholds, the overcoming of which implies treatment under different rules or different tests (substantial power; dominance; monopoly)? If so, how are these threshold measured?**

Referring the Guidelines, the NMa has indicated that an undertaking with a dominant position, can only enter into vertical restraints to the extent that these can be objectively justified, in which event nor the cartel prohibition nor the prohibition on abuse of dominance applies.\textsuperscript{16}

**How are vertical effects measured? In particular, is the allocation of profit within the distribution channel taken into consideration, or left to provisions other than those of competition law (unfair trading practices, etc.)?**

The NMa uses no clear specific test to measure vertical effects. The NMa focuses primarily on horizontal effects. To our knowledge, the NMa has not taken the allocation of profit within the distribution channel specifically into account in the assessment of VR. Allocation of profit is mostly a matter of abuse of a dominant position, or of specific legislation. Recently proposals to enact pricing legislation in reaction to the price war in the food retail sector were rejected.

**How are horizontal effects measured? In particular, what test is used to measure market foreclosure?**

The NMa has acknowledged that any vertical restraint has horizontal effects as it restricts an undertaking in its freedom of action vis-à-vis its competitors. For example: vertical price maintenance with respect to a number of resellers has the same effect as horizontal price fixing between such resellers, as

\textsuperscript{14} E.g. case 2036 (Heineken), case 1941 (Waterbedrijf Eurooport), and cases 1405 (Metro) and 2110 (Basismedia).

\textsuperscript{15} Case 1994 (Astra Zeneva), para. 107.

\textsuperscript{16} Case 2036 (Heineken), para. 84 and Guidelines at para. 141.
differences in efficiency and service level cannot result in differences in price levels.\textsuperscript{17}

Such restrictive effects are increased when a supplier enters into similar agreements with a considerable number of distributors.\textsuperscript{18} No specific test is used, however, to measure market foreclosure. Foreclosure effects resulting from an exclusive purchasing agreement are investigated on the basis of the tied market share resulting from the agreement, the other exclusive agreements entered into by the supplier (tied market share resulting from all similar agreements entered into by supplier), the cumulative effects of similar agreements entered into by competitors (total tied market share on the basis of similar agreements), the level of trade on which the agreement is entered into (market foreclosure is considered less likely with respect to intermediary products), the duration and extent of exclusive purchasing obligations and possibilities to terminate the agreement.\textsuperscript{19}

\textbf{In the case of a network of similar vertical restraints, how is cumulative effect measured?}

The NMa has not published any detailed investigation of cumulative effects in the assessment of a vertical restraint. It is therefore not entirely clear how exactly the NMa measures cumulative effects. In cases where cumulative effects were considered, the NMa has taken into account the share of the market (or alternative distribution outlets) that is covered by similar agreements, the influence such vertical restraints have to access to the market, and the extent to which the vertical restraint at issue and similar vertical restraints entered into by the party involved, contribute to this tied market share.

\textbf{Are other elements taken into account? If so, which ones?}

In the analysis of vertical restraints, the NMa has inter alia taken into account that the market involved is a new dynamic market that is in full growth, the nature of the product involved\textsuperscript{20} and the fact that the legislator intended to stimulate competition on certain markets which is frustrated by the vertical restraint involved.\textsuperscript{21}

\textsuperscript{17} Decision of 14 October 1999 in Case 587 (\textit{Nederlands Uitgeversverbond}), para. 33.
\textsuperscript{18} Case 757 (\textit{Chilly and Basilicum}), para. 19.
\textsuperscript{19} E.g. case 2036 (\textit{Heineken}) and case 1941 (\textit{Waterbedrijf Europoort}).
\textsuperscript{20} Case 1405 (\textit{Metro}), para. 74 and 82 and onwards.
\textsuperscript{21} E.g. case 1994 (\textit{Astra Zeneca}), para. 105.
Is the analysis of vertical mergers taken as a point of comparison?

No. In one case, it has been stated explicitly that theories on analysis of vertical mergers are excluded when assessing agreements under the cartel prohibition.22

2.2.3.2. Pro-competitive Effects

Which positive effects on vertical competition are admissible (solving a problem of double marginalization, of cost, of hold-up, of incentive, of free-riding, of image and/or service; entry on a new market; etc)? Under what conditions?

It is noted that positive effects on competition are only taken into account in the assessment whether the conditions of (now) the legal exemption have been met. In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided that the positive effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Which positive effects on horizontal competition are admissible? Under what conditions?

In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided that the positive effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Is any positive effect on competition admissible? In particular, in which conditions is an effect benefiting to a market other than the relevant production or distribution market, i.e. an upstream market (for instance, the R&D market) or a neighbour market, admissible?

In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided the effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Are positive effects for the economy admissible (environment, regional development, etc)? If so, which ones and under what conditions?

Positive effects on the economy are admissible (under the same conditions as other positive effects on competition), provided they qualify as contributing to improving the production or distribution of goods or to promoting

22 Case 2110 (BasisMedia), para. 47.
technical or economic progress. Positive effects on the environment have previously been deemed to qualify as such.\textsuperscript{23}

Is the analysis of vertical mergers taken as a point of comparison?

No.

2.3. **Evaluation and Control of Evidence**

2.3.1. Evaluation in First Instance

2.3.1.1. Standard of Evaluation

What standard of evaluation of pro- and anticompetitive effects of a vertical restraint is imposed on the authority competent for adjudicating in first instance? Is it required to ascertain possible effects (‘reasonableness’) or likely effects (‘balance of probabilities’)? In the second case, it is a simple (‘likely’) or a qualified (‘very likely’) balance of probabilities?

The NMa has wide discretion in the assessment of the pro- and anticompetitive effects of behaviour of undertakings. In its assessment, the NMa is bound to the general principles of due administration. On appeal the court assesses whether the NMa has in reasonableness been able to come to the conclusion whether or not the conditions for an individual (now legal) exemption are met.\textsuperscript{24} In this assessment, the court has investigated whether (positive or negative) effects have been made sufficiently plausible (voldoende aannemelijk gemaakt).

2.3.1.2. Substance of the Evaluation

Does the evaluation carried out account only for consumer surplus or also for producer surplus? If so, under which conditions?

The evaluation may take account both of both consumer surplus and producer surplus, in the latter case provided that a fair share of the benefit will accrue to consumers.

May other interests be taken into account (public interest, shareholder interest, etc.)? If so, under which conditions?

In principle, only objective economic efficiency improvements are taken into account in the competition assessment of vertical restraints.

\textsuperscript{23} E.g. decision of 10 December 2003 in case 3007 (Stichting Papier Recycling Nederland), para. 74.

\textsuperscript{24} E.g. judgments of the District Court of Rotterdam of 29 september 2001 (Inter Partner Assistance S.A. v NMa) and of 16 May 2001 (Vereniging Koninklijke Nederlandse Maatschappij voor Diergeneeskunde v NMa).
Is the regulatory framework taken into account, in particular in the case of regulated markets? If so, how?

The regulatory framework is taken into account in particular when defining the relevant market, and in determining the scope for competition between market participants. In addition, the NMa has explicitly held that where the legislator has intended to create room for competition or to enhance competition in a market, market participants must refrain from frustrating these intentions through restrictive agreements.25

Are these elements balanced (‘consumer welfare’) according to certain criteria? If so, which ones?

No, they are not.

Are these criteria prioritized (‘structured rule of reason’) or not (‘unstructured rule of reason’)?

No. Under Dutch competition law a rule of reason does not exist. If an agreement appreciably restricts competition, positive effects are taken into account under the assessment whether the conditions for the legal exemption are met.

Has the authority taken the step of formalizing and publishing these criteria, through a document such as guidelines or an opinion? If so, what is the legal value of this document? Is this document updated so as to reflect accumulated experience, in particular with respect to economics? Is it possible to challenge the substance of this document before a superior authority? If so, has it already been the case? With what result?

The NMa has not issued guidelines on the assessment of vertical restraints, but has indicated that it will apply article 6 DCA in accordance with the guidelines and notices issued by the European Commission (including the Guidelines).26 In addition, the NMa has indicated that it will assess the applicability of the legal exemption of article 6(3) DCA in accordance with the European Commission guidelines on this subject.27 The NMa guidelines on cooperation between enterprises28 (which were recently updated, reflecting accumulated experience and court decisions) do not deal with vertical restraints. Guidelines and notices of the NMa are considered to be policy rules (beleidsregels) which cannot be challenged before a court directly, but may be challenged together with a decision in which such guidelines and/or notices are applied.

27 Directeur-generaal 2005.
28 NMa 2005.
2.3.1.3. Conclusion of the Evaluation

In the case of residual doubt as to the balanced effects of a vertical restraint, do the decisional practice and the case-law allow to say if the authority currently prefers to make a ‘type I error’ (over-applying the law: prohibiting a perhaps pro-competitive vertical restraint) or a ‘type II error (under-applying the law: allowing a perhaps anticompetitive vertical restraint)? Is this preference a statistical trend or the result of an explicit choice?

No rule of reason exists, and pro-competitive effects are only taken into account in the assessment whether the conditions for the legal exemption are met. As the parties involved must establish that these conditions are met, this system may be more likely to lead to ‘type I errors’ than ‘type II errors’.

Where the authority concludes that the vertical restraint is, on balance, anticompetitive, is it empowered to suggest, negotiate and/or impose remedies?

The NMa can impose remedies in a sanction procedure in the form of an order to bring an infringement to an end subject to a periodic penalty payment. The Ministry of Economic Affairs is currently investigating whether to include the instrument of commitments as set out in article 9 of Regulation 1/2003 in the amendment of the DCA. Informally the NMa has frequently suggested/negotiated remedies by indicating it would prohibit an agreement in the form as submitted to the NMa if not amended, or by sending a notice indicating the NMa will open a formal procedure if certain behaviour or a certain agreement is not changed (‘negotiated decision making’ as the NMa calls it).

Is it also empowered to test these remedies on the market and/or to monitor their implementation? How are these powers applied in practice? With what results?

The NMa is free to test remedies on the market and to monitor their implementation. There is no general formula as to the specific application of these powers in practice.

2.3.2. Review in Second Instance

What degree of review of the (administrative or judicial) decision of first instance is applied by the authority of second instance (appeal or judicial review)? Is first instance adjudication on the remedy reviewed differently from adjudication on the vertical restraint itself?

The NMa has wide discretion in applying article 6 DCA. In its assessment, the NMa is bound, however, to the general principles of due administration (e.g. the duty of due care, proper preparation and the obligation to provide
proper and consistent grounds for a decision). On appeal the court assesses whether the NMa has in reasonableness been able to come to its conclusion, whether (positive or negative) effects have been sufficiently made plausible (voldoende aanneemelijk gemaakt) and whether the NMa has acted in accordance with the general principles of sound administration.

In practice, does the case-law of the last five years offer examples of confirmation or reversal, in second instance, of new legal or economic theories elaborated in first instance? If so, which ones?

The case law with respect to vertical restraints in the last five years offers no clear examples of confirmation or reversal of new legal or economic theories.

3. **Vertical Aspects**

This third part aims at providing a panorama of the legal treatment of the most current vertical restraints. National rapporteurs are invited, insofar as possible, to answer in a table. An indicative table is attached to the questionnaire.

3.1. **Price-related Vertical Restraints**

What rule is currently applicable to the main types of vertical restraints relating to the level or components of the price (per se illegality; per se legality; rule of reason)?

Resale price maintenance is in principle illegal per se. This is different only if the parties can demonstrate that this restriction has no appreciable effect on competition, or that the conditions for the legal exemption are met. Maximum or recommended resale prices are not deemed illegal per se, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?

No.

Are there exceptions to this test?

Not applicable.

Have significant decisions been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No significant decisions have been taken over the last five years concerning these types of vertical restraints. Worth mentioning, however, is the decision (on objections) of the NMa of 21 December 2001 in Case 757/153.
What were the main factual elements of the cases?

Following a complaint filed with the NMa by a distributor (Chilly/Basilicum) against a resale prohibition in the general conditions of a supplier of clothes (G-Star), the NMa decided that a clause regarding recommended minimum prices constituted an infringement of the cartel prohibition. In this respect, the NMa noted that the wording of the clause was such that the distributors were in practice obliged to apply the recommended minimum prices (unless the supplier granted prior approval to deviate from these prices) and that therefore the recommended minimum prices in practice were fixed resale prices. According to the NMa, the clause was therefore restrictive of competition by its very nature, in which case it has to be assumed that competition is restricted appreciably. The same applied to a clause in subsequent general conditions, according to which the distributors were advised to ask G-Star’s permission in case the recommended resale prices were not applied. According to the NMa, such clause had as its object to verify if the recommended prices were observed by the distributors, at least to have prior control or influence on the price policy of the distributors. The decision of the NMa was upheld by the District Court of Rotterdam in its judgment of 13 February 2004.

Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?

No.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No.

Has the implementation of these remedies been monitored and assessed? With what results?

Not applicable.

3.2. Non-price Non-territorial Vertical Restraints

What rule is currently applicable to the main types of vertical restraints relating to quantity, quality, variety, services, clients, etc. (per se illegality; per se legality; rule of reason)?

Non-price non-territorial vertical restraints that appreciably restrict competition are illegal unless they fall within the scope of the Block Exemption or meet the criteria of article 6(3) DCR. However, most non-price
and non-territorial vertical restraints (with the exception of customer restrictions and other restrictions mentioned in article 4 of the Block Exemption) are not deemed to have a restriction of competition as their object.\(^{29}\) These vertical restraints only infringe the cartel prohibition if these can be demonstrated to have an appreciable restriction of competition as their effect. To the extent that the thresholds set out in the De Minimis Notice\(^{30}\) are not exceeded, an appreciable effect is deemed not to exist and such vertical restraints are legal.

**Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?**

No.

**Are there exceptions to this test?**

Not applicable.

**Have significant decisions been taken over the last five years concerning these types of VR? If so, which ones?**

Decisions worth mentioning are the decision of the NMa of 28 May 2002 in Case 2036 (Heineken), and the decision of the NMa of 9 July 2002 in case 1994 (Astra Zeneca).

**What were the main factual elements of the cases?**

*Heineken*

Heineken notified the standard agreements it entered into with pubs and other licensed outlets (‘on premises outlets’) to the NMa requesting (to the extent necessary) an individual exemption. The agreements provided for exclusive purchasing obligations for the outlets which Heineken gave financial and commercial support to. Heineken’s market share in the Netherlands with respect to beer sold through on premises outlets was 50-60\% and the Block Exemption therefore did not apply. The exclusive purchasing obligations regarded only draught pilsner, and could be terminated by the purchaser at any time observing two months notice and subject to the repayment of any outstanding loans.

The NMa conducted a detailed investigation as to whether the agreements resulted in market foreclosure (at the level of the market as a whole). The NMa concluded that this was not the case and therefore the

\(^{29}\) E.g. case 2036 (Heineken) para. 98 (regarding exclusive purchasing obligations), case 1405 (BasisMedia) para. 67 (regarding exclusive right to distribute products), and case 1437 (Monuta) para. 45 (regarding exclusive right to provide services).

\(^{30}\) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C-368, of 22 December 2001.
Heineken agreements did not result in a restriction of competition. First of all, the NMa established that 50% of the on premises outlets were not tied to a specific brewer and therefore there were plenty of alternative outlets available for competing brewers. Secondly, competing brewers were not foreclosed from supplying the outlets that were tied to Heineken. Although the agreements were entered into for indefinite duration, the outlets could terminate the exclusivity at any time (with two months notice), while evidence showed that in the past significant switching behaviour took place. For Heineken, therefore, there was no ‘safe period’ during which its purchasers could not switch to competing suppliers. In addition, the exclusivity only applied to draught pilsner and not to other draught beers and bottled beers. In addition there were no practical impediments to terminating the agreement (e.g. fines or other financial barriers, cellar tanks owned or financed by Heineken could easily be used for other brands and therefore refinanced by a new supplier). The NMa also took into account that Heineken could not terminate the agreements unilaterally at any time, and that Heineken undertook to notify the outlets annually of their possibility to terminate their agreements with Heineken.

AstraZeneca

AstraZeneca notified the agreements it entered into with in-hospital pharmacists and public pharmacists to the NMa requesting an exemption. The agreements provided (inter alia) that the pharmacists were under the obligation to sell medicines that AstraZeneca supplied with special discounts, only to patients in hospitals or nursing homes (‘intramural patients’). Such medicines could therefore, not be sold to patients outside such institutions or to other pharmacists. AstraZeneca argued that this prohibition was necessary to maintain the discounts granted to intramural patients. In its assessment the NMa took into account that a recent amendment of the regulatory framework with respect to sales of medicines, intended to create competition between hospitals and public pharmacists in the supply of medicines to extramural patients. The prohibition in the agreement resulted in an inability for intramural purchasers to sell the medicines against lower prices in the extramural segment and resulted in preservation of the different segments, contrary to the intention of Government. The NMa held that the contractual prohibition was a market partitioning arrangement which had a restriction of competition as its object. The prohibition prevented increased competition from in-hospital pharmacists on the extramural segment which could lead to increased efficiency, quality and lower prices of pharmacists outside hospitals. In addition, the prohibition resulted in increased (already significant) barriers to entry into the intramural segment, as new entrants could not match the extremely high discounts (up to 80%) on the intramural segment. Impossibility to enter the intramural segment would have the result that actual market entry becomes very difficult.
Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?

No. The Heineken and AstraZeneca decisions apply the principles set out in the case law of the European Court of Justice and the Commission and the Guidelines. Nevertheless, the Heineken decision does clarify that exclusivity arrangements entered into by undertaking with high market shares do not necessarily restrict competition.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?

In the Heineken case discussed above, Heineken amended the notified agreements following comments by the NMa after a first assessment of the notification. The amendments provided that exclusivity was limited to draught pilsner, and Heineken undertook to notify its purchasers annually of their right to terminate the agreements. Although technically these amendments cannot be qualified as remedies, it is likely that these amendments are the result of pressure from the NMa.

Has the implementation of these remedies been monitored and assessed? With what results?

It is not clear if the NMa has monitored whether Heineken applies the amended agreements in practice.

3.3. **Territorial Vertical Restraints**

What rule is currently applicable to the main types of territorial vertical restraints (per se illegality; per se legality; rule of reason)?

Territorial vertical restraints are illegal unless they fall within the scope of the Block Exemption or meet the criteria of article 6(3) DCR.

Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?

No.

Are there exceptions to this test?

Not applicable.

Have significant decisions been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No.
What were the main factual elements of the cases?
Not applicable.

Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?
Not applicable.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?
No.

Has the implementation of these remedies been monitored and assessed? With what results?
Not applicable.
References

CPB & NMa 2005

Directeur-generaal 2005

European Commission 2005

NMa 2004

NMa 2005
1. Introduction

In 2004, the Dutch spent around € 1.5 billion on purchasing goods through the internet. Compared with the year 2003, this means an increase of 30%. Almost 4 million Dutch made online purchases in 2004. On average, their purchases were an amount of € 424, € 60 more when compared to the year 2003. This rise is caused by an increase in the sale of travel arrangements, flight tickets and insurance via the internet.1

In this contribution, we describe the legal framework that governs online purchases by consumers. This legal framework mainly protects the interests of the consumer.

2. The Legal Framework

In general, the purchase of goods is governed by the Dutch Civil Code (‘DCC’). The online purchase of goods is governed by the same rules of law as those governing the traditional purchase of goods. The DCC provides for various mandatory rules which govern consumer purchases in particular.

Online purchases are characterized by the ‘distance’ between buyer and seller. Buyer and seller do not meet each other and the buyer does not have the opportunity to inspect the goods prior to the conclusion of a purchase agreement. For distance purchases a specific set of rules is laid down in Section 9A of Book 7, DCC. This section basically implements the EC Directive on the protection of consumers in respect of distance contracts (97/7/EC).2

The aforementioned Section 9A gives the online consumer various rights which he does not have in relation to a traditional purchase. Likewise, the seller has various obligations which he does not have outside the scope of a distance sale.

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1 Thuiswinkel Markt Monitor 2004, research carried out by Blauw Research.
2 Section IX a was inserted pursuant to the Distance Contract Act (Wet verkoop op afstand) of 21 December, 2000 (Staatsblad 2000, 617).
The most important right granted to online consumers is a cancellation right, i.e. the right to rescind online contracts for convenience. Within seven working days after the receipt of the goods purchased through the internet, the consumer may cancel the online contract. If the offering party has not provided the consumer with certain information, the period within which the cancellation right can be exercised is extended to three months. In the event of cancellation the consumer is only liable for the cost of returning the goods. The offering party must return all payments made by the consumer.

The cancellation right does not apply to all online purchases of consumer products. No right of cancellation for convenience is granted with respect to, amongst others, audio and music CD’s and computer programs if the seal has been broken, newspapers and perishable products. Furthermore, certain types of purchases are entirely excluded from this specific consumer protection. For instance, a consumer who purchased a product through an online auction cannot invoke this protection.

The consumer who purchases services online has, in principle, the same protection as the purchaser of goods, albeit that certain services such as financial services are excluded from this protection (Section 7:46 e DCC).

The electronic offering of financial services is to be given its own legal framework in the Financial Services Act, which implements the EC Directive concerning the distance marketing of consumer financial services (2002/65/EC). This new Act is described further below. First, we shall give a further analysis of the protection offered in relation to online consumer purchases.

3. The Obligation to provide Information

Prior to the conclusion of an online contract, the offering party should provide the purchaser with mandatory information (Section 7:46 c DCC):

a) the identity and in the event a pre-payment is prescribed, the address of the seller;

b) the main characteristics of the goods;

c) the price, inclusive of all taxes;

d) if applicable, the costs of delivery;

e) the manner of payment, delivery and execution of the distance purchase;

f) information on the possibility to rescind agreements;

g) information on the costs of communication, if these deviate from the standard costs;

h) the term for the acceptance of the offer or the term during which the price will remain valid;

i) in the event of continued performance contract – the minimum term of the agreement.
At the conclusion of online purchase or timely thereafter, the seller has to provide certain information, if and when this information has not been provided prior to the conclusion of the purchase agreement. The information that should be provided in writing – an e-mail would suffice – concerns:

a) the information mentioned above which should have been provided prior to the conclusion of the online contract;
b) the requirements for exercising the right to rescind agreements;
c) the address of seller’s office where the buyer can file a complaint;
d) to the extent applicable, information about the guarantee and the services which have been offered in relation to the distance purchase;
e) the requirements for termination if the distance purchase relates to a period of more than a year or an indefinite period.

If the online seller does not provide this information, the consumer can demand that this information be provided. If the consumer incurs damages as a result of a lack of information, the seller should compensate the buyer. The most far-reaching consequence of the seller not complying with his obligation to provide the mandatory information, is the extension of the cancellation right to three months.

4. The Cancellation Right

As mentioned above, the online buyer has a term of seven working days to rescind the purchase contract. The parties can agree to a longer period. This term of seven days is mandatory as far as the protection of the consumer is concerned, the parties cannot agree to a shorter period.

The period of seven working days starts the day following the receipt of the goods. If the information mentioned above has not been provided to the purchaser at the execution of the distance purchase or timely thereafter, the aforementioned term is extended to three months.

If during the three months period, however, the mandatory information has been provided, the term of seven working days starts on the day following the day on which the information was provided.

The cancellation right of rescission does not apply to certain goods. These goods are described as:

a) goods which have been made according to specifications of the buyer;
b) goods which clearly have a personal character;
c) goods which cannot be returned in view of their nature;
d) goods which can perish or go out of date quickly;
e) audio, video and computer programs if the buyer has breached the seal of the information carrier;
f) newspapers and magazines;
g) goods with a price which is linked to fluctuations of the financial market which cannot be influenced by the seller.

5. Legal Effect of the Cancellation Right

The cancellation right should be exercised by written statement. An e-mail suffices for this purpose. The statement must be received by the seller (Section 3:37 DCC) within seven working days. The legal effect of exercising the cancellation right is rescission of the contract.

In principle, rescission of an online contract has the same legal consequences as rescission of a contract on the basis of a breach of a contractual obligation. The only difference is that rescission of an online contract – in the absence of a breach – does not entitle one of the parties to damages.

Following a rescission of a contract and thus also an online purchase contract, the parties have to undo the performance of the agreement. In relation to online purchase contracts which are rescinded – in the absence of a breach – specific rules apply:

a) the seller may not charge any costs to the buyer, apart from the cost of resending the goods;

b) the purchase price should be paid back to the buyer without incurring costs to him;

c) repayment must take place as soon as possible, but ultimately within thirty days following the rescission.

A rescission of a contract has no retroactive effect. This means that the legal basis for the obligations that were carried out by the parties remains in place. Accordingly, the parties do not have an action based on undue payment (Section 6:203 DCC). The initial obligations of the parties are replaced by an obligation to undo the obligations which were already carried out by the parties.

In the event of rescission, the buyer has the legal obligation to return the purchased product in the same condition as it was received. If the buyer cannot return the product in such same condition, he has the legal obligation to compensate the seller for the damages, provided that the shortcoming can be attributed to him (Section 6:74 DCC). In general, a shortcoming cannot be attributed to a party, if the shortcoming cannot be imputed to his fault, or cannot be attributed to him according to statutory provision, legal act or according to generally accepted standards. Here it is important that the risk of the goods is transferred to the buyer upon the delivery of the goods to him (Section 7:10 DCC). Whether the ownership of the goods is transferred at the same time, is irrelevant. The physical delivery is decisive for the transfer of the risk. In view of this transfer of risk, we are of the opinion that the buyer should, in principle, always compensate the seller for the damages which he
incurs if the product is not returned in its original state. This also applies if the goods are damaged as a result of an event beyond the control of the buyer.

6. Limitations to the Cancellation Right

A question which has been debated in the Netherlands is where the cancellation of the consumer finds its limits. The cancellation right can be limited by the rules of reasonableness and fairness. Also, the principle which prohibits the abuse of rights may play a role here.

In short, the rules of reasonableness and fairness determine that a statutory or contractual provision is not applicable between the parties if and when this would be unacceptable in the given circumstances according to criteria of reasonableness and fairness (Sections 6:2 and 248 DCC). These provisions determine when a party will not be able to invoke a statutory or contractual provision. They also apply to the rescission of an online contract. The Dutch Supreme Court has ruled that the conclusion that a party cannot invoke a statutory provision should not be reached easily. A high standard applies. A mere conflict with the principle of reasonableness and fairness is not sufficient to justify this sanction. The fact that invoking a contractual or statutory provision is unreasonable, is not sufficient to exclude application of this provision. A party is allowed to act unreasonably. Acting in violation of the principle of reasonableness and fairness should be considered ‘unacceptable’ before the conclusion can be reached that a statutory or contractual provision will not apply.

A legal right cannot be exercised if it is abused (Section 3:13 DCC). A right is abused if it is solely used to harm another party. There can also be abuse (i) if a right is used for a purpose other than the purpose for which the right was granted or (ii) if in all reasonableness the right cannot be exercised in view of the disproportionate relationship between the interest that is served by the exercising of the right and the interest which would be harmed.

Can a consumer, for instance, exercise his cancellation right if the purchased product has been used? In general, the relevant statutory provisions do not state that a buyer cannot exercise his cancellation right if a purchased product has been used. A hypothetical case discussed in Dutch literature concerns a consumer who buys a tuxedo through the internet. The consumer wears the tuxedo for one evening and returns it the next day. The tuxedo smells of cigars. Can the consumer still exercise this cancellation right?

Another example discussed in Dutch literature concerns a consumer who bought a walkman through the internet. The walkman is to the

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4 Hijma 2004, p. 83.
consumer’s liking and he starts to use it. The next day, the consumer accidentally drops the walkman on the floor. The walkman is no longer working and damaged. The consumer then remembers its right to rescind the agreement and returns the damaged walkman.5

Here there are two apposing views. One view is that in these cases the consumer can exercise his cancellation right, but that he has the obligation to compensate the seller for damages. In this view there is no need to apply the principle of abuse of right or the principles of reasonableness and fairness which could prevent a party from exercising a legal right.

A problem with the application of these principles is that they require an insight into the reasons for rescission of the contract. The applicable statutory provisions clearly state, however, that the buyer can rescind the agreement without giving any reasons. This means that the consumer can rescind the agreement for any reason whatsoever.

Nevertheless, a more limited interpretation of the cancellation right is possible. The opposing view6 holds that the consumer just does not have to state his reasons for cancellation. This does not necessarily mean that he can exercise his cancellation right at all times. In this view, it is accepted that, under circumstances, the buyer will have to explain why he is to rescind the online contract. In this view, the buyer who purchased the tuxedo to wear it for only one day with the intention of returning it the next, would abuse his legal right or violate the rules of reasonableness and fairness. Where the seller invokes these principals the buyer must give his reasons for cancellation. A similar conclusion is reached with respect to the walkman which was dropped on the floor and was subsequently returned to the seller.

In our view, these principles should be applied reluctantly. Accordingly, we do not see a reason in the examples given above that the consumer should be prevented from exercising his cancellation right, keeping in mind the wide protection that is given him. A satisfactory result can be reached by applying the rules governing rescission of a contract.

The relevant rule is that the consumer has to return the purchased product in its original state. If he cannot return the product in its original state, he has the obligation to compensate the seller for the damages. As in general the value of used goods is lower than the value of unused goods, the buyer has to compensate the seller for the difference. If the product has been used, the seller will not be able to sell it to another party as a new product. The related economic loss should be for the account of the buyer.

If a product which has been used cannot be distinguished from an unused produced, the buyer will be able to return the product in the original state, despite its use. If the tuxedo still looks brand new after it has been worn for some time, the interests of the seller are not harmed.

5 Hijma 2004, p. 78.
The interests of the seller are sufficiently protected by the obligation of the buyer to compensate his damages. In the example of the walkman, the damages will probably equal the cost price of the walkman for the seller.

There is also a practical issue to be considered. The intentions of the buyer are hard to prove. It seems more in line with the statutory rules governing the cancellation right to disregard the intention of the buyer entirely. The matter could then be brought back to establishing whether or not the purchased product is still in its original condition. If not, the buyer should compensate the seller. After all, the goods are for the risk and account of the buyer as soon as he has received them – unless the parties have agreed otherwise.

This seems a straightforward approach but in practice, complications can arise. If the seller seeks compensation from the buyer he could have the burden of proof that the product is no longer in its original state, i.e. in the state in which it was delivered to the consumer. If a damaged product is returned, it will be difficult to establish whether the damage occurred prior or after the delivery to the buyer.

7. **Application of the Cancellation Right to other Contracts**

It should be noted that the cancellation right for distance contracts are not limited to contracts concluded through the internet. Contracts concluded by telephone or telefax can also be regarded as distance contracts. Moreover, the scope of the cancellation right is broader than distance purchases. It also applies to contracts for the delivery of services, lease agreements or transportation agreements, if these are concluded at a distance.

The principles discussed above, also apply to the cancellation, i.e. rescission, of these types of contracts.

8. **International Dimensions**

One cannot deviate by contract from the rules set out above to the detriment of the consumer, as these are mandatory provisions of Dutch law. Of special note is that a consumer that has its residence in the Netherlands can also rely on these rules if the online contract is not governed by Dutch law. The same applies to the residents of other EU Member States. Accordingly, a supplier based in the US can be faced with European residents who rely upon a cancellation of an online contract for convenience. If the US supplier has not fulfilled its information requirements – possibly because he was not aware of them – the consumer can cancel the agreement within three months after the goods were delivered to the consumer in Europe.
9. **Alternative Dispute Resolution**

In most cases it will not be economical for an individual consumer to bring legal action against a seller who does not comply with his obligations. The legal costs would be prohibitive. In this area, alternative dispute resolution ('ADR') may offer a solution. This obviously only in cases where the seller has agreed to ADR.

9.1. **Home-shopping Association**

A majority of the shops in the Netherlands that sell on the internet are connected to the Home-shopping Association (*Nederlandse Vereniging Thuiswinkel Organisatie*). This Association introduced a quality mark in the year 2001: the Home-shopping quality mark. This mark is supported by the Dutch Consumers Association. To use the mark, the party must become a member of the Home-shopping Association. The membership is meant for Dutch companies that realize part of their turnover through sales via the internet, catalogues, mail etc. to consumers and which, therefore, fall under the relevant laws and regulations. Currently, the Association has more than 250 members and is a rapidly growing trade association in the Netherlands. With this quality mark, the member companies make a commitment to the consumers that they conform to the applicable rules and regulations and conform to the code of conduct of the Association. The member companies have agreed to ADR and should respect the outcome of the resolution given by the Home-shopping Dispute Resolution Committee.

In 2004, the Dutch Consumers Association investigated 300 home shopping internet sellers to assess whether they abide by the rules concerning distance contracts. Of the researched internet sellers, 37 (12%) were a member of the Home-shopping Association. The overall outcome of the research was disappointing, but it showed that all or most members of the Home-shopping Association did abide by the rules.

The Home-shopping Association has its own Dispute Resolution Committee, falling under the Dispute Resolution Committees Office in The Hague. If a consumer has a problem with an online purchase, he should turn to the Dispute Resolution Committee of the trade association to which the (online) shop is connected. The decision of the committee leads to a binding third-party ruling. The fee differs from committee to committee but never exceeds €100. The Home-shopping Dispute Resolution Committee fee is only €25, which is paid while submitting the complaint and only when the committee has decided that the case is likely to succeed. If the applicant wins the case, the offering party must pay the fee to the applicant.

A few statistics of the Home-shopping Committee: in 2004, a total of 114 complaints where submitted. In the same year, 16 decisions were given by

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7 See the website: <http://www.geschillencommissie.nl>.
the committee, 14 of which were submitted the previous year. The major part of the complaints could not be treated, because the consumer did not comply with the formal requirements. Furthermore, many of the complaints filed where settled during the procedure. The money at stake amounted on average to € 1.977.

9.2. Examples of Cases of the Home-shopping Committee

Below we describe some cases which were handled by the Home-shopping committee.

In one case, a consumer bought a battery on the internet, but did not read the advertisement properly, as a result of which, he bought the wrong battery for his notebook. The consumer wanted to return the battery, but the offering party refused. The consumer turned to the Home-shopping committee and demanded rescission of the agreement. The offering party claimed that the product had been especially ordered for the buyer and that the buyer had already opened the packaging, as a result of which the battery had become unsaleable. Furthermore, the offering party referred to its general terms and conditions. The committee determined that the question in this case was whether the consumer has the possibility to exercise his cancellation right without giving reasons. The Committee decided that the consumer could exercise his right, despite the fact that the packaging had been removed. If the general terms and conditions of the offering party restrict the consumer for that matter, they are legally non-binding. The seller had to accept the battery back and refund the money to the consumer.

In another case, a consumer responded to an online advertisement and concluded an online contract via e-mail. He bought two samples of an all-in-one device that prints, scans and copies. The price was € 65. The offering party confirmed the purchase and gave instructions on how to download the invoice. The consumer paid € 130. A few days later, the offering party informed the consumer that there had been a mistake: the correct price per device was € 259. He notified the consumer and let him chose either to pay the remaining amount and have the products delivered or to cancel the contract. The consumer refused both. He was of the opinion that he had a valid purchase agreement, which had even been confirmed by the offering party. The offering party claimed that, according to its general terms, the quotation was always made under reservation of errors. He claimed that the incorrect price was due to a conversion error, which occurred when converting guilders into euros. Furthermore, he stated that before the order was carried out, the consumer was notified about the error in the price and was given the choice, either to buy and pay the remaining amount or to cancel. The order was not confirmed in writing and therefore an agreement was not concluded. The Committee decided that the offering party had sent an invoice to the consumer, which can be considered as a confirmation of the order. The fact that the billing was automatic was for the account of the
offering party. This, however, did not mean that the consumer had the right to order at the price mentioned in the offer. This would amount to a violation of the principles of reasonableness and fairness, according to the Committee. When comparing prices, it appeared to the Committee that the cheapest offer for the same product was € 310. Because there was such a big difference in price, the consumer could have known that the price mentioned in the offer was incorrect. It would not be fair to allow the consumer to buy the products for the amount of € 130 each. The Committee decided that the consumer had the right to buy the product for the correct price, € 259 each. On the other hand the Committee found the offering party to blame that the consumer had been, for a considerable period of time, under the impression that he had encountered a great bargain. Accordingly, the offering party should compensate the consumer for the postage and telephone costs, amounting to € 45.

In the last case we mention, a consumer concluded an online contract for the purchase of a laptop. A day after conclusion, the consumer notified the offering party that he would like to cancel the agreement within seven days after receiving the product. Three days later, the consumer returned the laptop, but did not receive his money back from the offering party. The offering party claimed that the consumer cannot rescind the agreement, because he had already turned the laptop on. The Committee was of a different opinion. The consumer had the right to terminate the agreement within seven working days. The offering party should refund the purchase sum within 30 days. The Committee took the view that the cancellation right was granted to the consumer for the reason that it is impossible for the consumer to know everything about the product before having bought and received the product. Hence, the consumer is entitled to a reasonable time for reflection. The consumer must, however, take into account the interests of the offering party and do no more than necessary to see whether the product is usable for the intended purpose. By turning on the laptop, the consumer stayed within these limits and, therefore, maintained the right to cancel the online contract. The offering party had to refund the purchase sum of € 1,504.16 to the consumer.

10. Electronic Signature

An important issue regarding the enforcement of online contracts, is proof. The authenticity and, therefore, the reliability of electronic documents and messages may be difficult to establish as they can be tampered with. Under Dutch law, electronic documents and messages can, in general, be used as evidence. The fact that electronic documents can be used as evidence does not necessarily mean that they are of great evidential value, as the courts are free in their assessment of evidence. The ability to prove the authenticity of the document depends to a large extent on the reliability of the techniques used. The use of the international safety protocol Secure Electronic
Transactions (SET) or the use of Trusted Third Parties, will certainly increase the evidential value of electronic documents.

Many of the uncertainties about proof of electronic transactions can be overcome by using electronic signatures. In legal transactions, an electronic signature that meets certain reliability requirements is assumed to have the same status as a handwritten signature on paper.

Electronic signatures can be used to secure an online transaction. Currently, electronic signatures do not play an important role with regard to the conclusion of online contracts by consumers, although this will probably change in the future.

In 2003, the Dutch Government finally implemented the Directive on a Community framework for electronic signatures (99/93/EC) in the Dutch Electronic Signature Act.8 This Act added a section to the Dutch Civil Code (Section 3:15a and further DCC). The most important rule is that if an electronic signature meets certain reliability requirements, it can be considered an alternative for a handwritten signature. The technical method of authentication (identification of the sender) as such is not prescribed. The Act distinguishes between two electronic signatures: the regular signature and the advanced signature. The most reliable is the advanced electronic signature, i.e. an electronic signature that (a) is uniquely linked to the signatory; (b) is capable of identifying the signatory; (c) is created using resources that only the signatory can maintain under his sole control; and (d) is linked to the data to which it relates in such way that any subsequent change of the data is detectable. Furthermore, it should be based on a qualified certificate and generated by a secure-signature-creation device. Under Dutch law, an electronic signature can be used as evidence. In practice, an advanced electronic signature more or less offers the same level of proof as a handwritten signature. If however, a court determines that the method of authentication that was being used was sufficiently reliable in the given circumstances, a non-advanced electronic signature could also offer the same proof as an advanced electronic signature.

11. Fraud with Payment Cards

Consumers who purchase products online often pay by credit or debit cards. Section 7:46 g DCC protects the consumer against the fraudulent use of his credit card and debit card within the scope of distance transactions. If the credit or debit card of a consumer has been fraudulently used, he has no obligation to pay the amounts charged to him as a result of the fraudulent use, provided the fraudulent use took place in the scope of a distance purchase. This is only different if and when the fraudulent use is the result of a circumstance which can be attributed to the consumer. The consumer

8 Dutch Electronic Signature Act (Wet Electronische handtekeningen) of 8 May 2003 (Staatsblad 2003, 199).
should take all reasonable measures to maintain the security of his payment cards. If a consumer does not keep a pin-code secret, the use thereof by third parties could be attributed to him. The consumer also has an obligation to report the loss or theft of his card as soon as possible. Violation of this obligation could lead to the conclusion that the fraudulent use should be attributed to the consumer.

The consumer will, in general, not know whether his card has been used fraudulently in a distance purchase. If he does not recognise a payment as a payment authorised by him, he could ask his bank or credit card company to specify the transaction. The consumer could also ask his bank or credit card company to provide the proof that he authorised the transaction. If such proof cannot be provided, the consumer should be able to rely on the protection against fraudulent use of his credit or debit card.

12. Financial Services

The EC Directive concerning the distance marketing of consumer financial services (2002/65/EC) has not yet been implemented in the Netherlands. The proposal for a Financial Services Act is still pending, and the act is expected to enter into force on 1 January 2006. The submitted proposal has been published. The Financial Services Act specifies the responsibilities of financial service providers with regard to the protection of consumers and provides for rules concerning financial services in general. The Authority Financial Markets (AFM) is charged with supervision of compliance with the Financial Services Act. The Act covers intermediaries as well as providers of financial services, such as insurance companies. The Act deals with both online transactions and traditional transactions. Here also the consumer who concludes the transaction online or at a distance is offered more protection. Also in this context, the offering party has a mandatory obligation to provide certain information to the consumer.

Article 40 of the Act gives the consumer a cancellation right. The consumer has the right to rescind the contract within fourteen calendar days from the day of its conclusion. If the mandatory information was not provided, this term starts on the day the information was provided to the consumer. For a life insurance contract, the term during which the cancellation right can be exercised is thirty calendar days. Here also, the term is extended if the mandatory information has not been provided.

In the case of linked contracts, rescission of the online contract also implies rescission of the linked contracts.

Article 41 of the Act provides for the consequences of rescission. In the case of rescission of the online contract, the service provider will be able to demand compensation for the financial product he delivered prior to rescission, provided he has informed the consumer beforehand about this compensation. However, the financial service provider may only start executing the contract after having been given permission by the consumer to
do so. This permission can be given separate from the contract or it can be laid down in the contract. If the consumer did not give the provider permission to deliver the service immediately following the conclusion of the contract, he cannot be required to pay compensation to the service provider.

Worthy of note is that the rules on the cancellation right related to financial services differ somewhat from the rules we discussed above in relation to purchase contracts for goods and other services. For example, with respect to the cancellation of a financial services contract it is explicitly stated that the consumer can exercise his cancellation right by sending a statement to that effect to the provider within the specified term. The statement of the consumer does not have to reach the provider within that term.
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1. **Exclusive Rights**

1.1. According to Article 13a of the Dutch Copyright Act (‘DCA’) temporary reproductions fall outside the scope of the reproduction right. Although Article 13A DCA is based on Article 5.1 of the Directive 2001/29/EG (hereafter ‘Directive’), it has a different taxonomy. Temporary reproductions are not part of the exclusive right as an exemption or limitation to the reproduction right, but fall outside the scope of this right.

1.2. The DCA provides the right to make works available through digital networks on the basis of an interpretation of Article 12 DCA (the general right to communicate the work to the public) and not through an explicit provision. The Law on Neighbouring Rights (‘LNR’) of the performing artists, phonogram producers, film producers and broadcasting organisations has included an explicit definition of communication to the public through digital networks in accordance with Article 3 of the Directive.

2. **Limitations and Exceptions**

2.1. In the context of the implementation of the Directive the Dutch legislator amended to a greater and lesser extent most of the existing limitations of the DCA and added a few new limitations. Furthermore, the limitations have been worded in a technology-neutral way.

2.2. The limitation of reproduction by the press on current topics (Art. 15 DCA) has been amended. This exception is now worded in a technology-neutral
way in order to include electronic reproduction. The provision of access to copyrighted works forming part of the collections of public libraries, museums and archives for the purpose of research or private study (Art. 15h DCA) is included as a new limitation. The exception concerning reproduction or publication for the sole purpose of illustration for teaching or scientific research (Art. 16 DCA) has been amended. This exception is now also applicable to digital use. Digital reproduction for private use (Art. 16c DCA) and digital reproduction for preservation purposes made by publicly accessible libraries, museums or archives (Art. 16n DCA) are included as new limitations. Ephemeral recordings by broadcasting organisations by their own means and for their own broadcasts and the preservation of recordings with an exceptional documentary character in official archives (Art. 17b DCA) have been amended along the lines of the wording of the Directive.

2.3.

Analogue reproduction for private use (Art. 16b DCA) and digital reproduction for private use (Art. 16c DCA) are subject to different conditions and restrictions. The main differences are that (a) digital reproductions for private use are subject to fair compensation while analogue reproductions are not (yet) and (b) reproducing on the instruction of third parties for their private use is allowed for analogue reproductions but not for digital reproductions. Furthermore, the DCA sets specific restrictions on the analogue reproductions of writings on paper, including musical scores and parts. Only a small portion of these works may be reproduced, except in the case of works of which, in all probability, no new copies are made available to third parties for payment of any kind or short articles, news items or other texts which have appeared in a daily or weekly newspaper or other periodical.

3.  Relation between Limitations and Contracts

3.1.

Under Dutch law it is in principle legally possible to extend the copyright protection by rendering the limitations of the DCA inoperative by contractual provisions. However, in a certain case testing against the principles of freedom of information and freedom of competition could lead to a denial of a claim to such contractual provisions.
4. Technical Measures and Rights Management Information

4.1.

Article 29a DCA implements Article 6 of the Directive. Those who circumvent effective technological measures and know or should reasonably know that they are pursuing such an objective are acting unlawfully. Under Dutch law those who provide services or manufacture, import, distribute, sell, rent, advertise for sale or rental, or possess for commercial purposes devices, products or components which (a) are promoted, advertised, or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of technological measures, are acting unlawfully.

The Dutch legislator has explicitly chosen for civil sanctions and not for criminal sanctions: an injunction (subject to a penalty upon default), damages, seizure, claim and destruction of technologies, devices, products or components in the case of a breach of the technical measures.

4.2.

Article 29b DCA implements Article 7 of the Directive. Those who (a) knowingly and without authority remove or alter electronic rights-management information or (b) distribute, import for distribution, broadcast, communicate or make available to the public works for which electronic rights-management information has been removed or altered without authority are acting unlawfully, provided such persons know or have reasonable grounds to know that by doing so they are inducing, enabling, facilitating, or concealing a copyright infringement.

The DCA only provides for civil sanctions and not for criminal sanctions in the case of a breach of electronic rights-management information provisions.

4.3.

Article 29a (4) DCA provides for a regulation that stipulates that by means of an order in council the allowance of technical protection can be limited if this protection impairs the meaning or rationale of the limitations for (a) people with a disability, (b) educational purposes, (c) private use, (d) reproductions on paper or any similar medium, (e) reproduction for preserving purposes, (f) ephemeral recordings by broadcasting organisations and (g) use in administrative and judicial proceedings. According to this regulation right holders can be obliged to ensure that, in spite of the technical protection, users are provided with the necessary means in order to benefit from the
limitations, provided, however, that such users have legal access to the protected material. Furthermore, this regulation does not apply to the provision of interactive on-demand services governed by contractual arrangements.

To our knowledge there have not yet been any agreements, court cases or factual problems in this respect.

4.4.

The DCA does not take into account the extent to which technical measures preventing private reproduction are in fact employed in respect of the remuneration for private reproduction. Up to now the Dutch legislator has left this issue to the interested parties in the market. The regulation on remuneration for private use makes a distinction between the DVD+R/RW and DVD-R/RW with regard to the remuneration for private reproduction. Because the DVD+R/RW offers the copyright holders more possibilities for technical protection of their works, the remuneration for this information carrier is lower compared to the remuneration for DVD-R/RW.1

5. Interpretation of Licensing Contracts concluded before the Digital Age

5.1.

Licensing contracts concluded at a time when internet uses were not yet known are interpreted in a restricted way. According to Dutch case law the author’s permission for the exploitation of copyrights is limited to uses that were anticipated at the moment when such permission was given. This was first decided in a case between a Dutch newspaper and freelance journalists. In this case a Dutch court decided that permission for publication in a newspaper does not imply permission for digital publication on CD-Rom or the Internet.2

6. Collecting Societies

6.1.

The digital reproduction and publication of works are administered by, respectively, the Stichting Lira (for writers and translators), Musicopy (for song texts and sheet music), Stichting Nieuwsraad (for the works of journalists), Stichting PRO (for publishers’ rights), De Visueelen (for illustrators’ and designers’ rights), and Vevum/Sekam/Sekam Video (for

1 Staatscourant 19 september 2005, nr. 181, p. 16.
screenwriters, directors, film and TV producers, film translators). The digital reproduction of works and related subject-matter on a medium for private use (Art. 16c DCA and Art. 10e LNR) are administered by the Stichting Thuiskopie. The digital reproduction and publication of neighbouring rights are administered by SENA, Norma and Irdi. The digital publication and reproduction of the copyrights of composers, text poets and music publishers are administered by BUMA Stemra.

6.2.

Until now collecting societies in The Netherlands have not employed digital rights management.

7. Secondary Liability

7.1.

The Dutch Civil Code, after the implementation of Directive 2000/31/EC on electronic commerce, provides for the liability of internet service providers in the case of electronic transactions (Art.6:196c DCC). This article identifies:

- the transmission in a communication network of information originating with another person, or the provision of access to a communication network (mere conduit);
- the automatic, intermediate and temporary storage of information originating with another person, to the extent that such storage is made for the sole purpose of enhancing the efficiency of the information’s onward transmission to other recipients of the service upon their request (caching);
- the storage, upon request, of information originating with another person (hosting).

The article contains numerous exclusions of liability, for instance when a provider of information does not initiate the transmission, does not modify the information or does not have actual knowledge of the unlawful activity or information. This article does not affect the possibility for a court to require the service provider to terminate or prevent an infringement.

Dutch case law confirms that a service provider does not communicate to the public, but acts as a mere conduit. A service provider does not modify or select the information contained in the transmission. Therefore the Court of Appeal did not consider a service provider liable for the information that third parties communicate through its server. However, the service provider under the circumstances (e.g. after receiving information about an alleged infringement) may violate the standard of due care which must be observed
in society. The service provider is then subject to tortuous liability (Art. 6:162 DCC – wrongful act).³

7.2.

In principle a service provider cannot hand over personal data (name, address and place of residence; NAW-gegevens) relating to their subscribers for reasons of privacy (the fundamental right of privacy, the Dutch Personal Data Protection Act (’Wbp’) and the Telecommunications Act).

However, a provider can be obliged to hand over personal data by an order of a court at the request of an interested party.

If the published information is indisputably wrongful or the obtaining of personal data is necessary to avoid further considerable damage, the provider can be obliged to pass on personal data without a court order.⁴

In addition, the Dutch Supreme Court⁵ has recently ruled that providers are also obliged to hand over personal data if:

- it is sufficiently plausible that the information is wrongful and harmful to a third party;
- the third party has a reasonable interest in obtaining the personal data;
- it is plausible that in this actual case there is no less radical possibility to obtain the personal data;
- weighing the interests between the third party, the provider and the holder of the website implies that the interest of the third party should be given preference.

The reach of this judgment has been limited by the Dutch Supreme Court to this particular case, but can possibly act as an example for other cases.

7.3.

(Deep)linking cannot be considered as a reproduction (verveelvoudiging) of a web page. Therefore it does not infringe a copyright. A number of judgments confirm this point of view.⁶ Nor can (deep)linking be considered to be a communication of the linked web page to the public (openbaarmaking). Dutch case law confirms the rule laid down in the German Paperboy case.⁷

³ Court of Appeal ’s-Gravenhage 4 September 2003, Scientology/XS4ALL.
⁴ Court of Appeal Amsterdam 7 November 2002, LJN, AF0091, Radikal.
⁵ HR (Supreme Court) 25 November 2005, LJN: AU4019, Lycos/Pessers.
⁶ E.g. District Court of Rotterdam, 22 August 2000, IER 2000, 55.
⁷ District Court of Arnhem 16 March 2006, LJN: AV5236, NVM/Zoekallehuizen.nl; Bundesgerichtshof 17 July 2003, I ZR 259/00.
8. Applicable Law

Private international law does not discern the nature of the underlying intellectual property right that has been infringed. Each country itself sets rules for the origin of these rights, to whom they belong or how they can be enforced.

Under these circumstances the law of the country where the protection is being invoked is applicable. This will mostly be the country where the damage occurs as a result of the infringement. For this reason, right holders will be protected by national law regardless of the origin of the infringement.
CONSTITUTIONAL GUARANTEES FOR THE INDEPENDENCE OF THE JUDICIARY*

R. de Lange & P.A.M. Mevis

1. Introduction

Judicial independence is generally seen as a fundamental value of the rule of law.1 Likewise, in the Dutch constitutional order, independence of the judiciary is regarded as an essential principle. In the Dutch Constitution, however, which dates from 1814 and was substantially revised for the last time in 1983, independence of the judiciary is not explicitly mentioned. The Constitution deals with the judiciary and its organization, but in this context does not explicitly mention judicial independence as an organizational principle to be respected in the arrangements for the judicial system – and therefore does not mention it as a fundamental right for citizens. The guarantees for the independence of the judiciary are to be found in statute law, in particular in the Judiciary Organization Act (Wet op de rechterlijke organisatie)2 and the Judicial Officers (Legal Status) Act (Wet rechtspositie rechterlijke ambtenaren).3 These guarantees are also partly based on European norms. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), in particular, has been highly influential regarding both the theory and practice of judicial independence. In addition, guarantees may be found in unwritten constitutional law. All in all, it can be said that the Dutch constitutional order considers the independence of the judiciary to be a central principle. This is true both for the judicial system as a whole in relation to other branches of government, and for the individual members in relation to the judicial system, in particular in relation to the judicial body within which they function. The

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1 Kuijer 2004, p. 204.
2 This Act dates from 1827, and was last subject to major amendment in 2001, by the Act on the organization and management of courts (Wet organisatie en bestuur gerechten) of 6 December 2001, Staatsblad 2001, 582 and the Council for the Administration of Justice Act (Wet op de Raad van de Rechtspraak) of 6 December 2001, Staatsblad 581. The new text was published in the Staatsblad 2002, 1.
extent to which the independence of individual judges or courts also applies to their relations with other judges or courts will be discussed further on in this article.

In every list of the characteristics of the rule of law, there is at least some mention of the independence of the judiciary. The right of access to a court is generally also mentioned as an essential characteristic. In this context, there is an assumption that adequate dispute settlement can best be carried out by courts, and not by administrative bodies. The ECHR gives expression to this idea in Article 6. For the determination of civil rights and obligations, and for judgment on a criminal charge brought against someone, the ECHR requires – and grants a right to – a judgment by an independent and impartial judicial authority. Similarly, the legal protection of citizens against the government should preferably be carried out by independent courts and not by administrative authorities. Precisely because of this independent position, judicial dispute settlement – and the review of government actions and rules inherent therein – is to be preferred over forms of control by administrative bodies. From the point of view of protection of citizens’ rights, in particular the fundamental rights mentioned in treaties and in the Constitution, adjudication and settlement of disputes by the independent judiciary is preferable.

Judicial independence has a number of aspects, some relating to the organization of the judiciary and some relating to the legal position of members of the judiciary. Different views exist regarding the relationship between these aspects. Some characteristics of the legal position of judicial officers can be considered essential for the independence of the judiciary, while there are differences of opinion regarding other characteristics. These issues will be discussed in the present report. In the course of this discussion, we will first examine the constitutional framework of judicial independence. Subsequently, some of the most important statutory provisions for the independence of the judiciary will be addressed.

2. General Remarks regarding Judicial Independence and the Constitutional Framework in the Netherlands

2.1. The Constitutional Framework: Constitution and ECHR

As was remarked earlier, the Constitution of the Kingdom of the Netherlands does not mention judicial independence as such. Provisions on the organization of the judiciary do, however, appear in a separate chapter of the Constitution: chapter 6. This chapter is entitled Administration of Justice (Rechtspraak).

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms grant citizens a right of access to an independent and impartial court when charged with criminal offences or involved in a dispute about civil rights. This last addition somewhat limits
the scope of the fundamental right of Article 6, as was demonstrated in the *Pellegrin* case (1999)\(^4\) and the *Ferrazzini* case\(^5\) for disputes that do not concern civil rights, there is no right to settlement by an independent and impartial court. This is the situation e.g. with regard to cases concerning aliens, cases concerning extradition, tax decisions, and cases concerning the legal position of civil servants where the exercise of public authority is involved (see *Pellegrin*, in which the European Court of Human Rights explicitly follows the functional approach that the European Court of Justice has developed in interpreting Article 39(4) of the EC Treaty (the public-service exception)).

Although not all adjudicators of disputes and courts\(^6\) have to be independent within the meaning of Article 6 ECHR, for most courts this is required. A clear example, which concerned the Netherlands, is the *Van de Hurk* case (1994)\(^7\). This case concerned the position of one of the highest administrative courts, the Industrial Appeals Tribunal (*College van beroep voor het bedrijfsleven*). The European Court of Human Rights (ECtHR) was of the opinion that the statutory power\(^8\) of the Crown to set aside decisions of the Industrial Appeals Tribunal meant that the Industrial Appeals Tribunal could not be considered an independent judicial authority. The fact that this power was never exercised by the Crown was of no consequence.

### 2.2. **The Constitutional Framework**

It is impossible to infer from the wording of the Constitution what a ‘judge’ or a ‘court’ is.\(^9\) The Constitution distinguishes between courts that are part of the judicial branch of government (i.e. the judiciary), and courts that are not part of the judiciary. The legislature decides which courts are (and which are not) part of the judiciary (Art. 116, first paragraph, of the Constitution). Certain requirements apply for members of the courts who are part of the judiciary. These requirements are broadly related to the independence of these courts in terms of the legal position of their members. The difference between the two types of courts has lessened since the establishment of a

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\(^6\) Not all courts adjudicate disputes. In criminal law, there is not a dispute as such between the citizen and the government. See Kortmann 2005, p. 257 (note) 421.

\(^7\) ECHR 19 April 1994, Series A no. 288, *Van de Hurk v. the Netherlands*.

\(^8\) This power was based on the Industrial Organization Act (*Wet op de bedrijfsorganisatie*).

\(^9\) ‘De tekst van de Grondwet biedt geen aanknopingspunten voor het antwoord op de vraag welke ambten als gerechten zijn te beschouwen. Ook met de grondwetsgeschiedenis komt men niet veel verder’. (The wording of the Constitution does not give any clues concerning the answer to the question which government offices can be regarded as courts. The history of the constitution does not clarify this further either). Kortmann 2005, p. 257.
fully-fledged system of legal protection against the government. This system, laid down in the General Administrative Law Act (Algemene wet bestuursrecht, 1994), has gone hand in hand with a reorganization of the judicial system – a reorganization which resulted in a substantial revision of the Judiciary Organization Act in 2001.

The Constitution of 1983 lays down an open system, i.e. the legislature is granted the possibility to include courts that have jurisdiction only in administrative matters – in particular the Central Appeals Tribunal (Centrale Raad van beroep), the Industrial Appeals Tribunal (College van beroep voor het bedrijfsleven) and the Administrative Law Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) – as part of the judiciary. Until now the legislature has not made use of this possibility.

The distinction between courts that do and those that do not belong to the judiciary does have legal consequences. An example of this difference is the power to impose sentences involving deprivation of liberty (Art. 113 of the Constitution); this power is reserved to the judiciary.

The Constitution thus distinguishes between courts that belong to the judiciary and those which do not. The Judiciary Organization Act further elaborates which courts belong to the judiciary. This act dates from 1827, but has been thoroughly modernized in recent years, in particular by the Act on the organization and management of courts (Wet organisatie en bestuur gerechten) and the Council for the Administration of Justice Act (Wet op de Raad voor de rechtspraak). The new version of the Judiciary Organization Act entered into force on 1 January 2002.

As already mentioned, the legislature is free to decide which courts belong to the judiciary. Only with regard to the Supreme Court (Hoge Raad) does the Constitution contain a provision in which this body is directly constituted as a body enjoying judicial governmental powers (Art. 118 Constitution).

The Judiciary Organization Act (abbreviated hereafter as JO Act) provides that the Supreme Court, the district courts and courts of appeal are part of the judiciary (Art. 2 JO Act). The Judiciary Territorial Division Act (Wet op de rechterlijke indeling) of 1951 lays down the number of courts of appeal and district courts, and the Judicial Officers (Legal Status) Act (Wet rechtspositie rechterlijke ambtenaren) of 1996 lays down the legal position of

10 The General Administrative Law Act comes into effect in a number of different phases – called tranches. The first tranche entered into force in 1994.
11 Act of 18 April 1827, Staatsblad 20, ‘op de zamenstelling der regterlijke macht en het beleid der justitie’ (on the composition of the judicial authority and the policy regarding administration of justice).
12 Act of 6 December 2001, Staatsblad 582.
14 And invested with government authority.
members of the courts mentioned here, and also of other persons concerned with the administration of justice.16

The jurisdiction of these courts covers civil (‘ordinary’) proceedings, criminal proceedings, tax law proceedings and most administrative law disputes. Only a few areas of administrative jurisdiction are assigned to bodies that are not part of the judiciary: in particular, appeals in economic administrative law, social security law, law relating to members of the civil service, and certain special areas of administrative law. These bodies are, nonetheless, courts; their members must meet all the requirements of eligibility as a judge, and they are courts or tribunals within the meaning of the EC Treaty.

2.3. The ECHR Framework

First of all, it is important to note that the concept of ‘judicial independence’ has an autonomous meaning within the framework of the ECHR, which does not necessarily coincide with the meaning of the concept under national law.17

In a number of judgments of the ECtHR, in which that Court ruled on complaints against the Kingdom of the Netherlands relating to the settlement of disputes between the government and citizens, questions were raised which concerned judicial independence. In these cases the national settlement of disputes at issue was sometimes carried out by a judicial authority, and sometimes it was not. However, even in cases where a judicial authority was involved the ECtHR noted several times that some elements of the judicial organization in the Netherlands did not completely comply with the requirements set for independent judicial tribunals. These cases – Benthem (1985),18 Van de Hurk (1994),19 and Kleyn (2003)20 – did not always lead to a finding of an infringement: in Benthem and Van de Hurk an infringement was

16 In some statutes, the Judicial Officers (Legal Status) Act (de Wet rechtspositie rechterlijke ambtenaren) has been declared to be applicable by analogy in the case of the dismissal of holders of certain administrative positions. See for instance Article 74, second paragraph, of the Government Accounts Act (Comptabiliteitswet 2001).

17 Bernhardt, 1988, p. 67: ‘Whether a person is “charged with a criminal offence” or a tribunal is “independent and impartial” cannot depend solely upon the national order of each State, but requires an international determination’. Independence is given an autonomous European ECHR interpretation; and it also has a Dutch interpretation based on the Constitution and its legislative history. Because of this, in theory, different sets of requirements that the organization of the judiciary must fulfil can come into existence.

18 ECtHR 23 October 1985, A8 1986, 1 (with annotation E.M.H. Hirsch Ballin), Benthem v the Netherlands.

19 The ECtHR did not consider the Industrial Appeals Tribunal to be an independent court, because some of its decisions could be altered by the Crown to the detriment of one of the parties. ECtHR 19 April 1994, Series A no. 288, Van de Hurk.

found, but in Kleyn, on the other hand, no infringement was found. Further, the Procola case (1996) has been of great importance for the Netherlands, not because there was any infringement by the Netherlands, but because the Council of State of Luxembourg, which was the focus of this case, is very similar to the Netherlands Council of State. In fact, this case was mainly about impartiality, and the guarantees for ‘structural impartiality’ of the court, rather than about independence. However, in the context of organizational aspects of the judicature, independence and impartiality are difficult to separate. In the past twenty years, the Kingdom of the Netherlands has substantially revised the organization of its Council of State, under the influence of the European Court of Human Rights’ case law. The Benthem judgment even led to the abolition of the – traditionally highly regarded – remedy of appeal to the Crown; and the Procola judgment – although, as was mentioned, this decision concerned Luxembourg not the Netherlands – has led to a revision of both the internal organization of the Council of State, and of the way it functions.

2.4. The Interpretation of the Term ‘Judiciary’

Recently the Dutch government has interpreted the term ‘judiciary’ in a way which gives that term a very broad meaning. In the explanatory memorandum to the bill for approval of the Constitutional treaty – the ‘European constitution’ –, the government notes that the transfer of jurisdiction on disputes regarding patents from the Dutch to the European courts does not imply a departure from the Netherlands Constitution, because jurisdiction remains with a court. It is explicitly noted that the Dutch Constitution allocates this category of disputes to the ‘judiciary’. Thus the Government interprets the term ‘judiciary’ here simply to mean ‘a court’. This extension of the term ‘judiciary’ to embrace all ‘courts’ could mean the abandonment of the system of the Dutch constitution with regard to this issue. It is unclear whether the Dutch Parliament shares this interpretation by the government, since the bill in question has been withdrawn.

2.5. Independence

The requirements of independence of the judiciary apply – taking into consideration what was said above about the scope of Article 6 ECHR – to all Dutch courts, those that belong to the judiciary as well as those that do not.

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22 Kamerstukken II 2004/05, 30 025, nr. 3.
This does not result from the wording of the Constitution, but from the
ECHR. For tribunals that deal with voluntary jurisdiction, arbitration, and
disciplinary law (disciplinary tribunals), these requirements do not apply.
This is, for instance, the case with medical disciplinary rules, disciplinary
rules for lawyers, and disciplinary rules for accountants.

2.6. The Key points of Judicial Independence: the Relationship with
other State Organs, Legal Status, the Organization of the
Judiciary, Constitutional Guarantees and Theory

2.6.1. Introduction

In academic writing, a distinction is made between a narrow and a broad
concept of judicial independence. According to the narrow, limited concept,
judicial independence concerns the relationship between the courts and other
organs of the state, particularly the legislature and the administration.

According to the broader concept, judicial independence relates to
independence in relation to any other authority, including that of the parties
to a dispute, interest groups and others.

As Kuijer writes: 'Nowadays, however, judicial independence will be
more and more interpreted as requiring that the judge can base his or her
decision on his own free conscience without being subjected to any authority,
including other organs of the state, litigants and other pressure or interest
groups'. It should be noted in this context that it is not self-evident that the
broad concept of judicial independence is supported by Dutch constitutional
law.

In the Netherlands, a distinction is usually made between different
types of judicial independence:

- functional independence; this can be ‘constitutional’ as well as de facto
  independence. Different views exist as to the scope of de facto

23 But, note the fact that the requirements set by the ECHR only concern the settlement
of disputes about civil rights and the validity of criminal proceedings. They do not
apply to certain areas of administrative law proceedings, as can be concluded from
several ECtHR judgments. This has to do with the way in which the European court
interprets the scope of the concepts of civil rights and obligations. Aliens law and tax
law in particular do not fall within this scope. So in these areas the requirements of
independence are also different, at least according to the ECtHR. In Dutch law no
distinction is made between the different areas of administration of justice.

24 Kuijer 2004, p. 207.
26 Kuijer 2004, p. 207.
27 The distinction between the two types of independence dates back to Duynstee 1974,
and is followed more or less generally. However, there are still divergent views on
the meaning of these types of independence, and on their relationship.
independence. A very broad approach is defended by Kuijer, who writes that *de facto* independence means that the judge should at all times feel that he can freely give his judgments. Kuijer writes: ‘factual independence will be infringed when a situation arises in which the judge no longer feels free to follow his own considerations’. 28 On this point, it should be noted that the judge is never completely free to follow his own considerations. The freedom of the judge consists in the fact that he is bound only by the law. Does independence also mean that the judge, or court, is ‘internally’ independent, i.e. within the system of judicial organization, in relation to the other courts? Different views exist on this issue in the Netherlands. 29

- personal independence, or independence based on the legal position of the judge; this concerns the guarantees that are built into the legal position of judicial officers regarding appointment and dismissal, pay, assessment, promotion, incompatibilities, duration of the appointment, protection against transferral and dismissal, disciplinary sanctions, handling of complaints, and other elements. 30

### 2.6.2. Institutional and Individual Independence

In this report we assume that judicial independence comprises various different aspects, organizational aspects – which regard the relationship between the court and other state organs, the organization of relationships between the courts themselves, and the internal organization of the courts – as well as aspects regarding the legal position of individual members of the judiciary. Our starting point in this context is that judicial independence is essential for guaranteeing the core values of the rule of law, in the sense that courts may not receive binding instructions from other state organs regarding decisions in individual cases. Independence is, in this sense, primarily institutional independence. The characteristics of the legal position of members of the judiciary which assure independence – for instance, the fact that the salary of judges is prescribed by law, and cannot be unilaterally changed by the government – should therefore be seen in the light of this institutional independence. Moreover, judicial independence can be understood as individual independence: every judge who has to decide a certain case, must be able to form his opinion in complete independence. No exertion of influence is allowed, not even within judicial organs comprising more than one judge. This understanding of independence would preclude consultation within courts on ‘judicial policy’ or on certain points of

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28 Kuijer 2004, p. 207.
29 Verheij 2001, p. 21 note 6 gives further references, in a footnote that was almost literally copied by Kuijer 2004, p. 208-209. See further Kortmann 2005, p. 257: judicial independence is independence in relation to other state organs, not in relation to other courts.
reference to be used by the judge. In the Netherlands this does not seem to be completely the prevailing opinion any more. Obviously, consultation how to decide a specific case is unacceptable. General consultation, however, aimed at broad harmonization of policy within one court itself, seems to be accepted as a fairly normal phenomenon. Harmonization between different courts and tribunals – such as consultation between the presidents of the Supreme Court and of the highest administrative courts – has become a generally accepted phenomenon. Within courts, policy documents are written concerning questions of common interest; on the basis of these, policy is determined which is then carried out by the different divisions of the court in question. This too has become normal conduct in the last few years. At the national level, agreements exist between all courts of appeal and district courts on points to be taken into account regarding sentencing. Problems with regard to judicial independence were, however, noted when the Council for the Administration of Justice (Raad voor de Rechtspraak) was established. The present report will not deal in depth with the experiences of the first few years of the Council for the Administration of Justice.

2.7. Other Aspects

2.7.1. The Sub Iudice Principle

The sub iudice principle is not laid down in the Constitution of the Netherlands. The principle has of old been regarded as an important constitutional principle, although there is not much mention of it in the major reference works on Dutch constitutional law. Nevertheless, in practice it plays an important role in the relationship between the government and parliament. The government does not usually answer parliamentary questions regarding matters on which a court still has to decide in final instance. A recent example was the reply to some parliamentary questions put by Ms Vos (GroenLinks): the Minister of Justice informed parliament that these questions could not be answered because the case was still in court. This position is in accordance with established practice. However, occasionally a political debate does, nevertheless, arise on matters still to be decided by the court. In particular, after the murder of the Dutch politician, Pim Fortuyn (2002), where a suspect was arrested almost immediately, there was rather intensive interference by parliament, in particular from a group of Fortuyn’s political friends. Such situations should be regarded as highly exceptional, though.

31 See in particular Bovend’Eert et al. 2003.
32 Kamerstukken II 2002/03, nr. 1859.
2.7.2. Liability for Damage Resulting from Judicial Errors

The last subject deserving attention in this general section, is the regulation of state liability in case of judicial errors. A rather restricted system of liability in this matter can partly be justified by considerations of judicial independence. Article 42 of the Judicial Officers (Legal Status) Act (hereafter JOLS Act) provides that the State of the Netherlands, and not the judge in person, is liable for damage resulting from mistakes that are made when in office. Up to now the Supreme Court has accepted liability of the State only twice, recently in a ruling of 18 March 2005 (Van Mechelen) following a judgment by the ECtHR in which a breach of Article 6 ECHR was established by the ECtHR. The judge is only liable vis-à-vis the State in cases of intent or deliberate recklessness. A judicial officer is not liable for the consequences of a judicial ruling (Art. 42 paragraph 3 JOLS Act).

3. Discussion of some Specific Aspects of the Guarantees for Independence

3.1. Incompatibility of Functions

According to Article 44 of the JOLS Act, the office of judge is not compatible with that of lawyer (solicitor or barrister), civil-law notary or the otherwise rendering of professional legal assistance. This prohibition does not apply to the deputy judges mentioned below. The membership of a body regulated by public law or of a general representative organ is not seen as a breach of independence. On the contrary, the JOLS Act requires the judicial organization to take measures to ensure that a deputy judge is able to hold such a position.

Furthermore, judges are free to express their political and social views, also in the media. In practice, judges are rather reticent in making use of this freedom.

3.2. Deputy Judges

A phenomenon which is perhaps typically Dutch is the function of the so-called deputy judge. This is a lawyer – with relevant professional experience as such – whose main occupation is outside the judiciary, but who takes part in the administration of justice on an incidental basis, usually as a member of a three-judge chamber, together with two normal judges. Academics, solicitors and barristers, corporate lawyers, tax advisors, administrative officers etc. may work as deputy judges.

35 Also accepted in EC law, ECJ, Köbler, case C-224/01, ECR 2003, p. I-10239.
34 Agnostaras 2001.
Deputy judges enjoy the same guarantees for independence as their colleagues whose main occupation is within the judiciary. A deputy judge is also appointed for life, and enjoys the special protection against dismissal laid down in Article 117 of the Constitution.

The use of deputy judges is widespread, and is not regarded as a threat to judicial independence. That is connected, amongst other things, with the fact that, as already mentioned, the deputy judge frequently operates within a three-judge chamber, so that his individual contribution to particular decisions remains concealed. His independence is in practice respected, also by his employer in his main occupation. There has, however, been increasing discussion as to how the requirement of impartiality should be implemented. Naturally, a deputy judge must refrain from judging cases with which he is connected in some way or the other. All positions that he holds besides his position as deputy judge are made public on the website of the court in question. The Netherlands Association for the Judiciary (Nederlandse Vereniging voor Rechtspraak) and the presidents of the courts have drawn up Guidelines with instructions for individual judges.

We will not go further into the question of the impartiality of deputy judges in this report. It cannot be ruled out that the fact that these officials have their main occupation outside the judiciary may lead to questions relating to their independence. For the time being, it seems that less use may be made of deputy judges – particularly solicitors and barristers – because of the discussion regarding their impartiality.

3.3. Judicial Independence and the Organization of the Administration of Justice

In order to explain the context within which the constitutional guarantees for judicial independence in the Netherlands are to be understood, it is necessary to consider briefly the organization of the judiciary as laid down in the Judiciary Organization Act of 2001.

An important element of the modernization that took place in 2001 was the establishment of a Council for the Administration of Justice (Raad voor de Rechtspraak). Such a body did not previously exist in the Netherlands. The tasks of the Council concern the administration and management of the organization of the judiciary. Article 91 JO Act mentions the preparation of the budget of the courts, the assignment of budgets, the supervision of the implementation of the budget, and the management of the courts, as well as ‘activities at a national level relating to the recruitment, selection, appointment and training of the court’s auxiliary staff’ (Art. 91, first paragraph, sub f, JO Act).

When the Council for the Administration of Justice was established, several authors expressed concerns as to whether the Council would be in a position to interfere with the substance of the administration of justice. Article 96 of the Judiciary Organization Act provides explicitly that the powers of the Council do not reach that far:
1. In the execution of the tasks laid down in Articles 94 and 95, the Council will not intervene in the procedural treatment, the assessment of the substance, or the judgment of a particular case. – 2. the first paragraph shall apply mutatis mutandis to the execution of other tasks and powers, assigned by or pursuant to this act, in the sense that the Council will not intervene in the procedural treatment, the assessment of the substance nor the judgment of categories of cases. (unofficial translation)

Although the first experiences with the activities of the Council for the Administration of Justice do not seem unfavourable, criticism has not yet ceased completely.36 It is as yet too early to draw definite conclusions on this point.

3.4. The Position of the Individual Judge within the Organization of his Court

The guarantee of the independence of the individual judge with respect to the organization of the court within which he functions, has the same characteristics as the guarantees with respect to the Council for the Administration of Justice. The management board of each court has been assigned tasks under the Judiciary Organization Act, but in each case it is added that (also) the management board of a court may not intervene in the procedural treatment, the assessment of the substance or the judgment of a particular case or categories of cases (Art. 23 paragraphs 2 and 3, JO Act). In performing its duties, the management board may give general or specific instructions to all judicial officers working at the court in question, but the exercise of this power is bound by the same guarantee (Art. 24, JO Act).

However true it may be that the management board of a court would certainly not even think of influencing a judge in his decision in a specific case, it must still be said that the management board’s control over the organization of operations within the court can have a large, albeit indirect, influence on a judge’s work and also on his independence. We point to the fact that, for instance, in the rules on criminal procedure there are a number of instances where a criminal case may be heard by either a single judge chamber or a three-judge chamber. This should depend on the difficulty of a case. The decision on this is left to the adjudicating judge. His policy and his decisions in specific cases can influence the ability of the court as a whole to handle its case load, or it may influence the ‘quality’ of decision-making, in the sense of the length of time within which cases are dealt with in a certain court. Both these aspects are matters in which the management board of the court is competent. When drawing up the budgets and the annual plan that is made for every court (Art. 31 and Art. 32, JO act), the way in which judges will deal with their cases and the amount of time involved is taken into

36 See in particular Kortmann 2005, who is highly critical of the new organization of the judiciary.
account by way of indication. This may influence decisions by judges in specific cases concerning the way in which the proceedings should be organized and conducted. Some sort of counterbalance is provided by the so-called ‘meetings of the court’, meetings in which all judicial officers working at a court participate. These may not be able to do more than offer advice to the management board (Art. 28, JO Act), but they still seem a highly suitable place for guaranteeing sufficient institutional independence to all the individual judges within a court.

3.5. **Dismissal**

3.5.1. Introduction

As explained earlier, the guarantee of independence contained in the appointment ‘for life’ (Art. 117 paragraph 1, Constitution; Art. 1a, JOLS Act), implies that an individual judge cannot be removed by a government body on grounds based on his decisions or performance. The fact that the judge does not have to fear consequences for his own employment from the way he functions, and particularly from the decisions he takes in specific cases – even when applying the law with regard to and against the government – is one of the most important guarantees for judicial independence.

This principle does not imply that a judge may never be dismissed, even in special circumstances; it does mean that such a dismissal is surrounded with special guarantees. This special nature explains why the legal basis for rules on such dismissal is to be found in the Constitution itself, in Article 117. This article is thus a supplement to and a **lex specialis** with regard to Article 109 of the Constitution, which contains the instruction to regulate the legal status of civil servants in general.

3.5.2. Resignation: Dismissal on Request and on Reaching the Age of 70

Judicial officers are dismissed at their own request. This takes place by royal decree (Art. 46 h, JOLS Act). Special reasons for the request do not have to be given. The constitutional provision contained in Article 117 paragraph 2 expressly creates the possibility of this ground for dismissal. The wording of Article 117 paragraph 2 prescribes fairly imperatively that the members of the judiciary who perform a judicial function shall be dismissed at their own request. When a judge requests his own dismissal, the Crown is not free to refuse this request. A request for dismissal is not necessarily the same as a voluntary resignation: for further explanation, see below. On reaching the age of 70, a judicial officer is dismissed by royal decree (Art. 46 h, second paragraph, JOLS Act).
3.5.3. Dismissal for Unsatisfactory Performance: Constitutional Basis

Although judicial independence involves a pressing need for protection against dismissal, the interest of an adequate administration of justice calls equally for protection against inadequately performing judges. Even Article 117 of the Constitution does not rule out the dismissal of judges on grounds of unsatisfying performance in special cases. The constitutional provision gives some additional guarantees in this context. First of all, such dismissal can be granted only in certain cases provided for by Act of Parliament. The wording of this provision prohibits the delegation of the determination of such cases to a lower legislative body than parliament.

The second guarantee is that the body with the power to grant, or order, such dismissal should be designated at the constitutional level. Because of the guarantee of independence of the judiciary as a whole in relation to any other government branch, the application of these grounds for dismissal is the exclusive competence of the judiciary itself, viz. of a court that is part of the judiciary. This wording itself implies that application of the provision cannot be assigned to a body within the judiciary that is not a ‘court’, such as a management board or the above mentioned Council for the administration of justice, nor to a court that does not belong to the judiciary. The courts which form part of the judiciary are determined by Act of Parliament (Art. 116, first paragraph of the Constitution; see above). In this context, Article 117, third paragraph, provides the further guarantee that the court in question will be designated only by act of parliament.

It should be noted, however, that the legal definitions are not such that a ‘court’ necessarily forms part of the judiciary (Art. 116 paragraph 1, Constitution), nor that only members responsible for the administration of justice have a seat in a court, whether or not that court is part of the judiciary. The protection of the independence of members of the judiciary, as intended in Article 117 paragraph 1 of the Constitution, only applies to the category of members mentioned in that provision, i.e. those responsible for the administration of justice. The type of independence that is guaranteed by appointment for life does not, therefore, necessarily apply to all members of a ‘court’.

3.5.4. Detailed Arrangements

3.5.4.1. Legal Basis: Judicial Officers (Legal Status) Act (Wet rechtspositie rechterlijke ambtenaren)

The constitutional instruction of Article 109 has been worked out in detail and specified with regard to judicial officers in the Judicial Officers (Legal Status) Act.37 Insofar as the choice has been made for special arrangements

regarding the legal status of this special category of civil servants, it follows logically that the instruction of Article 117 paragraph 3 of the Constitution, to regulate the suspension and dismissal of judicial officers, is also carried out in this act of parliament.

The elaboration of Article 117 paragraph 2 of the Constitution can be found in chapter 6a of the Judicial Officers (Legal Status) Act. The exclusivity of these rules has been further limited by the fact that this chapter only applies to the judicial officers appointed for life, and not to other members of the judiciary.

3.5.4.2. Exclusivity of the Rules; the Criminal Courts have no Jurisdiction

The rules regarding dismissal in the Judicial Officers (Legal Status) Act were intended to be an exclusive set of rules: other provisions regarding dismissal are prohibited. This can also be inferred from Article 28 paragraph 2 of the Penal Code. The system of penalties of the Penal Code acknowledges the deprivation of rights as an accessory penalty to – only – certain offences designated by act of parliament. Such deprivation of rights may include disqualification from holding any public office or from holding certain public offices. Although the removal of a judge from office by means of such a penalty imposed by the criminal court is not in conflict with Article 117 paragraph 3 of the Constitution, in fact Article 28 paragraph 2 of the Penal Code rules out the imposition of this penalty by the criminal court on (amongst others) all members of the judiciary – appointed for life or for a limited period.

3.5.4.3. The Cases

The cases in which a judicial officer appointed for life can be dismissed are:

a. the case in which he is permanently unsuited to fulfil his duties because of long term illness. In case of illness, the Supreme Court can assign other duties (Art. 46k, first paragraph, JOLS Act). These should be ‘suitable’ or ‘acceptable’ within the meaning of the legislation applicable to other employees or civil servants. The refusal of such alternative duties can lead to dismissal.

b. unsuitability to perform his tasks not caused by illness;

c. acceptance of an office or position that is incompatible de jure with the office held by him;

d. loss of the Dutch nationality;

e. either a final conviction for a serious criminal offence (not for a minor offence, and regardless of the imposed punishment) or a final and irrevocable judgment that imposes on him a measure entailing the deprivation of liberty;
f. placing under financial guardianship, bankruptcy or suspension of payments, application of the statutory debt rescheduling arrangement, or commitment for debt i.e. one of the various forms of financial incapacity determined by law;

g. as a result of action or omission, seriously prejudicing the proper functioning of the administration of justice or the confidence that is to be placed in it;

h. repeated failure to comply with provisions that prohibit him from exercising a certain occupation, or that appoint a permanent or continuous residence, or that prohibit him from meetings or conversations with parties or their lawyers or attorneys, or from accepting any special information or documents from them, or that impose on him an obligation to keep a secret, even after the disciplinary measure of a written warning has been issued to him.

3.5.4.4. Requirements for the Requirements

The principle of legality already means that these cases must be fairly explicitly elaborated in the relevant statute. The criteria of the ECHR require the cases to be sufficiently ‘accessible and foreseeable’. It should be reasonably possible for every judge to ensure that his conduct as a judge complies with the relevant legal provisions, so that he may easily avoid applicability of these cases to him. In particular, the ground given under (g) is notable for its relatively broad nature. On the other hand, this is a specific application of the ground ‘neglecting the dignity of his office, his official tasks or duties’ under Article 46c paragraph 1 sub (a) of the Judicial Officers (Legal Status) Act. Violation of that more open standard of conduct can lead to the disciplinary measure of a written warning, but as long as this ground does not become more concrete and of a seriousness as referred to and described under (g), there is no ground for dismissal. As for the ground referred to under (f), one may wonder whether this ground is necessary in a democratic society.

3.5.5. Court: The Netherlands Supreme Court

Article 117 of the Constitution, already mentioned above, provides that the court which has powers in relation to these grounds for dismissal – and thus in relation to dismissal – should be designated by act of parliament. The Constitution does not further indicate which court this should be. In the Judicial Officers (Legal Status) Act the legislature chose to grant competence in respect of dismissals to the highest national court, namely the Netherlands Supreme Court. This court is the only one that can dismiss an individual member of the judiciary who has been appointed for life. The Supreme Court only takes decisions regarding dismissal when such is sought by the Procurator General of the Supreme Court. The latter is not a member of the
judiciary, but is appointed for life; the administration cannot give him binding instructions to demand dismissal of a member of the judiciary responsible for the administration of justice.

3.5.6. Suspension and Disciplinary Punishments

Pending a possible dismissal, a judicial officer who has been appointed for life can be suspended from his duties once a ground for dismissal as mentioned in the law is presumed to be present. This would be the case, for instance, if he is taken into custody for a criminal offence. The definition of grounds for suspension is thus in each case always connected with the existence of a concrete presumption of a ground for dismissal. The constitutional guarantee of independence as described in Article 117 also covers suspension; partly for this reason, the suspension of members of the judiciary appointed for life is also assigned to the Supreme Court, in Article 46f Judicial Officers (Legal Status) Act. The Supreme Court may decide that during the period of suspension, the judicial officer’s salary is partly or entirely withheld. The Act does not provide for compensation in case the suspension does not lead to dismissal. Finally, decisions regarding suspension are also only taken upon the demand of the Procurator General of the Supreme Court.

3.5.7. Written Warning as a Disciplinary Sanction

Besides dismissal and the associated provisional measure of suspension, the Judicial Officers (Legal Status) Act also provides for the disciplinary sanction of the written warning, which is not mentioned in Article 117 of the Constitution. The judicial officer who is president of the court has the power to give a written warning, as a disciplinary sanction. The grounds for imposing this sanction were already stated above. The sanction is only imposed after the judicial officer in question has had the opportunity to put forward his view orally or in writing (Art. 46e, paragraph 1, JOLS Act). Appeal from this sanction lies to the Central Appeals Tribunal (Art. 47, paragraph 3, JOLS Act). For reasons related to the independence of the judiciary, this sanction can only be imposed by a judicial officer and not by the board of management of the court, on which persons who are not judicial officers also sit.\footnote{Verhey 2001, p. 70, with reference to p. 71 of the explanatory memorandum to the legislative proposal Organisatie en bestuur gerechten, Kamerstukken II 1999/00, 27 181, nr. 3.}
3.5.8. ‘On Request’

As was mentioned above, judicial officers who have been appointed for life will also be dismissed at their own request. In this context, it should be noted that a dismissal on request is not the same as a voluntary resignation. The procedure for dismissal by the Supreme Court against the will of the judge involved is in practice hardly ever applied; cases involving dismissal are already rather exceptional, and when they do arise, it is not uncommon for the judge involved to request his own dismissal already beforehand. This is usually the case when a judge is suspected of a criminal offence which he does not deny. Dismissal proceedings whose outcome is already self-evident can thus be avoided. It cannot be ruled out that a judge who requests his own dismissal in such a situation, does so partly on the basis of conversations with other people, in which he may be influenced with regard to the decision he takes.

3.5.9. Complaints about the Conduct of Judges

A distinction should be made between dismissal or suspension of judges, on the one hand, and the possibility to complain about the way in which a judge has treated a citizen, on the other. Unjust or arbitrary treatment may lead to a complaint. The judicial decisions themselves are explicitly excluded from the possibility of complaint. The Judiciary Organization Act (Art. 26) requires each court to draw up a procedure for dealing with complaints. The legislature is still dealing with the establishment of an external complaints body. Until this body is established, the external complaints procedure contained in Article 14a-14e JO Act (old version) remains in force. This procedure applies only to the conduct of judicial officers responsible for the administration of justice. The complaint is heard in first instance by the Procurator General of the Netherlands Supreme Court. After a preliminary investigation, he may ask the Supreme Court for a decision on the complaint. A complaint can also be dealt with in consultation with the president of the court to which the judicial officer belongs whose conduct is the subject of the complaint. The settlement of the complaint is not intended to have legal consequences. For this reason, the power to settle complaints, either following the internal or external procedure, does not need to be explicitly reserved to the judiciary.

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The issue of constitutional referenda touches on the very foundations of the constitutional system of a country. It inquires into the nature of the power to make and to amend a constitution, and into how to understand this power and the procedures involved. In particular, it raises fundamental questions regarding the democratic nature of constitutional politics as well as the nature of democracy at the basis of a constitution.

This contribution on the Constitution of the Netherlands could have been very short indeed, much shorter than it is. The present Constitution of the Netherlands does not provide for a referendum, nor has it been practised in the Constitution’s making or its amendment. With one or two exceptions, the constitutional referendum is hardly recognized as being of its own kind in this country.

Yet, as we shall see, constitutional referenda have been looming large at the margins of the system. They are at the temporal horizon of the constitutional system from the very beginnings of the Kingdom until the recent rejection of the Treaty establishing A Constitution for Europe. They are at the margins of its territorial scope, as the overseas countries of the Kingdom have repeatedly consulted their population as to the desired constitutional future of the Kingdom. And they are at the horizon of political debate, or rather – with one exception – in the margin of a series of proposals throughout the 20th century to introduce a general legislative referendum.

The constitutional referendum is also looming at the margins of the present method of constitutional amendment in a quite different manner: although the Constitution does not provide for a referendum or anything equivalent to that, paradoxically the present method of amending the Constitution is taken by most constitutional lawyers to involve a consultation of the electorate on pending amendments. We hold this view for erroneous on several scores. This kind of misunderstanding as to the precise nature of the constitutional process is in itself significant for the type of constitution we are dealing with.

We shall discuss these various elements in the present contribution. After a brief general characterization of the constitutional system, we will first discuss the present method of constitution making. Next we will have a brief glance at the use of constitutional referenda in the constitutional history
of the Netherlands, at the use of consultative constitutional referenda in the overseas countries, and finally at the various proposals for introducing constitutional referenda. We will round this essay off with a number of concluding reflections.

1. The Nature and Character of the Constitution of the Netherlands

When we distinguish between revolutionary constitutions and historical, incremental constitutions, the constitution of the Netherlands is definitely of the latter type. There is a single document called Grondwet. In 1815, due to the union of Belgium to the Northern Netherlands, it had both a Dutch and French official version. In French it was, significantly, not called Constitution but Loi fondamentale. This gives a better rendering than the current English translation which we shall use here as well, which translates Grondwet as Constitution of the Netherlands.

This Grondwet does not encompass the whole of the constitution, nor does it contain the most important constitutional rules. Of higher rank than the Grondwet is the Statuut voor het Koninkrijk der Nederlanden, Charter for the Kingdom of the Netherlands, which concerns the relations between the European country and the two overseas countries, the Netherlands Antilles and Aruba. Not all fundamental constitutional rules can be found in either of these documents. The fundamental rule of the governmental system - the rule of no-confidence which makes it a parliamentary system of government - has remained a rule of unwritten, customary constitutional law to this day, just as ministerial responsibility has been expressed in the Constitution only in a laconic and incomplete manner.¹

Apart from other rules of constitutional law contained in sources outside the Constitution [Grondwet], there is a fair amount of consensus that the role of the Constitution is primarily to codify rules and principles which have become generally accepted, rather than to modify public society and to dominate and steer the political system.

Most of the great constitutional modifications took place in the 19th century and ended with the democratic reforms of the early 20th century. These modifications basically concerned the governmental system, which changed from autocratic monarchical rule - albeit under a constitution - towards a system of quasi-aristocratic parliamentary government in 1848 as confirmed by the parliamentary practice of the 1860s; and finally it were constitutional provisions which transformed the system from aristocratic towards democratic as a result of debates raging since the 1870s and finding an end with the revision of 1917 and its final confirmation in the constitutional amendments of 1922.

¹ Article 42, second paragraph, of the Constitution is all there is. It states: The King shall be inviolable; the ministers are responsible.
All these modifications and reforms took place by incremental changes to the Constitution of 1814/1815. The changes required no new republics, not even new constitutions. Although there is some disagreement on whether the original of the present Constitution dates back to 1814 or 1815 – which in itself is significant – we are still constitutionally governed by that 1814/1815 Constitution as amended since. Continuity is the hallmark of the constitutional system, notwithstanding intermittent political upheaval, which, on occasion, led to constitutional accommodation; a real political revolution is hard to trace in Dutch constitutional history since 1848. And even 1848 was not accompanied by truly revolutionary movements in politics – the liberal movement in the Netherlands was a movement of reform, not a revolutionary movement.

As we shall see, the fact that in the Netherlands the Constitution does not occupy that exclusive and elevated position which it does in other continental European countries has also meant that the constitutional culture is relatively weak. Constitutional debate is nearly absent and, if engaged in, is not very profound nor characterized by intellectual rigour, but dominated by considerations of political convenience. It is not a hazardous guess to hold that politicians are hardly aware of constitutional rules and principles beyond one or two of these. The Constitution is an instrument which in the end is not very different from any other piece of legislation. This sense is perhaps reinforced by the fact that acts of parliament cannot be reviewed by courts for their compatibility with the Constitution (though they can be reviewed against self-executing treaty provisions such as those which are found in, for instance, human rights treaties).

This all has its effect on issues regarding constitutional referenda. But before we can say anything about these, we must indicate the present method for amending the Constitution, because it is within that method that it might have a role to play.

2. The Present Role of the Electorate in Constitution Making

2.1. Pouvoir Constituante

The background we have just sketched, may help understand various traits of the constitutional law of the Netherlands. One of these is that in the literature there is little concern to identify the pouvoir constituante, neither historically, nor in terms of present-day constitutional theory. There is no clear concern to identify who has held or holds original power to constitute the state, its institutions and the principles and rules on which they are to operate. Moreover, sovereignty is considered a concept which is not helpful in making a constitution like the Dutch work, nor for understanding its operation. As a somewhat singular exception to continental Europe’s constitutional doctrine, sovereignty has no constructive role to play in the
treatises and textbooks on constitutional law of the Netherlands. This approach has deep historical roots, which go back to the more than two centuries of the Republic of the United Provinces which did not claim sovereignty over the provinces it united, and in which no institution of this overarching Republic claimed sovereignty either. During the 19th century that other concept of sovereignty – sovereignty of the people – was too divisive a principle to be invoked successfully as a founding or legitimating concept.

An authentic, original constitution making power, a true unconstituted pouvoir constituante, existing so to say extra ordinem, cannot be identified in the Netherlands constitutional history. The Constitution is much rather a product of the vagaries of history, consolidated by incrementally taking up what has emerged as a new or not so new consensus.

As a consequence of this state of affairs the literature speaks rather loosely about the grondwetgever, constitution-making power, without any clear distinction between the power to make a new Constitution and the power to amend it within the bounds of the Constitution’s own provisions on constitutional amendment – and so shall we in this essay. Nevertheless, at times the Constitution has been amended in an unconstitutional manner. This was the case at any rate in 1815 and 1840, and, as we shall see below, at least arguably also the recent amendment of 2005 was unconstitutional. But none of the subsequent constitutions have been considered revolutionary.

Also institutionally, this constitution-making (or rather: constitution-amending) power is hard to define. It requires a careful analysis of the provisions on which the process of constitutional amendment is based, as well as of constitutional practice. We shall undertake this analysis with a view to ascertaining the manner in which the electorate cooperates in the exercise of the constitution-making power. We shall conclude that this electorate (the ‘people’ as one would have it in certain constitutional systems) does not have constitution-making power, neither in fact nor in law.

2 Exemplary is the most widely used textbook by Kortmann 2005, p. 69-72; in greater detail, De Witte 2003.

3 For a brief exposition see, Besselink 1996, p. 192-206; also in: FIDE 1996.

4 The provisions of the Constitution of 1814 made it explicit that at first reading an act of parliament would have to declare not only the necessity of the amendment, but also ‘the amendment or addition [must] be clearly indicated and expressed’ (Art. 142 Const. 1814). However, the act leading to the entirely revised Constitution of 1815 only expressed the necessity of this revision but not its contents.

5 The Belgians no longer participated in the procedure for the amendments following the separation. In reality the amendments took effect not as a result of the Netherlands Constitution of 1840, but as a consequence of the revolutionary force of arms in 1830, sanctioned by the international powers in 1831. The Belgians had their own Constitution already in February 1831 and were no longer part of the Dutch Parliament. In practice, this meant that the provision which prescribed that the Lower House (total number of members: 110, of which 47 Belgian) could only decide if two thirds of the members were present, by a majority of three quarters of the vote (Art. 232 Const. 1815), could not be followed.
2.2. Constitutional Provisions on the Procedure for Constitutional Amendment


The essence of the procedure is that the amendment has to be passed twice in parliament and be ratified twice by the government; these are called the two ‘readings’. Until 1996, we could say more simply that an amendment had to be adopted by two successive parliaments and ratified by two successive governments. Since 1996, however, no new elections for the Upper House are necessary for it to adopt an amendment. So two different Lower Houses deal with the amendment, but in principle it is the same Upper House deals with it twice.

The ‘first reading’ takes the form of a normal Act of Parliament ‘which states that an amendment to the Constitution as proposed by the Act shall be considered’ (Art. 137, first paragraph, of the Constitution). This Act requires the normal majority of the votes in each of the two Houses of Parliament.

After publication of this Act, the Lower House is dissolved (Art. 137, third paragraph, Constitution) – a rule introduced in 1848.

After the election of the new Lower House, each of the Houses of Parliament ‘shall consider, at second reading, the proposed amendment […]’. They can only pass it with at least two thirds of the votes’ (Art. 137, fourth paragraph, Constitution). This is the ‘second reading’.

After governmental ratification, the amendment enters into force immediately upon publication.

In constitutional practice, the dissolution prescribed by Article 137, third paragraph, of the Constitution, is timed in such a manner that the elections coincide with the periodic general election of the Lower House. As we said, the constitutional amendment of 1996 scrapped the dissolution of

6 Article 137 of the Constitution:
1. An act of parliament shall state that an amendment to the Constitution as proposed in the Act, shall be considered.
2. The Lower House may divide a bill presented for this purpose into a number of separate bills, either upon a proposal presented by or on behalf of the King or otherwise.
3. The Lower House shall be dissolved after the Act referred to in the first paragraph has been published.
4. After the new Lower House has assembled, the two Houses of the States General shall consider, at second reading, the proposed amendment referred to in the first paragraph. They can only adopt it with at least two thirds of the votes cast.
5. The Lower House may divide a bill for the amendment of the Constitution into a number of separate bills, either upon a proposal presented by or on behalf of the King or otherwise, if at least two thirds of the votes cast are in favour.
the Upper House. This was justified as follows. The Upper House is elected by the Provincial Councils immediately after the direct election of the latter. As the dissolution of the Upper House is not accompanied by the dissolution of the Provincial Councils, in practice the Provincial Councils would tend to re-elect the same Upper House. This was considered to be an ineffective ritual.

2.3. *The Nature and Meaning of the Dissolution of the Lower House*

The predominant view in present-day constitutional literature is that the dissolution of the Lower House, as part of the process of constitutional amendment, is a consultation of the electorate on the amendment. Often this is taken so far as stating that the newly elected parliament is to decide in accordance with the wishes on the amendment expressed by the electorate. This view goes back to the writings of Thorbecke in the first half of the 19th century. This view is, at least under present circumstances, erroneous both in fact and, it is submitted, also in law for the following reasons.

It is erroneous in fact because the electorate does not pronounce itself on the amendment at all. It is true that the amendment may theoretically be a prime issue during the elections. However, the only time that this may be said to have been the case was in 1917, when the general franchise was introduced as well as equal financial treatment of public and denominational schools. The amendment of 1948, which created the (ultimately abortive) possibility of a kind of commonwealth confederation of the Netherlands and Indonesia (as well as Surinam and the Netherlands Antilles in the West), was another occasion where the politics of decolonisation at the basis of the constitutional amendment played a role in the elections. But in none of the other cases during the 20th century amendments and the 21st century did the amendment play any role during election campaigns. So as a matter of fact, dissolutions are not aimed at consulting the opinion of the electorate on the amendment pending.

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7 This is so since 1983, but not before; before, only half of the Upper House was elected every three years.
8 Johan Rudolf Thorbecke (1798-1872), a Leiden law professor and a member of the Tweede Kamer [Lower House] who was to become the protagonist of the liberal reform of 1848, and prime minister of three cabinets (1849-1853; 1862-1866 and 1871-1872). Outspoken in this respect was the proposal by the Staatscommissie, chaired by Thorbecke, who drafted its report, saying about the newly elected parliament after dissolution: 'Its vocation is to answer the question which has been submitted to the people whether the drafted amendments are wished for or not'. In this view the new parliament merely translates the elections into a 'yes' or 'no' to the amendment. This view was not adopted by the government, which endorsed the proposal, but considered the dissolution no more nor less than electing a newly representative body which has to decide on the amendment.
This conclusion is reinforced by the following arguments. Since the introduction of an electoral system of proportional representation in 1917, elections have never produced clear majorities but only minorities. Even if a constitutional amendment were to be limited to one issue only – which it has rarely been – then it would be a rare event to have any clear position with clear results. The fact that parliament after the dissolution continues also as a regular parliament, complicates this further. It means that the issue of the constitutional amendment cannot reasonably be the one and only consideration in casting a vote.

Until 1995, the Upper House was dissolved simultaneously with the Lower House except, in 1995, the dissolution of the Upper House was postponed to coincide with the periodic election of the Upper House by the (newly elected) Provincial Councils. In 1996, as we mentioned, the dissolution of the Upper House with a view to deciding on a pending constitutional amendment was abolished altogether. The consequence of this is that one of the two Houses of Parliament with decisive powers on the amendment of the Constitution is necessarily provided not merely with an older democratic mandate, but with one which is necessarily unrelated to any particular constitutional amendment for the simple reason that at the time of the elections of the Provincial Councils, which subsequently elect the Upper House, there is (usually) no constitutional amendment yet passed at first reading; so the amendment cannot possibly play a role at these elections. Yet, this House has an identical power to adopt or to reject the amendment of the Constitution as the Lower House, which was renewed for the purpose. Under this circumstance, it is incoherent to conceive of the elections as a kind of plebiscite which translates into a newly composed parliament deciding in conformity with the wishes expressed by the electorate on the amendment: if there would be any plebiscitarian aspect to the dissolution (which there is not) this could, since 1996, only be the case for one of the two Houses with constitution-making powers. If the aim of the dissolution of the one House would be to give the electorate the chance to approve or disapprove of the amendment, this approval or disapproval cannot possibly bind the other half of parliament (the Upper House) which is not dependent on any new election.

It is not the newly elected Lower House which alone has decisive constitution-making power; it shares it with the old Upper House whose mandate has not been renewed to adapt it to its new role of makers of the Constitution. The Upper House is turned from a law-maker into a

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9 The abolition of the dissolution of the Upper House in 1996 increases the democratically unrepresentative nature of the constitution-making process. Letting the dissolution coincide with the elections of the Upper House after the (direct) elections of the Provincial Councils (as happened against the initial wishes of the government in 1995) would have increased the representative nature of the constitution-making process. In the very muddled reasoning at the time of the constitutional amendment of 1996 this was entirely overlooked.
constitution-maker, as if by chance, through the coincidence of the adoption of an Act at first reading and the dissolution and the forming of a new Lower House with constitution-making powers. It certainly is not turned from a law-maker into a constitution-maker by any decision of an electorate, not even by its own electorate, being the (themselves directly elected) members of the Provincial Councils. As there is no trace of any direct or indirect decision of an electorate that could possibly be at the basis of the subsequent decision of the Upper House to approve or not to approve the amendment (disapproval requiring only one third of the vote (minus one), approval two thirds of the vote), it has become impossible to say that at the basis of parliament’s decision there is some quasi-plebiscitarian consultation of the electorate.

The most decisive argument against the orthodoxy that dissolution exists to consult the electorate on the desirability of a particular constitutional amendment, is the strictly representative nature of the electoral process involved. The dissolution concerns in law and in fact no less nor more than the election of a representative body. This representative body is bound by the constitutional provision guaranteeing its members total independence of judgment in fulfilling their representative task.\(^\text{10}\) It is precisely the non-plebiscitarian character of the process of amending the Constitution which necessitates the use of a representative body to adopt or reject an amendment. The new election is urged to assure the truly representative nature of one of the two branches of parliament which is to decide about such an important issue as the amendment of the Constitution.

This argument is confirmed also in terms of strict law. As the language of Article 137 makes clear with great precision, at first reading Parliament adopts an Act, which declares that a proposed amendment ‘is to be considered’ (paragraph 1). This proposed amendment is to be considered not by the electorate at elections. Nor is it in fact, for never has the proposed amendment been submitted to the electorate at elections in any straightforward manner (although in relatively rare cases mentioned it played a role at the background). The voters are not asked to pronounce on the text of an amendment. The elections at dissolution are not a referendum at all. The Constitution makes it quite clear that elections are aimed at composing the House (until 1996 the Parliament) which is to consider the proposed amendment at ‘second reading’ (see Art. 137, fourth paragraph, of the Constitution). At this second reading the real constitution-making power is exercised, because only now can a final decision be taken.

What is lost out of sight in the present constitutional literature and practice is the function which the dissolution was supposed to have in relation to the issue of who has constitution-making power. The originally proposed amendment of 1848 was quite outspoken in this regard. It

\(^{10}\) Article 67(3) of the Constitution: ‘The members shall not be bound by a mandate or instructions when casting their votes’.
proposed to elect a new parliament in order to distinguish clearly between the legislature, i.e. the law-making power and the constitution-making power.\textsuperscript{11} It even went so far as to propose not only the dissolution of the old Houses to that purpose, but also the subsequent dissolution of the new Houses after it had exhausted its constitution-making function.\textsuperscript{12} This element has clearly been retained in the language of the present provisions, which go back to 1848. Even though the newly elected Lower House (until 1996: Parliament) continues to function as a normal legislative assembly, the very reason for this new election, as reflected in the language of Article 137 of the present Constitution, is to enable it to act as a constitutional assembly.

All this has now been quite definitely gone lost in the constitutional practice of the day. It is the view of the present government (parliament concurred in the view of the government)\textsuperscript{13} that it is not necessary to have a constitutional amendment decided by the Lower House sitting after the election ex Article 137, but can also be decided at second reading by a later Lower House which has not assembled on the basis of a dissolution ex Article 137, third and fourth paragraph, of the Constitution. This Lower House does of course have an electoral mandate, but not a mandate covered by Article 137 of the Constitution, and hence no constitution-making power. And yet, the constitutional amendment of 2005, concerning the right of elected members of the representative bodies to be temporarily replaced in case of illness, pregnancy or child-birth, was not adopted at second reading by the Lower House elected after the dissolution of 23 March 2002, which was based on Article 137, third paragraph, of the Constitution,\textsuperscript{14} but by the

\textsuperscript{11} See on this Buys 1887, p. 794 et seq.

\textsuperscript{12} The proposed but failed amendments of 1946 and 1951 to elect a Chamber for Constitutional Revision after adoption of an amendment at first reading is similar to the original proposal of 1848, and is also based on institutionally identifying the constitution-making power and separate it from the normal legislative power.

\textsuperscript{13} They did so following a totally incomprehensible advisory opinion of the Council of State, Raad van State (Advies Raad van State 17 October 2003, Kamerstukken II [Parliamentary Documents Lower House] 2003/04, 29 200 VII, nr. 36). It argued that the history and intention of Article 137 in 1995/1996 made clear that only the Lower House elected after dissolution on the basis could consider a pending amendment, but that a strictly literal interpretation did not exclude another conclusion; this literalist interpretation has, in the opinion of the Raad, to prevail – a rare species of constitutional interpretation of such a very recent constitutional provision, no doubt inspired by purely political considerations of the moment. If the Raad – whose advice is not binding – had concluded otherwise, it would have implied the end of at least one constitutional amendment (on the direct election of mayors) which was crucial to the smallest coalition party; on this Peters 2004, nr. 3. In the end, the constitutional amendment on the election of mayors was rejected on second reading by the Upper House, just as an amendment introducing a corrective referendum had been rejected on second reading in the Lower House, but the amendment on the temporary replacement of elected representatives was passed in both Houses by the required two thirds of the vote.

House elected at a later dissolution as a consequence of a political crisis in November 2002 (on the basis of Art. 64 of the Constitution only, so not on the basis of Art. 137(3)).\textsuperscript{15} It is therefore at the very least arguable (but this author holds it as the better view) that the one amendment which has so far passed at second reading\textsuperscript{16} after this dissolution was passed in an unconstitutional manner and can therefore not be deemed to be constitutionally binding.

It should be pointed out that this is a merely academic stance, which normally has no impact at all on the views of the politicians within the constitutional institutions. Readers are reminded that Article 120 of the Constitution of the Netherlands prohibits courts from reviewing the constitutionality of acts of parliament. It is inconceivable that a Netherlands court would take this prohibition to be so narrow as not to prohibit judicial review of constitutional provisions.

However all this may be, this constitutional practice illustrates how hard it is to identify who holds the constitution-making power.

2.4. \textit{Who has Constitution-making Power?}

Institutionally, the criterion is that the relevant institutions must have decisive powers to adopt or reject the relevant document authoritatively. Thus, with regard to the legislative power, Article 81 of the Constitution of the Netherlands states that it is exercised by the government and States General jointly.\textsuperscript{17} The fact that, for instance, the Council of State, \textit{Raad van State}, is not mentioned although it is mandatory that it is heard on any bill before its introduction in parliament, makes clear that decisive power is the criterion. This was confirmed by the (so far: failed) attempts to introduce a binding corrective referendum. There is general consensus that this requires an amendment to Article 81 of the Constitution. Thus, all proposals to introduce a legislative referendum propose an amendment to this Article to the effect that the legislative power is exercised by the government and States General jointly, ‘subject to the possibility of a referendum’. In a sense, the voters at referendum are thus considered to share in the legislative power.

The constitution-making power can on this basis and in light of the analysis in the previous section of this essay, institutionally be located in the institutions at second reading. It is true that this second reading requires the initiative of an act of parliament at first reading. But this is no more than a prerequisite initiative, it is not the exercise of ultimate power to adopt or


\textsuperscript{17} Article 81 of the Constitution: Acts of Parliament shall be enacted jointly by the Government and the States General.
CONSTITUTIONAL REFERENDA IN THE NETHERLANDS: A DEBATE IN THE MARGIN

reject the amendment.18 The initiative taken by act of parliament consists in the formulation of the amendment and a decision on whether to have it considered by the constitution-making power proper, which is parliament (and government) at second reading.

The constitutional practice from after 2002, to the effect that also a later Lower House than the one elected after dissolution on the basis of Article 137 has constitution-making power, makes the identification of the institution retaining this power at second reading very blurred. Any Lower House elected after the first reading can hold that power, just as since 1996 any Upper House has constitution-making power. This blurring also implies means a blurring of the distinction between constitution-making power and normal legislative power. Hence it may even blur the distinction of constitutional law with normal law, which is not clear-cut in the Netherlands legal order anyway, composed as constitutional law is of norms of various status and character.

One thing is certain and this regards the question who does not have constitution-making power and who therefore cannot be said to be part of the constitution-making power: that is the electorate electing a new Lower House which is to decide on a constitutional amendment. So, also from an institutional point, the conclusion must therefore be that the electorate (the ‘people’) does not have constitution-making power in the Netherlands.

3. The Constitutional Referendum at the Margins of the Netherlands Constitution

The above situation should not obfuscate the fact that at the temporal and territorial horizons there have been constitutional referenda and there has existed and still exists also a debate on constitutional referenda in the margin of the debate about the possible introduction of referenda in general. We discuss those marginal cases here.

3.1. Historical Constitutional Experience: the 19th Century

Historically, the Netherlands resulted from the end of the Republic of the United Provinces, after more than two centuries, in 1795. Formally, it were the States General of the old Republic which called for a new constitution when they established the Regulation for the National Assembly – which

18 Also for normal legislation an initiative is necessary, which is the introduction by or on behalf of the King of a bill, or the initiative presented by a member of the Lower House and its introduction by the Lower House in the Upper House. This does not give the King or member of the Lower House at this stage legislative power in the sense of Article 81 of the Constitution. And, of course, the cooperation of many others is necessary as well; we mentioned the Raad van State already, but we could add countless civil servants, assistants to members of parliament, etc., etc. None of these have legislative power, although they cooperate in its exercise.
included a plan for the drafting of a new Constitution to be referred to the people for adoption or rejection in each province. The States General also called the National Assembly’s first meeting, thus putting an end to themselves.\textsuperscript{19} The resultant new Batavian Republic, initially began a process of constitution-making along the lines of the said Regulation. However, the first proposal – the Big Book, consisting of no less than 918 Articles (excluding the General Principles and Annexes) – was massively rejected in a popular referendum on 8 August 1797, with 108,761 voting against and 27,995 voting in favour of the proposal. Incidentally, only citizens could vote who had declared ‘to hold as legitimate solely the form of government which is based on the sovereignty of the whole nation, and thus to hold all hereditary offices and dignities as illegal and in conflict therewith’.\textsuperscript{20}

The solution to the deadlock came by a \textit{coup d’état} and a text based on an adaptation of the French Constitution of 1795 by Larevellièreme-Lépeaux, put forward by the secretary to the French Ambassador in The Hague.\textsuperscript{21} The eventual text was subjected to a popular scrutiny of sorts, those citizens not being called to the elections who had not shown up in the previous referendum, nor those ‘who are publicly known as supporters of the stadholderate and of the federal form of government’, and ‘those who are publicly known as being against the present state of affairs’.\textsuperscript{22}

A subsequent constitutional referendum, overturning the 1798 Constitution, which itself provided that it was to remain unchanged for five years, was called in 1801, in order to be able to bypass parliament. This was done to sanction the Constitution of 1801 – a text which had the strong support of and was presented by Napoleon Bonaparte himself – on the basis of the recurring constitutional principle of the ‘right of the people to change its Constitution’\textsuperscript{23} now turned into the inherent ‘power of the people at any time to change the Constitution’.\textsuperscript{24} The fact that only 52,219 voters of an electorate of 416,419 had voted against was reason to consider it adopted with overwhelming majority – the fact that only 16,617 had actually voted in

\begin{footnotes}
\item[19] Some of the relevant documents are published in Bannier 1936, p. 1-35 and p. 554-556.
\item[20] Article 11 of the Regulation of the National Assembly [\textit{Reglement volgens het welk eene algemeene Nationale Vergadering door het Volk van Nederland zal worden byeen gereoepen en werkzaam zal zijn}], 30 December 1795; in: Bannier 1936 (note 2) p. 19.
\item[21] Bannier 1936, p. 7.
\item[22] Decree of the Constituent Assembly of 10 March 1796, quoted in Bannier 1936, p. 9.
\item[23] Decree of the National Assembly 19 January 1798, concerning the principles of the proposal to be \textit{referred} to the people, which speaks of \textit{het recht des Volks tot verandering zyner Constitutie}, the right of the people to change its constitution; in: Bannier 1936, p. 7.
\item[24] A letter of the Executive to the Representative Assembly asserts that ‘a nation always has the power to change its constitution’, \textit{een Volk altijd de magt heeft zijne staatsregeling te herzien}; see Bannier 1936, p. 117.
\end{footnotes}
favour and the rest did not show up, remained conveniently undisclosed to
the public, although at the time it was something of a public secret.25

Similarly, the Constitution of 1805, which centralized power in one
person for the sake of convenience of relations between France and the
Batavian Republic, was subjected to a popular vote. This time the electorate
counted 353,332 persons. Of these 136 voted against and on the basis of the
principles of the referendum of 1801, the rest of the citizens – of whom on
this occasion 339,157 did not show up – was considered to have been in
favour.

The Constitution of 1806, which turned Holland (as it was then called)
into a puppet monarchy with the French emperor’s younger brother Louis
Napoléon on the throne, was not put to a popular vote to avoid the irritation
of the Emperor – and obviously, the subsequent annexation in 1810 by France
did not require any sham for imposing the French Constitution of 1799.

The interlude between the end of the old Republic in 1795 and 1813
when the French left, was looked upon throughout the rest of the 19th
century as a dreaded example, and it cannot surprise that it is still considered a
period of constitutional instability. The particular use to which constitutional
referenda were put in that period made the phenomenon highly suspect.
However, one could not quite do without any form of direct or indirect
legitimacy for the new constitutional regime established shortly after the
French left the Netherlands.

Thus, the Constitution of 1814, which the sovereign prince William I
had asked for as a condition for accepting sovereignty, was submitted to
some form of approval. A referendum to the people itself was considered too
democratic and reminiscent of the French constitutional abuses. That is why
one contrived an indirect form of legitimacy. Lists of in total 600 notable men
were drafted which were laid before the public who could approve,
disapprove or object to the names. The eventual group of notables (counting
474) met in a ‘Great Assembly representing the United Netherlands’ to cast
their votes, of which only 26 opposed the Constitution (mainly because of the
provision stating that the prince had to be a member of the Reformed
Church).

The same devise was used in 1815, when Belgium was united to the
Netherlands subsequent to a decision to that effect by the Congress of
Vienna. The country was to be governed by the Constitution of the Northern
Netherlands ‘qui sera modifiée d’un commun accord, d’après les nouvelles
circonstances’.26 This commun accord took two forms. Firstly, a constitutional

25 See the sources in De Gou 1995.
26 This was stipulated in the first of the so-called London Articles: ‘Cette réunion devra
être intime et complète de façon que les deux pays ne forment qu’un seul et même
état, régé par la constitution déjà établie en Hollande et qui sera modifiée d’un
commun accord, d’après les nouvelles circonstances’. These articles were included by
reference to by the Protocol of the Conference of 21 June 1814, as ‘les points de vue
mis en avant par lord Clancarty et agréés par le Prince Souverain d’Hollande.
committee was formed composed of both Belgian and Dutch representatives. They negotiated and drafted a new Constitution, with novelties like a bicameral parliament. The text was submitted to the normal procedure for constitutional amendment in the Northern Netherlands and, secondly, submitted to the approval of the notable Belgians selected in the same manner as was done in 1814, representing the then three million Belgians. This form of indirect popular scrutiny could only have a positive outcome by making use of a variation on the earlier experience of constitutional referenda, and more in particular the odd manner of counting the votes. About one sixth of the voters did not show up, which according to the proclamation of William I on the results ‘displeased’ him ‘although their absence can be considered proof that they were satisfied with the proposed draft’. Also, of the 796 which voted against there were 126 who did so expressly declaring their objections to the provisions on liberty of religion, provisions which could not be otherwise because the international Treaties on the unification imposed them – hence, also these were considered to be in favour of the rest of the proposed Constitution. And finally, the States General of the Northern Netherlands, representing some two million citizens, had voted unanimously in favour. Thus, William I concluded that ‘after these calculations and comparison of the respective votes cast, no doubt can remain regarding the feelings and wishes of the large majority of our subjects and the consent of this large majority has clearly become apparent’.27

We can see in the devises used in 1814 and 1815 historical precedents to the mixing of the idea of representation with that of consulting citizens, which nowadays is still prevalent in the constitutional literature and practice we discussed in the previous section of this essay. We could say, nevertheless, that given the nature of the process, the consultations of 1814 and 1815 were more of a referendum than can be said of the present method for amending the Constitution. Moreover, the consultation of 1814 (and perhaps also of 1815) concerned not the amendment of the Constitution, but the making of a new Constitution. It concerned the involvement of citizens in a more original pouvoir constituante then is at play in amending the present Constitution.

If the 1814/1815 consultations can then be considered constitutional referenda, they were the first and last experience with the instrument as far as the Netherlands Constitution, the Grondwet, is concerned. But it was not the last experience with constitutional referenda in general. There are two other examples of constitutional referenda in the Kingdom, the consultative referenda in the overseas countries and the consultative referendum on the Treaty establishing a Constitution for Europe. We will briefly describe them.

27 Proclamation of 24 August 1815, Staatscourant 26 August 1815; also in Colenbrander 1909, p. 618-620.
3.2. The Consultative Constitutional Referenda (I): the Overseas Islands of the Kingdom

The Kingdom of the Netherlands is formed by the country in Europe and by two countries in the Caribbean: the Netherlands Antilles, which consist of five islands (Curaçao, Bonaire, St. Maarten, St. Eustatius and Saba), and the country of Aruba. As we mentioned above, the relations between the three countries are governed by the Statuut voor het Koninkrijk der Nederlanden, the Charter for the Kingdom of the Netherlands (1954). These constitutional relations are quasi-federal in as much as a number of matters, such as foreign relations and defence are declared matters for the whole realm (federal matters) whereas all other matters are within the autonomy of each of the countries (such as economic, financial and social affairs, etcetera). We must mention all this in this paper, because the Statuut provides for the right to unilateral secession for Aruba, conditional on a referendum to that effect in that country; and because on the other islands consultative referenda have been organized on the constitutional future of the islands.

The island of Aruba was originally part of the Netherlands Antilles, but gained autonomy as a separate country in 1986. This was originally intended to be an interim status leading to independence 10 years later. However, the clause on independence in 1996 was withdrawn by an amendment of the Charter of 1994. Instead, Aruba acquired the right of secession. This is to be found in Articles 58 to 60 of the Charter. A legislative act of the parliament of Aruba is to declare the wish to terminate constitutional relations within

28 Until 1975 the Statuut also covered the country of Surinam, which in that year gained independence. Significantly, the people of Surinam were not given the chance to express themselves on their independence by referendum, as the instrument was strange to the constitution on the Kingdom.

29 Charter, Article 58: 1. Aruba may declare by country ordinance that it wishes to terminate the constitutional order enshrined in the Charter in respect of Aruba. 2. A bill for such a country ordinance shall be accompanied on its submission by an outline of a future constitution, containing in any event provisions on fundamental rights, government, the representative assembly, legislation and administration, the administration of justice and amendments to the Constitution. 3. The States may only approve such a bill with a majority of two thirds of the sitting members.

Article 59: 1. Within six months of the approval by the States of Aruba of the bill referred to in Article 58, a referendum to be regulated by country ordinance shall be held, at which those entitled to vote in elections to the States may express their opinion on the bill. 2. The bill shall not be enacted as a country ordinance until it has received the approval of a majority of the voters in a referendum.

Article 60: 1. Once the country ordinance has been enacted in accordance with Articles 58 and 59 and once the future constitution has been approved by the States of Aruba with a majority of at least two thirds of the sitting members, the date on which the government of Aruba feels that the constitutional order should be terminated in respect of Aruba shall be determined by royal decree.

2. This date shall be no more than a month after the constitution has been adopted, which in turn shall be no more than a year after the date of the referendum referred to in Article 59.
the Kingdom and thus to gain independence. This act must be accompanied by a draft future constitution of Aruba and can only be adopted with a majority of two thirds of the members of the Aruban parliament. According to Article 59 of the Charter, this act must be subjected to a referendum, in which it can only be adopted with a majority of votes.

This referendum is at present the only binding referendum that exists within the Kingdom. It is strictly speaking a legislative referendum, but as it concerns the structure and form of the Kingdom, it must in effect be considered a constitutional referendum.

As we mentioned, the five islands of the Netherlands Antilles have had a series of consultative referenda on the constitutional future of these islands within the Kingdom and the Netherlands Antilles. The first round took place in November 1993 and October 1994. Four options were sketched from which one only could be indicated, which were the continuation of the relations within the present Netherlands Antilles, a separate status as a country (like Aruba), the status of a province within the Netherlands (incorporation) and independence. The outcome showed an overwhelming preference for retaining the present constellation of the Netherlands Antilles. This meant that certain attempts to work towards a new constellation, including independence, had to be shelved.

This position changed over the last years. The five islands show, in terms of their political system, little coherence. Political parties are not organized on a countrywide basis but have an island constituency only. The electoral system fosters this. The predominance of Curaçao in the country government (which is located on Curaçao), economic differences between the island economies and the geographic distance between the leeward and windward islands weakened the sense of having much in common. Hence, also the mood shifted. This was reason for another set of consultative referenda on the constitutional future of the Netherlands Antilles, organized by the islands. The first was St. Maarten (approximately 34,000 inhabitants), which organized its referendum in 2000, when the population preferred a separate autonomous status like Aruba. Bonaire (approx. 12,000 inhabitants) held a referendum in September 2004, followed by Saba (approx. 1,500

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30 For the background and results of the first round of referenda, see Oostindie & Klinkers, 2001, especially p. 229-234. Of the second round of referenda there exist no generally accessible official documents. For the purpose of this essay this author has relied on details published in newspapers, particularly the Antillian newspaper Amigoe (which has a good, freely accessible internet version) and Dutch newspaper reports, particularly NRC Handelsblad and Volkskrant.

31 At the island of St. Maarten (half of which is French), where this was the preferred option for 59.4 per cent of the votes; on the other islands this preference ranged from 73.6 to 90.6 per cent of the votes. An autonomous status was the preference of 33.2 per cent of the voters on St. Maarten, and 17.9 per cent on Curaçao, but less than 10 per cent on the other islands. Incorporation was an option for 7.7 per cent of the votes on Curaçao, but only a few per cent elsewhere. Independence was the preferred option on St. Maarten for 6.3 per cent of the vote, but elsewhere less than 1 per cent.
inhabitants) in November 2004; both opted for more direct relations with the Netherlands over retaining the present Netherlands Antilles. Curacao (approx. 133,000 inhabitants) opted for an autonomous separate status in April 2005, while the small island of St. Eustatius (approx. 2,700 inhabitants) was the only one which with overwhelming majority voted to remain in the Netherlands Antilles in a referendum of the same month.

These referenda were indeed only consultative, and were organized by the islands separately. Nevertheless, they have pushed forward negotiations between the islands of the Netherlands Antilles and the Netherlands to dismantle the Netherlands Antilles. This will of necessity sooner or later lead to a revision of the Statuut voor het Koninkrijk.

3.3. The Consultative Constitutional Referenda (II): the Treaty Establishing a Constitution for Europe

The Netherlands have had their own consultative constitutional referendum on the Treaty establishing a Constitution for Europe on the 1st of June 2005. This referendum was called for by a parliamentary initiative in the Lower House, which promoted the adoption of a bill prescribing a consultative referendum, to be held before the Lower House was to debate and decide on the constitutionally required parliamentary approval of the Constitutional Treaty. The justification for this referendum was found in the fact that the European Union has acquired constitutional importance for the Netherlands. The Council of State in its advisory opinion on the referendum bill by a stretch of the imagination even saw a parallel between this consultative referendum and the elections prescribed before the second reading of an amendment to the national Constitution.

The particular moment of the referendum, that is to say preceding the parliamentary debate on the Constitutional Treaty, was thought to derive from the consultative, non-binding nature of the referendum. It was to inform parliament about public opinion. Contrary to this ostensible aim, a number of political parties felt constrained to pronounce they would consider the outcome of the referendum binding, dependent on the voters' turnout. Thus, nearly all major parties committed themselves to the outcome as binding if there was a clear result and a sufficient number of voters casting a vote. And so there was. The turnout was about 63%, which is considerably higher than for elections for the European Parliament, and the 'no' was supported by 62% of the voters. This led to the withdrawal by the government of the bill on the approval of the Treaty without any

parliamentary debate taking place on the Treaty at all.\textsuperscript{34} So much for the informed debate in parliament which the consultative referendum aimed at.

It is the official view of the government, supported by a majority in parliament, that the present text of the EU Constitution cannot be re-submitted. The expectation is that it will not be until 2007 that a debate on Europe’s constitutional future will again become possible.

The aftermath of the referendum is paradoxical. A large majority of parliament supported the outcome of the intergovernmental conference, and – obviously – so did the government itself. So the overwhelming ‘no’, although it could be foreseen in the last weeks before the referendum took place, must have been a disappointment to all those politicians. Members of parliament, however, were quite enthusiastic about the referendum as such. It was for the first time in many years that they were called to speak several times a day – not, as during the normal campaigns to a small group of loyal party members dutifully showing up, but in cafés, meeting rooms, debating clubs, societies and debating meetings of many kinds, filled to the brim with passionately discussing citizens. This was not what they were used to. It triggered a recent spate of initiatives attempting again to introduce referenda at the national level, as we shall see presently.

4. The Debate on Referenda: Proposals for Introducing Constitutional Referenda in the Netherlands

In this section we discuss the proposals which have been put forward in the course of time to introduce a constitutional referendum. With the exception of the proposal of the early 1920s, they all treated the constitutional referendum as one form of the general legislative referendum.

4.1. The 1920s

In December of 1918, an official ‘state commission’ was installed by royal decree to prepare a general revision of the Constitution. This commission, chaired by the Minister for the Interior, Ruys de Beerenbrouck, was asked also to study the peoples’ initiative and referendum. The general background to their work was the situation after the end of the First World War. The aim of the constitutional revision was reinforcing democracy. This was not merely from a sense of after-war optimism, but also to prevent revolutionary movements and a renewed declaring of the revolution as had occurred (and failed) a month before.

The largest possible majority of the commission (only J. Schaper, member of the Lower House for the socialist party dissented) concluded in its quite brief report that the introduction of a peoples’ initiative and

\textsuperscript{34} Letter from the prime minister of 1 July 2005, \textit{Kamerstukken II} 2004/05, 30 025, nr. 8 (reprint).
referendum would involve ‘grafting a plant of exotic origin on our constitution’ and judged this to be ‘a dangerous experiment’. It made an exception, however, for a referendum in two cases: 1) on constitutional amendments, and 2) when a decision has to be taken as to the form of the state when no successor to the throne is constitutionally available, that is to say on the question whether the monarchy has to be continued. As to constitutional amendment, the state commission proposed a constitutional referendum as ‘a more simple and articulate form’ of consulting the electorate than the dissolution of parliament ‘which avoids the inconveniences attached to any dissolution’. It stated that if an amendment is adopted by parliament with a large majority, there is no need for a referendum:

‘One may then rightly assume that the decision is in conformity with public opinion. Is that majority in one of the Houses less than two thirds, than a consultation of the people is unavoidable and a referendum appropriate. Also then, however, a majority of two thirds shall be appropriate, in accordance with what the Constitution already prescribes, because only when a general conviction has occurred a revision of constitutional provisions should take place’.

In other words, the approval of a constitutional amendment required the adoption in a referendum with a two thirds majority of the vote.

This proposal was introduced by the next government, of which Ruys de Beerenbrouck was prime minister. However, many objections were voiced and several amendments put forward in the Lower House, which in the end rejected the proposal at first reading.

4.2. The Proposals of 1946 and the 1950s

There have been two government proposals to change the procedure for amending the Constitution, which did not directly propose a constitutional...
referendum, but which did touch indirectly on the idea of a constitutional referendum.

The two proposals, which differed in technical details that will not concern us here, had in common the idea of elections for a special Chamber of Constitutional Revision, Kamer voor Grondwetsherziening which was to decide about a constitutional amendment after adoption of the initial Act formulating the amendment. The establishment of this Chamber would obviate the need for an interim dissolution of parliament. It would no longer be necessary to wait with proceeding with the amendment until the general elections. Also, the elections for the Chamber would more clearly focus on the proposed amendments.

Both times the proposal did not receive enough support in parliament. The bill of 1946 was rejected at second reading in the Lower House, where the main objections focussed on the fact that it was considered desirable to have constitutional amendments dealt with in a parliament elected on more general political considerations than that of a pending amendment only. At the background there seemed to exist the perception that the situation in the colonies might make amendments necessary, while also the cold war ideologies made themselves felt by the end of 1946 – two sensitive issues which one did not like to be presented as single issues to a popular vote.40 However that may be, it was deemed wiser that political parties would decide on the basis of established political lines, and not so much on separate issues and interests that might be at stake in revising the Constitution.

The objections to the bill introduced in 1951 were already apparent at first reading in the Lower House to such an extent that the government decided to withdraw the relevant bill when it came to a vote on the text and on a plethora of amendments and sub-amendments.41 For our purposes it is relevant that the objections were similar to those in 1946, but were even more articulate. They concentrated precisely on the emphasis which the government had put on separating the issue of the constitutional amendment in elections from general political considerations. This, in the view of many, made the election of the Chamber for Constitutional Revision an indirect referendum and would be at odds with the representative nature of parliamentary democracy.

4.3. Constitutional Referenda as a Variety of a Regular Referendum: The Biesheuvel/Prakke Commission

The issue of constitutional referenda later on arose in the margin of the debate about introducing a general possibility for national referenda. The main source of concrete and well-considered proposals came from another

41 See Handelingen II, 1950-151, Bijlagen, 2341 nrs. 1 et seq.
state commission, named after its chairmen the Biesheuvel/Prakke Commission, which presented its report in December 1985.

This Commission proposed three types of referenda. Firstly, it proposed the introduction of a binding, corrective referendum. It would be facultative, that is to say at the initiative of the electorate itself, expressing itself in an initial request supported by 10,000 voters and a definitive request by 300,000 voters. The Commission did not wish to exclude constitutional amendments from this type of referendum, but restricted the possibility of a referendum to an amendment adopted by parliament at second reading (i.e. with at least two thirds of the vote). In this referendum no special majorities would be required to adopt or reject the amendment; in the view of the Commission a normal majority should suffice. The restriction to a referendum at second reading only was motivated with the argument that otherwise two referenda on the same amendment would become possible, which was deemed undesirable (why parliament should have two chances to speak out but the electorate not should not, was left unclarified). It acknowledged that the dissolution after the first reading also involves the consultation of the electorate, but argued that this does in practice not concern the substance of the proposed amendment.42

The Commission also proposed to introduce a people’s initiative, volksinitiatief, to be exercised in combination with the referendum. This initiative concerns the introduction of a bill in the Lower House, if supported by at least 300,000 citizens. Should either the Lower House reject the bill with at least two fifths of the vote in favour of the bill, or the Upper House reject it, or not be dealt with within a period to be specified, the bill would have to be subjected to an obligatory referendum for adoption. The initiative should in the opinion of the Commission also extend to initiatives to amend the Constitution, although its adoption in a subsequent referendum would require a majority of two thirds of the vote which should also be at least thirty percent of the total number of citizens entitled to vote.43

Finally, the Commission also proposed the introduction of a consultative referendum before the Lower House takes any decision on a bill, which as a general possibility would – in the view of the Commission – require a basis in the Constitution. The consultative referendum could

43 Staatscommissie 1985, p. 77-78 and 125-133. One curious exception to the obligation to subject the initiative to a referendum was found in the proposed Article 89 to the Constitution: ‘A referendum will not be held, if the Lower House deems the bill in conflict with the Constitution, the Charter for the Kingdom of the Netherlands or an obligation under public international law’. It is unclear when an initiative to amend the Constitution could be deemed to be in conflict with the Constitution, as the Constitution does not contain substantive limits to the possibility of amending it. Presumably, this could only be the case when an initiative would claim original pouvoir constituant beyond the provisions of the Constitution itself.
consider any topic on which parliament is to take decisions, which includes proposals for amending the Constitution.44

4.4. The 1990s and Beyond

None of the proposals of the Commission received a positive response in parliament at the time. It was only in 1996 that the proposals of the Biesheuvel/Prakke-Commission received a follow-up. This was a consequence of the coalition agreement in which the smallest party, D66, which originated in 1966 as a party for constitutional reform, wrought from the other two coalition parties45 the concession that a binding corrective referendum be introduced. The bill subsequently introduced opened the possibility of a referendum in the manner proposed by the Biesheuvel/Prakke-Commission. For constitutional amendments this meant that a facultative referendum would become possible after adoption of an amendment at second reading.

This proposal for introducing the referendum was adopted at first reading, but in May 1999 in a dramatic session of the Upper House it was rejected with a one vote margin at second reading.46 This led to a brief political crisis in the cabinet, which was resolved by a compromise according to which a Temporary Referendum Act was to be introduced in parliament at the short term, while a renewed attempt was to be made to introduce the same amendment to the Constitution as had just failed.

The Temporary Referendum Act was introduced successfully in 2001 and provided for a non-binding corrective (‘consultative’) referendum. The Temporary Referendum Act of 2001 excluded referenda on constitutional amendments. This was due to the fact that the referendum which the Act opted for was to take place after parliamentary adoption and governmental ratification of a bill, suspending only the entering into force of an Act in Parliament in case of a referendum. The present Constitution makes such suspension impossible as regards constitutional amendments.47 It was taken for granted that the choice for the moment of the referendum (after parliamentary adoption and ratification, before entry into force) would have as a side-effect that constitutional amendments were excluded. It would have been very easy to change its timing and choose for a referendum between parliamentary adoption and ratification by the government, either for

44 Staatscommissie 1985, p. 81-90 and p. 131-133.
45 PvdA (the social-democrat labour party) which was a lukewarm supporter of the referendum, and VVD (liberal conservative party) which had always opposed the referendum.
46 This was due to the negative vote cast by the former leader of the VVD, Wiegel, who thus failed to follow what was on this occasion the line of his party.
47 Article 139 Constitution: Amendments to the Constitution passed by the States General and ratified by the King shall enter into force immediately after they have been published.
consultative referenda in general or for constitutional referenda only. Evidently, the concern to include referenda on constitutional amendments was not deemed so important as to lead to a reconsideration of the moment for the referendum. This confirms that constitutional amendments play a marginal role in the debate over the referendum.

No attempt to initiate a referendum under the Act was ever made, also because of the very high thresholds for holding a referendum. The Temporary Referendum Act expired on 1 January 2005. The intention again to introduce in the Constitution the possibility of a facultative referendum but then a binding, decisive one (including the possibility of a referendum after adoption and ratification of a constitutional amendment at second reading) failed at second reading, this time in the Lower House under a different coalition cabinet (29 June 2004) – and this time without a cabinet crisis.

4.5. After the EU Referendum

As we remarked above, the high participation of citizens in the EU referendum, which seemed to express in the eyes of politicians a renewed political interest of citizens, were reason for members of parliament to renew efforts to introduce the referendum as a means of bridging the gap between political decision-making and the citizen. These led to a proposal on a ‘light version’ of the citizens’ initiative; the re-introduction of a consultative referendum, which again takes for granted that it excludes constitutional amendments; and a renewed attempt at introducing a facultative, binding and corrective legislative referendum which does extend to constitutional referenda. We will briefly sketch the main points of these proposals.

The first, a ‘citizens’ initiative’, was launched by the presidency of the Lower House.48 This initiative is to take the form of a petition to the Lower House by at least 15,000 persons resident in the Netherlands of at least 16 years of age and should ’aim at the making, amending or withdrawal of a legislative measure or at the governmental policy to be pursued’.49

Whereas the Biesheuvel/Prakke Commission deemed it necessary to change the Constitution for its introduction, the present proposal is to regulate the matter only in the Rules of Procedure of the Lower House and its Committee on Petitions (to be renamed: Committee on Petitions and Citizens’ Initiatives). The Committee is to report to the House and may refer the initiative to another appropriate committee. Although this may seem a clear route towards legislative initiative, parliamentary committees do not have the right to present and initiate bills, only individual members of the Lower House and the Lower House itself have this right; so it will remain

48 Proposal of 8 June 2005, Kamerstukken II 2004/05, 30 140, nrs 1-3.
dependent on individual members to follow up or not to follow up a petition. Due to this, the citizens’ initiative does not really create a legislative initiative at all. This may explain why the matter need not have a constitutional basis. The proposed regulations are meant as an experiment to be evaluated after two years.

For our purposes it is important to note that the proposal excludes citizens’ initiatives to amend the Constitution. The proposed Article 132a of the Rules of Procedure of the Lower House excludes from the initiatives ‘matters in conflict with the Constitution or public morality’. An amendment to the Constitution is necessarily a proposal to change it, and in a sense necessarily conflict with it; there are no substantive constitutional provisions limiting any change or amendment of it. On the other hand, the language used may leave open an initiative aimed at amending the Constitution as long as this does not conflict with the procedural rules for amending it.\(^5^0\)

The matter was raised in the (written) investigation of the proposal by the Committee on Procedures of the House. The answer given by the Speaker of the House reveals that indeed citizens’ initiatives cannot be allowed to concern an amendment to the Constitution. The reason adduced is that the procedure for amending the Constitution should not be evaded by a citizens’ initiative.\(^5^1\) This is a most unsatisfactory answer, as it suggests that initiatives can bind the Lower House, which it clearly cannot, because in the proposal an initiative is in essence no more than a petition which the Lower House may deal with in the fashion it considers appropriate. It does in no manner affect either the powers of the Lower House or the legislature.

Given the unsatisfactory answer, one can hardly blame those who think that this kind of proposal is based on the premise that it is harmless to hear the opinion of citizens on unimportant decisions, but that citizens should not become too deeply involved in important decisions.\(^5^2\)

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\(^5^0\) See footnote 43, for a possible – and equally unclear provision – in the report of the Biesheuvel/Prakke Commission, which, however, made explicit provisions for the inclusion of initiatives to amend the Constitution.

\(^5^1\) The formulation of the answer (in Kamerstukken II 2005/06, 30 140, nr 5, p. 4) was clumsy to say the least. The Speaker spoke of the ‘legislature’ having surrounded constitutional amendments with special, laborious procedures, and mentioned especially the necessity of a declaration of the legislature at first reading ‘after a parliamentary debate’ – he must have forgotten that most of the amendments of 1996 concerned the deletion of most of the transitory articles to the Constitution which had substantively lapsed. No parliamentary debate was devoted to these amendments of the Constitution either in first or in second reading, nor were any remarks made at committee stage in both readings.

\(^5^2\) After finalizing the present contribution, the Lower House adopted the proposals on the citizens’ initiative on 7 February 2006. Amendments adopted concern the raising of the minimum age to 18 years, the threshold from 15 000 to 40 000 and the prohibition of an initiative on an issue within two years after it has been on the agenda of the Lower House. The prohibition of a citizens’ initiative on the Constitution has been retained.
The second proposal made since the EU referendum is a bill presented at the initiative of three members of the Lower House and concerns the re-introduction of a ‘consultative’, that is to say a non-binding corrective, referendum by act of parliament. This proposal does not require an amendment of the Constitution, and can be introduced by Act of Parliament. The bill lowers the thresholds for holding a referendum (it requires 300,000 citizens after an initial request of 10,000 citizens). Like the (lapsed) Temporary Referendum Act of 2001, the bill excludes any constitutional amendments from this referendum. An attempt at circumventing the purely formal constitutional obstacle has not been made, although the solution would be very simple indeed.

The third proposal is a proposal to amend the Constitution and introduce a facultative, binding referendum. Identical to the Biesheuvel/Prakke proposal and the earlier constitutional amendment which was rejected in June 2004, the new amendment adds a paragraph to Article 137 to the effect that a constitutional referendum is only possible after completion of the second reading. The difference between the new bill and the rejected amendment is that the present bill leaves the establishment of the thresholds to be determined by an act of parliament which can only be adopted by two thirds of the vote.

5. Some Concluding Remarks

Summing up, we can say that constitutional referenda are not in the limelight in the Netherlands.

The experiences with constitutional referenda during the period immediately after the French Revolution and during the first years of the Kingdom were quite negative. Apart from a series of consultative referenda at local level in the overseas countries and the constitutional referendum for one of the overseas’ countries in case it wishes to make use of its right of secession, there is only mention of it in the very margin of the debate on the introduction of legislative referendum. Constitutional referenda are – with one exception – at best considered to be a mere species of the legislative referenda, but even then its special character is hardly recognized.

The debates on the introduction of the legislative referendum have focused on its consequences for the representational character of the present parliamentary system. This was made explicit with regard to constitutional amendments on the occasion of the rejection of the proposals of 1946 and 1951 to introduce a Chamber of Constitutional Revision to be elected after adoption of a constitutional amendment at first reading by Act of Parliament.

53 The bill was presented on 16 November 2005, see Kamerstukken II 2005/06, 30 372, nrs. 1-3.
54 Article 5 sub d of the Bill.
55 The present version of the Bill was presented on 16 November 2005 and can be found in Kamerstukken II 2005/06, nrs 6 (text of the Bill) and 7 (explanatory memorandum).
This is by now curiously at odds with the dominant view in the constitutional practice and literature which considers the present dissolution of the Lower House (before 1996: both Houses of Parliament) as a consultation of the electorate in the manner of a quasi-referendum. This view is based on a misunderstanding, as we have tried to argue in this essay.

This dominant view is hard to reconcile with the ease with which in proposals for a consultative, non-binding referendum not the slightest attempt is made to include a consultative referendum on constitutional amendments. Worse, the present proposals for a citizens’ initiative excludes constitutional amendments, notwithstanding the fact that the initiative is, when it comes to it, entirely non-committal for any of the institutions involved in legislation and constitution-making.\footnote{See \textit{supra} note 52.}

Altogether we may say that constitutional thought and practice in the Netherlands as to the nature of constitutional amendment and the possible role of the electorate in it, also in the form of a constitutional referendum, is quite incoherent.

The new attempts to introduce referenda (and the citizens’ initiative) do not have as their primary concern constitutional referenda; two of them explicitly exclude them for no good reason. This may surprise all the more as the infamous referendum on the Treaty establishing a Constitution for Europe which triggered these proposals was, though not formally, substantively a constitutional referendum and found part of its justification in the constitutional importance of that Treaty.

One explanation for this is the lack of distinction made between normal legislation and constitution-making within the Dutch constitutional order. Constitution-making is marginal to law-making, the former being no more than a species of the latter. This agrees with the relative position of the Constitution within the whole of the constitution and within the legal order. It is reinforced by the weak constitutional culture within political circles and outside.

Would the presently pending proposals to attempt the introduction of a referendum – and in its margin a constitutional referendum – stand a chance to be adopted this time?

This is – at the time of writing – a matter of speculation only. Here, this speculation can only concern general explanatory trends. These may give reason to think that sooner or later the referendum may materialize. Whereas during the 20th century the Netherlands was characterized as a ‘pillarized’ society based on denominational minorities and the absence of any majority view, this has changed since secularisation became socially effective and dominant since the 1990s. Previously nearly all social institutions of civil society existed in about three to five varieties. Protestants, Catholics, socialists, and liberals or ‘neutrals’, each had their own sports clubs, trade unions, employers associations, radio and television broadcasting.
associations, and political parties, while none of these pillars could possibly claim to represent a majority position. Under such circumstances it was important to act merely through power brokering by representative institutions. Decision-making based only on numeric considerations could but endanger the social and political equilibrium. Referenda do not fit in this system. But as secularisation has largely removed the foundations of the pillars, and one can say in the meantime also the pillars itself, representative institutions are themselves controversial. In the new climate – although it shows some of its instable aspects in the occasional violent excesses of the last years in the Netherlands – precisely instruments of direct participation unmediated by political or other representative institutions are appropriate.

From this point of view it may well be expected that sooner or later referenda shall be introduced on a regular basis. But constitutional referenda shall for the time being not acquire special status. For this the constitutional climate is too different from that in some other European countries and elsewhere in the world.
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Introduction

This report is about avoiding and punishing corruption in the public service in the Netherlands. We are looking for the way public law (especially national penal and administrative law and including the influence of international law on these fields of national law) is dealing with this issue. In the instruction paper, recognizing that the situation of corruption will be significantly different, the general approach seemed to be: 1) finding the problems in the jurisdictions and looking for the definition of (for instance) the Public Service, 2) explaining in what ways rules tend to safeguard the institutions in question from potential corruption, 3) explaining in what ways the integrity of individual transactions is protected, 4) describing the investigative institutions, the procedures and the penalties.

In the Netherlands the developments differ a bit from the description in the instruction paper as the general approach. Firstly, until now there has not been much clarity in law and policy about the definitions of the terms corruption, fraud, integrity and good governance; often there are ‘misty’ discussions between the Government and Parliament in which the Judiciary plays a rather marginal role. The Fourth Power Institutions1 (National Ombudsman, the Court of Audit and the Council of State) are more important in that discussion. Secondly, the main problems of corruption were not primarily ‘discovered’ by the Judiciary but by Parliament that created special investigation commissions to work on special corruption cases, supported by the Fourth Power Institutions. Thirdly, based on an international report in the context of the Council of Europe a discussion started on the extent and the nature of corruption at the national level in the Netherlands. Fourthly, in that discussion in essence only the penal repressive approach to corruption was discussed and there was no real discussion about the preventive and repressive aspects of the administrative law approach. With this report we also want to stimulate national and international legal discussion on corruption in the Netherlands.

1 Addink 2005a, p. 251-284.
1. **Context: Problems and Definitions**

1.1. **Problems**

1.1.1. The Development of Conceptions of Corruption in the Netherlands

For a long time the general opinion in the Netherlands was that corruption is far removed from the (legal) reality in our country. It was a problem that existed in countries in Africa, Asia or in South America, but not in Europe and especially not in the Netherlands. Research reports indicate that there is quite a low level of corruption in the Netherlands. Even a rather recent report\(^2\) showed that only 47 cases of corruption (and abuse of office) were transmitted to the Public Prosecution Service in 2001 and 26 during the first half (25 June) of 2002. According to the Corruption Perceptions Index for 2002, issued by Transparency International, the Netherlands was listed at number 7 with a score of 9 out of 10, occupying a high position compared with other European Union member States (5th position after Finland, Denmark, Sweden and Luxembourg). In 2004 the Netherlands’ position in the Corruption Perceptions Index was the 10\(^{th}\) place with a score of 8.7 out of ten.\(^3\) Based on this information the view of the Dutch authorities was that corruption is not a major problem and not a widespread phenomenon.

This general opinion concerning corruption has changed, however. Nowadays corruption in the public service in the Netherlands is a hot issue. Not because of the amount of cases, but more because of the far-reaching character of corruption cases. These cases have been exposed by recent investigations by the Dutch Parliament. In the process of obtaining more transparency with respect to corruption there was also a crucial role for the press. Several cases in the press show that corruption occurs in all branches of the public government: the police, public works, government buildings, public housing and other fields of spending government money. We are now realizing that inaccurate definitions of corruption have been used. The approach to corruption was adopted from one side only (penal and repressive) and therefore the perspective which existed was too narrow. Besides, the Dutch legal system is influenced by the developments in the internationalization of the administrative law on corruption, by the implementation of regional (European) and international law and by comparing administrative law in other countries. From an academic legal perspective a distinction can be made between the narrow penal law approach and the broader approach, which also includes the public administration and the administrative law approach.

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\(^3\) Transparency International, Corruption Perceptions: 2002 Index and 2004 Index.
Corruption is an issue with a legal history, but for too long only the narrow penal law approach has been adopted. It is also important to realize that the forms of corruption have developed in a broader perspective in the sense that different types of corruption occur. These developments have made it necessary to look in a critical way at the traditional legal norms in which corruption was repressively punished and by penal law only. Two developments can be distinguished. Firstly, attention is not only given to the repressive approach to corruption, but also to ideas which have been developed in relation to the preventive approach to corruption. New legal norms have been created for civil servants as well as politicians to safeguard and guarantee correct public service. Secondly, there is not only the development of new penal law but also of new administrative law and including internationalisation aspects based on the relevant influences of European and international law on national law.

1.1.2. The Role of Investigations by the Dutch Parliament

The national opinion concerning corruption has changed, among other things because of the role of Parliament. Several extensive investigations commissioned by the Dutch Parliament took place in the years 2002-2005. The greatest scandal of recent years has been the so-called public building fraud. In a television programme a whistle-blower revealed information about corrupt practices in the field of government construction and public road projects. On 5 February 2002, Parliament decided to set up a Parliamentary Fact-finding Committee on the Construction Industry. The Committee concluded that irregular underhanded tenders, in which decision-making civil servants and politicians are influenced by gifts in any form, were usual practices. Subsequently, the Committee decided to investigate the nature and the scope of the alleged irregularities and more particularly to examine all the relevant facts about the construction of the Schiphol railway tunnel. The size and the seriousness of the irregularities revealed shocked the Committee: it concluded that the construction sector was affected on a large scale by practices which are contrary to the regulations on fair economic trade. Preliminary talks between companies aimed at reaching agreements on prices and market division and duplicate bookkeeping practices showed that most of the big construction enterprises make up structures which could lead to cartels. Because of a violation of competition regulations, construction companies were fined by the Netherlands Competition Authority (NMa). Finally, some local government authorities commenced tort actions. They argued that because of cartel agreements the government had paid too much for public works and they claimed damages. The final decision of the highest judicial authority is not yet known.

However, the Committee concluded that there was no indication of any form of civil servants’ structural corruption. Nevertheless, the Committee was concerned about the number of supposed breaches of integrity by a
small number of civil servants. Furthermore, it suspected that the relations between civil servants and construction companies are too close and that this can lead to collusion. Therefore, the regulations for civil servants and public procurement were sharpened.

1.1.3. The critical GRECO Report on Corruption (policy) in the Netherlands

The Compliance Report on the Netherlands within the framework of GRECO\(^4\) of March 18, 2005, which was related to the report from the Dutch government within the framework of the First Evaluation Round\(^5,6\) is very important. It includes the Dutch Government’s comment and can be seen as the actual Dutch Government’s opinion on corruption.

GRECO addressed seven recommendations to the Dutch Government. There is a need for a more proactive approach to the phenomenon of corruption (1), there is a need for more detailed statistics, targeted research and analysis (2), applying whistleblowing regulations for all public sector entities should be considered (3), a strategy to establish a fluid channel of communication with the private sector should be developed by the criminal information and investigation services (4), there should be more specific anti-corruption in-service training for the police and the public prosecution (5), the Public Prosecution Service should ensure that the prosecution authorities take appropriate and fully informed decisions on whether to initiate or continue a prosecution (6) and the possibility to create specialised panels of judges for the most complex and serious cases related to economic crime.

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\(^4\) GRECO: Groupe d’Etats contre le corruption; Group of States against corruption.


\(^6\) GRECO has instigated two Evaluation Rounds. The First Evaluation Round (1 January 2000 – 31 December 2002) dealt with themes based on specific provisions of the Council of Europe’s Twenty Guiding Principles for the Fight against Corruption (Resolution (97) 24): 1) independence, autonomy and powers of persons or bodies in charge of preventing, investigating, prosecuting and adjudicating corruption offences; 2) immunities from investigation, prosecution or adjudication of corruption offences; - specialization, means and training of persons or bodies in charge of fighting corruption. The Second Evaluation Round (commenced on 1 January 2003) deals with themes based on specific provisions of the Council of Europe’s Twenty Guiding Principles for the Fight against Corruption (Resolution (97) 24) and associated provisions of the Criminal Law Convention on Corruption (ETS No. 173): 1) identification, seizure and confiscation of the proceeds of corruption; 2) the role of public administration, efficiency and transparency with regard to corruption; 3) prevention of legal persons being used as shields for corruption; 4) tax and financial legislation to counter corruption; 5) links between corruption, organized crime and money laundering. About the Netherlands there is only a report on the First Evaluation Round.
offences should be considered (7). In the report there were also three general points of criticism concerning the Netherlands’ Corruption Policy.

In the first place there are in the Dutch Policy comprehensive efforts to promote integrity and ethics in the public sector; however, the phenomenon of corruption as such seems to have been given limited attention. It was suggested to GRECO that corruption was probably more widespread than was recognised by the central authorities. Therefore it was recommended that the Dutch authorities which are responsible for formulating anti-corruption policies should adopt a more proactive approach towards the phenomenon of corruption in order to combat it more efficiently. This underlines the importance of a more preventive approach and administrative instruments for a corruption policy by developing administrative law aspects.

A second remark concerns the responsibility of the administrative authorities not only for their own acts, but also for the acts of their civil servants. The situation of (political) responsibilities makes it necessary that administrative authorities have the necessary instruments and the (investigative) powers not only to develop a proactive corruption policy but also to have available controlling and enforcement instruments in relation to corruption. For this policy the administrative authorities need more statistics. The Dutch authorities only have information from the Public Prosecution Service. More detailed statistics would give the authorities a better basis for assessing the threat that corruption poses to Dutch society, thereby enhancing the possibility to implement countermeasures. There is a need for the development of more detailed statistics and targeted research and analysis in order to measure more clearly the extent of the corruption phenomenon in the country and based on that information the authorities at the centralized and decentralized level can develop a real (preventive and repressive) corruption policy.

The third general point of criticism concerns (partial) legislation. With regard to the penal law dimension of the Dutch anti-corruption system the report is very positive: it is broadly based and generally sounds. However, the report explains that in the Netherlands there is no ‘Law on conflict of interests’ or a ‘Law on (the Prevention of) Corruption’. In essence, in the Netherlands we are lacking an administrative law Act on (the prevention of) corruption!

Within the framework of the Law on Civil Servants there are some provisions relating to the conflict of interests (the obligation to report outside remunerative work, the registration of those jobs and the prohibition of outside jobs which could pose a ‘risk’ to the proper functioning of the public service) and this law will soon introduce an obligation for each State institution to adopt its own Code of Conduct (although most of them already have such a Code) as an instrument to prevent corruption. This is still a too restrictive approach to corruption: the public sector is made up of more than civil servants, the legal norms of good governance are still lacking (a code is just a good start), including the obligation to make plans for a policy to
eliminate and prevent corruption and the administrative sanctions by which to enforce the norms of good governance. Another recommendation was to consider applying whistle-blowing regulations for all public sector entities (at the central, regional, and municipal level) in order to harmonise regulation in this field and to avoid setting double standards.

1.1.4. Report ‘Public Corruption in the Netherlands’; the Dutch Government’s Opinion

The actual situation concerning corruption in the Netherlands as described above is partly based on the report ‘Public Corruption in the Netherlands’ ordered by the Netherlands Government which has been published in May 2005 and which was (also) written because of the international criticism on the Dutch Corruption Policy. The study primarily focuses on the quantitative factual and penal law aspects of corruption in the Netherlands. Attention has mainly been paid to the repressive aspects rather than to the preventive aspects of corruption. Fundamental aspects of administrative law (preventive as well as repressive) with regard to corruption were lacking in the report. Within the framework of the administrative law system the administrative authorities have the competence to take preventive or repressive decisions on corruption in the public sector. The administrative law instruments can be used in a much more effective and direct way than the penal law mechanisms, which in general take a long time, often several years. The consequence of the analysed existing situation in the Netherlands is that only the most serious cases of corruption will be brought to Court.

In the report two central questions have been answered. The first question was: what is the nature and extent of public corruption in the Netherlands? The second question was: how are cases of corruption dealt with in internal and criminal investigations? It is first noted that it is very difficult, if not impossible, to disclose all forms of corruption. Only a part thereof (the tip of the iceberg) becomes visible, but nobody knows the exact extent of the problem.

’It shows that there are a limited number of criminal cases and convictions each year (about 50 criminal cases, 27 convictions and 8 persons imprisoned). Within the whole public sector 130 internal investigations are conducted each year (...).

The surveys of the employees’ estimation on the extent of corrupt behaviour in their work environment show another picture. A survey among Dutch police officers showed that 4% of the police officers noticed bribery at least once in their team in the twelve months preceding the survey. For corruption like nepotism, cronyism and patronage, much higher percentages were found. From the surveyed police officers 19% perceived favouritism of family and friends at least once in their work environment and 59% favouritism by the management. A similar survey among 1000 randomly selected workers in the

Dutch labour force showed similar patterns for corruption: 7% bribery, 33% favouritism of family and friends, and 73% favouritism by the management.8

(…)

A ten case multiple case study was conducted with the main research question: What is the nature of corruption in the Netherlands. (…)
The nature of corruption is one of officials “sliding down” towards corruption; most processes of becoming corrupt can be qualified as a “slippery slope”. Corruption is rarely caused by personal problems of the official, like financial problems. Furthermore, important motives for officials to become corrupt are, next to material gain: friendship/love, status and making an impression on colleagues and friends. About the personality of the corrupt official, it was confirmed that often, corrupt officials have dominant and strong personalities (…). About the organisations of the official, it is noted that in most corruption cases, the supervision over the corrupt official is not very strong and that in many corruption cases, the control procedures are inadequate.

About the relationship between the briber and the corrupt official, it is noted that the relationship between the briber and the official is often structural; corruption is part of an enduring relationship. Since both parties may be guilty of a punishable offence, there is trust on both sides (…). Corrupt officials, also the ones who operate outside so-called corrupt networks, do not limit their corruption to one incident. Also, the corrupt official hardly even receives a gift for which a clear compensation is expected.9

In reaction to this report the Minister noted that the most important recommendation of the report is to uniform the recording of integrity violations (among which is corruption) within the public government. The Government attaches great value to sound Government and living in a society with a transparent public administration. Each violation of this rule is detrimental to the confidence of the citizen in the Government. For this reason civil servants and governors should be particularly keen on integrity.

The vision of the Dutch Ministers is that the corruption policy must concentrate on the preventive as well as the repressive aspects. The fight against corruption must take place on an ongoing basis. This involves the implementation of an active integrity policy under the coordination of the Minister of the Interior and Kingdom Relations and employing an adequate (criminal) enforcement policy, under the responsibility of the Minister of Justice. About local level several publications have been published.10

Concerning the administrative law aspects, the following two lines can be seen in the Netherlands: corruption policy, the first line, is about the integrity discussion while the second line concerns the case law of the administrative court in civil servant cases. Since 1990 the Minister of the

Interior has paid attention to preventive aspects of corruption. In 1992 the Minister made a public appeal to guard against fraud, corruption, breaches of integrity in general, and especially the hidden forms of small-scale bribery. She posited that there was more corruption than people thought and she announced a new policy of maximalizing the integrity of government and government officials. The announcement resulted in administrative measures, public inquiries, policy documents and in legislation. The Ministry of the Interior set up a very influential website on integrity, containing actual developments, advice and good practices.

The case law of the Central Appeals Tribunal (for public servants) has a repressive as well as a preventive effect. In pursuance of the law relating to public servants the public authorities can take disciplinary measures against civil servants who violate certain rules and neglect their official duties. Against those measures civil servants can appeal to the District Court and they can lodge a higher appeal to the Central Appeals Tribunal. The case law of this court provides a good survey of the kinds of violation of integrity norms, including situations of corruption and fraud.11

Recently the Dutch Government has taken different measures which were mentioned in the government’s answer to the GRECO report.12 Firstly, in 2003, a ‘Policy Document on integrity policy for public administration and the police’ was approved by Parliament. It contains an overview of integrity policies within the public administration and the police in the Netherlands and a list of actions (‘policy intentions’) by which to improve integrity. All these ‘intentions’ have been implemented:

- the Civil Servants Act has been amended in order to introduce a number of integrity measures addressed to the relevant staff and organisations;
- guidelines for Integrity Projects have been drafted. Public authorities can use these guidelines to identify vulnerable areas within their organisations;
- a guide for confidential integrity counsellors has been drafted and issued to all Public bodies;
- a specific Internet site on integrity issues in the public sector has been created: <http://www-integriteitoverheid-nl>;
- the Minister of the Interior and Kingdom Relations has carried out an integrity policy study, the results of which were submitted to Parliament;
- as for 2004, integrity audits are being carried out within all ministries.

Secondly, at the end of 2003 an anti-corruption action plan was prepared, which contains the following proposals: a) to investigate corruption and b) to

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11 Cases in the case law concerned gifts or grants, corruption and fraud by civil servants, the violation of a code of conduct, the leaking of information and additional activities.
formulate an anti-corruption policy document that clearly identifies the different organisations involved in the anti-corruption policies and the functioning of the various processes of prevention, investigation and prosecution. The objective of this document is twofold: to describe the current preventive and repressive measures against corruption which are in place and to provide a blueprint for the future. The anti-corruption policy document will be completed end of 2005.

In the same document the central authorities have reported that an amendment to the Civil Servants Acts entered into force on 1 May 2003, which provides that every administrative organisation has to draft its own whistle-blowing regulations. The Minister of the Interior has examined how a uniform recording of integrity violations can be achieved. Better registration can provide an insight into the real scope of corruption within public government. Moreover, the Minister has noted, as a result of a study by the General Court of Auditors, that each ministry should record integrity violations in its own department.

The two critical points in the letter by the Minister to Parliament are – in our point of view – that, first, the answer to the problem of corruption should not be the vague standard of integrity and, second, that there is no explanation for the fact that in practice the public service states that there is much more corruption than is reflected in penal cases.

1.1.5. Actual Problems concerning Norms in Administrative Law and Penal Law Corruption Regulations

Here a brief overview will be provided about the administrative and criminal law regulations and case law. His issue will be discussed more in detail in chapter II.

The most important administrative law norms can be found in the Civil Servants Act.13 In Article 125 there are regulations on prohibiting additional activities which are not conducive to the optimal functioning of the public service. Article 125a contains the norm that civil servants must refrain from revealing ideas and feelings or associating with and meeting certain persons as well as attending certain demonstrations, if such actions are not conducive to the optimal functioning of the public service. But in specific regulations there are also some norms in relation to corruption.14 15 The Dutch Penal

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14 See: General Civil Service Regulations (ARAR): – General: 1) Duties and actions of government personnel (ARAR, Art. 50) and 2) Prohibition on alcohol (ARAR, Art. 78); – Oath and affirmation of office: 1) Oath and affirmation of office (ARAR, Art. 51) and 2) Regulations on the form of the official oath/affirmation of office for civil servants (Order by the Minister of the Interior, Official Gazette 92, 18 May 1998) – Additional functions: 1) Additional functions (ARAR, Art. 61), 2) Contracts and deliveries (ARAR, Art. 62), 3) Payment for work done for third parties (ARAR, Art. 63a) – Gifts: 1) Gifts and services (ARAR, Art. 64). About financial matters:
Code criminalises the active and passive bribery of domestic public officials (Arts. 177, 177a, 362 and 363), active and passive bribery in the private sector (Art. 328ter) and active bribery during elections (Art. 126). Provisions on active and passive bribery also apply to national judges (Arts. 178 and 364), former civil servants, foreign civil servants, international civil servants, foreign judges and judges of international organisations (Arts. 178a and 364a), as well as future civil servants (Arts. 177 and 177a).  

1.2. Definitions: Public Service, Corruption, Fraud, Integrity and Principles of Good Governance

It is important to use different terms for different activities and norms and clear definitions of these terms so that any misunderstanding will be avoided. Different terms are necessary to highlight the various nuances and to deepen the discussion about the legal aspects – instruments, norms, procedures, compliance, enforcement and legal protection – of the issues surrounding corruption. The problem of corruption can only be properly tackled if there is a regional and international approach in which norms of principles of good governance occupy a central position.

1.2.1. Definition of Public Service

Two aspects are relevant with regard to the term Public Service. Firstly, it must be transparent which persons form part of the Public Service. There are, from a legal perspective, two types of persons working for the public service: civil servants and persons who have a private law (contractual) relationship with the government. Besides, a foreign public official and a person in the public service of a foreign country or an international organization and judges of a foreign state or an international institution can be part of the Public Service. The information mentioned here is mostly taken from the GRECO report. Secondly, we also have the discussion whether politicians

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15 Problems in the case law especially concern the following aspects: gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

16 Problems in the case law especially concern the following aspects: gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

17 Case law has considered the following aspects: ‘to offer, promise or give’, ‘to offer a service’, ‘any undue pecuniary or other advantage’, ‘small facilitation payments’ and ‘whether directly or through intermediaries’.

18 A recent study about the penal law aspects of civil servant corruption in the Netherlands: Sikkema 2005.

and members of representative institutions are also civil servants so that we can speak about a broader interpretation of a civil servant.

1.2.1.1. The Civil Servant in Penal Law

The notion of a ‘civil servant’ is defined in Article 84 of the Penal Code, pursuant to which it applies to ‘all persons elected to public office in elections duly called under the law’ (Art. 84-1), ‘arbitrators’ (Art. 84-2) and ‘all personnel of the armed forces’ (Art. 84-3). The term ‘civil servant’ has been broadly interpreted in the case law and it includes persons who are appointed to a public function by public authorities in order to perform part of the duties of the State or its bodies. In practice, this means that public officials, as referred to in the articles on corruption, are composed of: Ministers (including the Prime Minister), under-secretaries, mayors, Royal Commissioners (of the provinces), aldermen (of the towns), members of the local council, members of Parliament, members of the Provinces States and all other public officials. Furthermore, the Supreme Court has defined a ‘public servant’ as ‘one who under the supervision and responsibility of the authorities has been appointed to a function whose public character cannot be denied with a view to implementing tasks of the state and its organs’. The Supreme Court has also extended this definition by ruling that someone is also considered to be a public official when carrying out responsibilities under the supervision and responsibility of the government and whose work is undoubtedly of a public character in order to fulfil the functions of the State and of its bodies.

Article 178a-1 of the Penal Code extends the meaning of ‘public servant’ in Articles 177 and 177a (see: I.1.1.4) to ‘persons in the public service of a foreign state or an international institution’. Article 178a-3 extends the meaning of a ‘judge’ in Article 178 to ‘a judge of a foreign state or an international institution’. Article 178a extends the application of these offences by stating that the various types of foreign public officials referred to are ‘considered as equivalent’ to the ones referred to in the offences themselves.

1.2.1.2. Civil Servant in Administrative Law

The notion ‘civil servant’ in the Administrative Law legislation and case law has a more narrow content. Relevant is the administrative status, the acquisition of that status and the appropriate administrative law. The administrative status has been defined as its own legal scheme of (collective
and individual) labour law for the staff at the government and in education. Three characteristics of this administrative status have a substantial meaning: 1. public law regulating the formally unilateral appointment and dismissal of civil servants (versus the two-sided employment contract and the resulting relevance of the Civil Code and other legal provisions); 2. the public legal protection of civil servants under the General Administrative Law Act including the administrative judge (versus the procedure relating to the civil judge); 3. the formal unilaterally determined regulation of labour conditions linked to the scheme of the development of labour conditions (versus the two-sided collective labour contract).

Civil servants are appointed under the Civil Servant Act as a civil servant working in the public service. Nowhere is the content of the term ‘appointed’ elaborated. However, it is commonly recognized that the actual appointment is a public law act, which is aimed at the realization of a civil servant relationship (administrative status). The administrative appointment takes place under the public law umbrella and is unilateral. The Civil Servant Act does not speak about acceptance or agreement. In practice, however, the appointment is not seen and experienced as a unilateral operation. It is therefore better to talk of a conditioned arrangement: the appointment depends on explicit or tacit acceptance by the person concerned. Public sector employees have been divided into the following sectors: central government, defence, education (primary and secondary), universities, institutions for higher professional education, research establishments, teaching hospitals, adult and vocational education, the judiciary, the police, the municipalities, the provinces and the water boards.

1.2.2. Definitions of Corruption and Fraud

In the Amsterdam report the following definition of corruption in the public context has been provided: ‘offering, giving, asking or receiving private gain because of the position or (non-) action of a public functionary’. Public functionaries are, in the context of penal law, civil servants as well as politicians including governors and ministers. This is not the only definition as also elsewhere in the literature there are many different definitions of corruption.20

The following aspects are relevant in relation to the definition of corruption.21 First, it is important to mention that the only relevant activities are those which are carried out in relation to the function of the person. So purely private activities are not relevant for the discussion about the content of public corruption. Second, the interpretation of persons means that


21 See Amsterdam Report 2005, p. 4 et seq.
functionaries are civil servants as well as politicians; it concerns corruption in the public service. The third element of corruption is that there is a third party who will profit from the (non-) action of the civil servant and the civil servant will receive something in return for this (non-)action. This party will be mostly somebody outside the public organisation. The fourth aspect is that we can speak about corruption in situations where there is not only a situation of receiving gifts, but also the prospect of receiving such gifts.

The definition provided here is more or less in line with the Dutch Penal Code, especially Articles 362 and 363. To explain this definition we have to study, first, these articles concerning gifts, promises or services and also the articles on bribery (Arts. 177 and 177a). Then we have to highlight the difference between corruption and fraud and what the limitations of these factual illegal activities exactly are. We will see that not only the negative qualifications (corruption and fraud) are relevant, but that for an administrative (preventive and repressive) approach we have to look at the standards which are relevant for the administration. These standards are especially integrity and the principles of good governance and these norms complete the national and international legal framework. But in administrative law we have a more narrow definition of a civil servant and, as a consequence, also a more restrictive content of corruption in which there is only discussion about civil servants, politicians thereby being excluded.

In the Amsterdam report a difference has been made between corruption and fraud; however, the two terms are related because both terms concern personal favours or promises. With regard to fraud there are two parties involved: the fraudster and the harmed person or institution. Corruption takes place between three parties: the civil servant who profits, the public organisation and the person who induces the civil servant to benefit from his (non-)actions. This difference can also be found in the administrative case law and administrative policy in the Netherlands.

There is in general an important difference in the Netherlands between the Penal Code and Administrative Legislation. In the Administrative Legislation a distinction is made between a legal fact (rechtsfeit), a legal norm (rechtsnorm), a legal consequence (rechtsgevolg) and a legal act

22 The notion of a civil servant has a broad interpretation in the case law (see HR 30 January 1914, W 9149; HR 1 December, NJ 1993, 354; HR 30 May 1995, NJ 1995, 620) and according to the law (Art. 84 Penal Code in which it is explained that also members of parliament and members of city Councils are civil servants in this context). In the law special attention has been given to situations before and the situation after the fulfilling of the function of civil servant.

23 See annex I and annex II of this report.

24 See Amsterdam Report 2005, para. 1.2.1.


26 Corruption: Central Appeals Tribunal 7 November 2002, 00/5791 AW, LJN AF3553.

27 Fraud: Central Appeals Tribunal 13 November 2003, 02/1004 AW, 03/1535, LJN AN8809.

28 See about Fraud-policy: Kamerstukken II 2004/05, 17 050-29 810, nr. 295.
(rechtshandeling). In the Penal Code attention is given to the punishable act (strafbaar feit) and the punishment (straf). From our point of view a fundamental point is lacking in the Amsterdam report: specifying the norm. We found general reflections concerning integrity. In another report good governance principles were mentioned, but there was also no specification in relation to corruption. There is a need for a positive administrative law norm which can be found in the Principles of Good Governance.

1.2.3. Definitions of Integrity and Principles of Good Governance

Citizens expect that the government fulfils its tasks in accordance with the norms of the rule of law and democracy and in an honest and impartial way. That is essential for a high quality, authoritative and reliable government. A breach of quality and integrity in the actions of the government has a great impact on the government’s authority and, in that respect, on the effect of the government’s actions. This requirement of integrity applies to civil servants as well as to governors; both have responsibility for the functioning of the government.

The basis of administrative integrity is derived from the democratic rule of law principles. To safeguard this integrity specific rules have been laid down in legislation. Moreover, common standards which are accepted by society as a whole play a specific role, such as the rules of social behaviour that every civil servant must observe. The principles of legal certainty and of equality are the basis of the principle of legality which, in turn, is a principle of the rule of law making it necessary to comply with and enforce the law. This line of logic then necessarily leads to a link with the principles of good governance, but the Dutch Government has created the vague norm of integrity, which is not a typical public law norm. Integrity is now frequently considered as the reverse of fraud and corruption. Also in the discussion between the Dutch Government and Parliament corruption and the violations of integrity seem to be the same thing. But integrity is something more than the opposite of corruption. Within dishonest (against integrity) behaviour other forms of undesired behaviour tend to lurk. These forms of behaviour can also influence the way citizens view the Government. Integrity is an inclination of probity, reliability, impartiality, objectivity and justice. The interpretation of this term has been directly linked with socially accepted standards and values and with the principles of democracy and the rule of law. Thus within the framework of integrity the developed standard framework seems to be too wide to encompass the problems of corruption as discussed here.

29 Huberts 2001, p. 4.
In the literature a link between corruption and integrity has been made.\textsuperscript{32} Corruption can be defined as involving ‘behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those associated with them, by the misuse of the public power entrusted to them’. The question here is the following: what is the relationship between corruption and integrity? The answer to this question should be that corruption is seen as a specific type of integrity violation, a violation against the accepted moral norms and values of political and administrative behaviour. From a theoretical point of view a number of integrity violations or forms of public misconduct can be distinguished:\textsuperscript{33} corruption; bribery; nepotism; cronyism; patronage; fraud and theft; conflict of private and public interests; manipulation of information; discrimination and sexual harassment; improper methods; waste and abuse of resources; misconduct during one’s free time. Only a few of these integrity violations can be seen as corruption. This clarifies the fact that integrity or appropriate behaviour means much more than not being corrupt. Nevertheless, it goes without saying that ‘behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those associated with them, by the misuse of the public power entrusted to them’ is a crucial aspect of organizational integrity. Integrity and ethics are important topics for all organizations, in the public as well as in the private sector. An extra complication in the integrity discussion is that several aspects of integrity standards are the same in the public and the private sector. Our conclusion is that the integrity norm is not a useful norm in the corruption discussion because it is an umbrella standard and it will therefore confuse the discussion about the normative aspects of corruption.

In his foreword to the Global Corruption Report 2005, Fukuyama\textsuperscript{34} explains that free markets are not self-sustaining: they presume the existence of governments that are capable of enforcing the rule of law, adjudicating disputes, and establishing property rights as the basis of long-term investment and growth. The consensus on the importance of institutions and good governance belies several critical weaknesses with regard to implementation. Not only in the developing countries but also in the Western world there are continuing problems with corruption in the construction industry and the Global Corruption Report 2005 focus on this factor. There are institutional, normative and political dimensions in improving governance by combating corruption. The Principles of Good Governance can play a crucial role in that fight.

Three levels of Principles of Good Governance (PGG) can be discerned: different conceptions of good governance associated with this concept (1),

\textsuperscript{32} Huberts 2001, p. 3.
\textsuperscript{34} Fukuyama 2005, foreword. See also Fukuyama 2004.
which are expressed in different sets of principles of good governance (2),
which in their turn form an interpretation of the relevant practices and legal
materials (3). When we look at the different approaches of the Principles of
Good Governance the following three functions can be distinguished. The
first function is that the Principles of Good Governance exist in international
law (especially in relation to development aid) and form an external field of
normative reference. The second function of the Principles of Good Governance
is in the field of public administration: principles of good governance used in the
process of developing networks. The third function based on administrative law
has been elaborated in this article: Principles of Good Governance forming
the internal fundamental basics for the administration.

In line with this third function of the Principles of Good Governance the
following six types of principles have been developed based on regional
(including European) and international regulations and case law:35 the
principles of proper administration, the principles of transparent
administration, the principles of public participation, the principles of
accountable administration, the principles of effective and efficient
administration and the principles of human rights administration.

There are also two rather new types of principles which can play a
crucial role in the fight against corruption: the principles of accountable
administration and those of effective administration.36 The principles of
accountable administration ensure that government acts are carried out not
only in a proper legal manner, but in a manner which is consistent with
fairness and good administrative practice.37 Recently the Dutch Court of
Audit clarified that its work will focus on Principles of Good Governance, in
particular the principles of accountable administration.38 In European law the
principles of accountable administration and those of effective administration
are much more developed than on the Dutch level. On the national level
these principles are quite new, but subject to the influence of European law
our expectation is that these principles will be developed on the national
level very quickly.

2. Rules Safeguarding Institutions

2.1. Preventive Measures

In the GRECO report the following remarks are made about the preventive
measures on corruption in the Netherlands.39 In the field of policy and

37 See also Brophy 2002, p. 9.
38 Stuiveleng 2003.
legislation on integrity in the public sector, the Ministry of the Interior is the coordinating State institution: given the decentralised structure of the Dutch system it establishes principles and guidelines for all governmental bodies. Apart from the Civil Servants Act and a specific regulation establishing that judges and prosecutors have the obligation to report any additional functions, there are no other specific regulations established at the national level. The Dutch authorities adopt policies based on the consideration that established rules alone are not enough to promote integrity among administrative bodies. They rely on civil servants’ conscience with regard to integrity problems. The main focus of the current Dutch policy on integrity is that administrative bodies: are aware of the importance of integrity; promote awareness; identify vulnerable spots in their organisations; take measures to reduce risks; have the capacity and the will to cope with violations of the integrity principle; and keep integrity at the top of the agenda. In answer to the GRECO criticism the Dutch government made it clear that in 2003 there was a policy paper from the government in which there were many good intentions which have now all been implemented. But is this a real answer to the Greco criticism? Firstly, we only have to look at the clouded discussion between the Dutch Government and Parliament on corruption, fraud and integrity; see our comments regarding the results of this discussion and the importance of the principles of good governance. Secondly, there was a request for a law on the prevention of corruption. In our opinion the presented legislation within the framework of the Civil Servants Act cannot be seen amounting to such a recommended Act. In that Act there is a restrictive definition of civil servant (omitting politicians) and only the too broad standard of integrity has been introduced in that Act. Our suggestion is to use the broader concept of civil servant (as we have in the penal law act) and to create instruments and norms in chapter 2 of the General Administrative Law Act. The instruments should contain generally binding rules in relation to activities which violate the Principles of Good Governance.

2.2. Administrative Law Rules

Articles 125, 125a and 125c are in this context the most relevant articles in the Civil Servants Act (latest version, Stb. 2004, 88). But there are additional administrative law regulations: the General Civil Service Regulations (ARAR), the Civil Servants Pay Decree (BBRA) 1984 and the Pension Regulations. The following brief description of the administrative norms will provide an overview. Civil servants are expected to act with integrity, in

40 See also: Kamerstukken II 2003/04, 29 436, nr. 1 etc. in which is written down the norm: the good civil servantship, the legal base or an integrity policy and the legal base for a code on good civil servant behaviour.

41 See annex I of this report.
other words to be incorruptible, unassailable and trustworthy. Rules on ethical behaviour – governing the acceptance of gifts, outside activities, confidentiality and whistle blowing – are included in the regulations on the legal status of civil servants. Civil servants are sometimes offered gifts or services by third parties. Standards have been laid down to preserve civil servants’ independence in such situations. They may only accept gifts with the competent authority’s permission, and all gifts worth more than € 50 must be refused. In principle, civil servants may engage in outside activities alongside their main job. This means activities with which a civil servant has not been, and could not be, charged by virtue of his position. These activities may be paid or unpaid, and may be performed in or outside normal working hours. Civil servants are required to notify the competent authority of certain outside activities, while other activities are prohibited in order to prevent any risk of a conflict of interest. Civil servants are also obliged to maintain confidentiality concerning everything they learn in the course of their work if the nature of the information calls for this. An exception is made in the case of information which should be given to the management or where management has exempted an employee from the obligation of confidentiality with respect to a particular matter. Employees who decide to blow the whistle place themselves in a very vulnerable position. It may very well destroy their careers. The Whistle-blowers’ Order is there to offer them the necessary protection. Civil servants may invoke the Whistle-blower’s Order establishing the procedure to be followed in dealing with suspected abuse. If a civil servant suspects unethical conduct within his or her department, this should be reported to his or her line manager or, if this is not considered appropriate, to a confidential adviser. The line manager or confidential adviser then notifies the competent authority. The competent authority instigates an inquiry and the employee receives confirmation of this investigation. Within eight weeks the employee is notified about the views of the competent authority regarding the alleged unethical conduct. In certain circumstances the employee can also approach the Commission on Integrity in the Civil Service (central government sector) if: the civil servant disagrees with the competent authority’s viewpoint, has not received any notification within the requisite eight weeks or within the extended (unreasonable) deadline.

Public officials are obliged to report suspicions of wrongdoing to their superior (under the Civil Servants Act). The order sets out in detail certain obligations and procedures for reporting any suspected abuse by central government officials. A failure to report is considered to be a ‘neglect of duty’, whereas disciplinary measures may be undertaken under the provisions of the Civil Servants Act. The obligation exists if there are reasonable grounds to suspect the following: a serious criminal offence; a gross breach of regulations or policy rules; misleading the criminal justice authorities; a serious risk to public health, public safety or the environment; or the deliberate withholding of information relating to any of the above.
2.3. Administrative Case Law

In an overview of the administrative case law in relation to these articles and more specifically about integrity including corruption and fraud, the following situations can be distinguished: accepting gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

In a case concerning grants, the court’s conclusion was that the employee had acted against the code of conduct on administrative integrity established by the municipality. The court considered, however, that the resulting instant dismissal was disproportionate to the violation in question.\(^{42}\) Then there are two cases concerning civil servant corruption. In the first case, a civil servant employed by a municipality entered into discussions with potential contracting partners on the possibility of concluding a contract on labour protection services and thereby influenced the consultations so that labour protection activities would be carried out by one specific labour protection service. The civil servant attempted to obtain financial advantages for himself as a private person by offering the labour protection service contract to one specific enterprise and had therefore abused his position. It was therefore a case of attempted administrative corruption and the disciplinary measure of (unconditional) dismissal was considered by the Court to be an appropriate punishment.\(^{43}\)

In another case the director of a municipal service had accepted gifts from construction companies while he was the person responsible for advising the municipal board on invitations to tender. The civil servant had invited a specific company without authorization while ignoring one of the companies on the list decided by the municipal board. In so doing the civil servant had exerted undue influence, in an unlawful manner, on the registration procedure. The administrative measures taken were a deduction in salary, provisional suspension and resulting dismissal.\(^{44}\)

In another fraud case there was the situation where upon the appointment of a civil servant, the civil servant in question had concealed relevant facts and therefore the principle of integrity had been violated. The confidence of the employer in relation to the integrity of the civil servant had undoubtedly been affected.\(^{45}\)

In a case concerning a violation of the code of conduct an employee of the Immigration and Naturalisation Service (the IND) had not communicated to his employer certain private contacts with an interpreter. The IND’s code of conduct prescribes that any undue influence on the functioning of the civil

\(^{42}\) District Court of Alkmaar 29 April 2003, AW 02/789 (LJN-number: AF8057).

\(^{43}\) Central Appeals Tribunal 7 November 2002, 00/5791 AW (LJN-number: AF3553).

\(^{44}\) District Court of Alkmaar 8 April 2004, AWB 04/447 and AWB 04/614 (LJN-number: AO7454).

\(^{45}\) Central Appeals Tribunal 13 November 2003, 02/1004 AW, 03/1535 AW (LJN-number: AN8809).
servant should be controlled and prevented and appropriate measures can be taken before such contacts have an influence on the work in question.46

In a case concerning the leaking of information by a civil servant working for the customs authorities, the civil servant in question had contacts with persons who dealt in narcotic substances. He had failed to inform the public prosecutor about an attempt to bribe him and had violated his duty of confidentiality by supplying oral and written information to third parties concerning the activities of the customs authorities in relation to transportation from another country. He had violated the principle of integrity as regards himself and his organisation and was punished by a disciplinary sanction and unconditional dismissal.47

Another case about the leaking of information concerned an interpreter working at a police station. He had passed on confidential data – the result of a widespread investigation by a specific police force of which he had specific knowledge as he had acted as an interpreter in the investigation – to the main suspect within that investigation. This was therefore a case of a violation of professional secrecy in exchange for personal financial gain.

There is also a case concerning additional activities where a civil servant worked for a municipality and his task was to appraise and prepare decisions on dispossession, company damage regulations and the granting of subsidies. He had failed to communicate to his employer that he intended to operate a bar for commercial purposes. Moreover, he had also failed to communicate an offer to join the board of a specific company. Due to this the civil servant in question had received a reprimand. Later the person became an associate in a commercial company in the area concerned and he also did not communicate this to his employer. The municipality thereby dismissed the civil servant because he was no longer suitable for the post.48 In another case a police officer wanted to own a bar in the former area which she patrolled. She had provided full information about these intended additional activities. Her employer had to assess whether there was an unacceptable conflict of interests. Her employer indicated that these activities could not be permitted. When working in a bar the police officer could have ended up in a situation where she had to act as a police officer or she could have faced her colleagues while they carried out an investigation.49

2.4. Penal Law Rules50

Articles 362 and 363 of the Penal Code contain offences relating to the active bribery of civil servants. In the 1990s there were some 20 to 25 such cases per

46 District Court of Arnhem, 10 October 2003, 03/1533 AW and 03/1532 AW (VV) (LJN-number: AM3274).
47 Central Appeals Tribunal, 20 November 2003, 02/3716 AW (LJN-number: AN 8832).
49 District Court of Breda 2 November 2001, 00/1804 AW (LJN-number: AD5054).
50 See for an overview: Roording 2002, p. 106-139.
year based on the old version of these articles. In 2001 these articles were amended because up until then there was no regulation within the law on the (non-)acceptable amount of bribery.51 These articles establish the criminal liability of the public servant who accepts a gift or promise, knowing or reasonably suspecting that such a gift or promise has been made in order to induce him to act or refrain from acting in the execution of his duties in a manner either not contrary (Art. 362) or contrary (Art. 363) to the requirements of his office. Secondly, the request of a gift or promise by a public servant for the same purpose is also criminalised. Thirdly, accepting or requesting a gift or promise is also penalised if this is done by a former public servant or future public servant. The terms ‘gift’ and ‘promise’ are broadly interpreted by the courts and include ‘something of value for the recipient’ (gift),52 and ‘something that will be carried out in the future for the benefit of the public servant’ (promise).53 The benefit in question can concern money, goods or activities, but it is also possible that the benefit could be immaterial like a public decoration or sexual services.54

For the penalisation of corruption by passive bribery Articles 177 of the Penal Code (bribery of an official in violation of his duty) and 177a of the Penal Code (bribery not in violation of an official duty) are relevant. These articles, together with Articles 362 and 363 were amended in 2001 because of the need to sharpen and broaden the criminal law instruments. This was necessary not only because of the specific Dutch situation, but also because of certain international treaties on corruption which the Netherlands had entered into.55

Within the framework of the above amendment a new article (Art. 178a) has been added to the Penal Code in order to extend the application of the active bribery offences. Previously bribery offences only applied to domestic public servants, to ‘persons in the public service of a foreign state or an international law organisation’, ‘former public servants’ and judges ‘of a foreign state or an international law organisation’. A new article (Art. 177a) has been added to the Penal Code in order to establish the offence of bribing a public servant in order to obtain an act or omission by him/her that is not in breach of his/her official duties. Article 177, which pertains to the bribery of a public servant, only applies where the purpose of the bribe is to obtain an act or omission in breach of official duties. The maximum term of imprisonment and the fine that apply under Article 177 of the Penal Code (i.e. where the bribe is intended to obtain an act or omission in breach of official duties) have been increased from 2 to 4 years imprisonment and from

51 The Minister of Justice explained (Kamerstukken II 1998/99, 26 469, nr. 3, p. 4) that there is a preference for directives from the public prosecutor because these are more flexible in relation to the developments in society.
52 HR 25 April 1916, NJ 1916, 551.
53 HR 21 October 1918, NJ 1918, 1128.
55 Kamerstukken II 1998/99, 26 469, nr. 3, p. 1 etc.
a category 4 fine (max Euro 11250) to a category 5 fine (max Euro 45.000). The offenses have been extended to cover the case where a person renders or offers a public servant a ‘service’ (Arts. 177, 177a and 178 of the Penal Code). In Article 178 also bribery in relation to a judge has been included and in Article 179 Articles 177 and 177a this has been extended to persons working in the public service of a foreign state or an organisation governed by international law as such persons are considered to be equivalent to civil servants. Provisions on active and passive bribery also apply to national judges (Arts. 178 and 364), former civil servants, foreign civil servants, international civil servants and foreign judges and judges of international organisations (Arts. 178a and 364a), as well as future civil servants (Arts. 177 and 177a).

As regards sanctions, they vary from a maximum term of 12 years imprisonment for the passive bribery of judges to a maximum of 2 years for the passive bribery of civil servants acting ‘(…) not in violation of his duty (…)’. The active bribery of public officials is punishable by a maximum of 9 years imprisonment in the case of judges, and 2 years for civil servants if the returned favour was not in violation of his/her duty. This sanction can be increased to a maximum of six years where the offence is committed by a Minister, an under-secretary, a mayor or certain other political officials.

2.5. Penal Case Law

In the Penal Case Law there have been problems of interpretation concerning the following points in the Penal law legislation: ‘gifts or promises’, ‘civil servant’, ‘knowing that it is made to him in order to induce him to act or to refrain from acting’ and ‘not contrary to the requirements of his office’.

‘Offering, promising or giving’. In the original text of the Act (before 2000) there was only a reference to a gift or a promise. In the case law offering or accepting a gift is explained as handing over or the factual acceptance of something that has value for the receiver. In relation to promising or accepting such a promise, this can refer to a future or an immediate favour for the civil servant in question. The benefit does not have to consist of money, goods or performance. It can also have an immaterial character, like receiving a decoration or obtaining sexual favours. The Supreme Court specifically decided this in 1994. In relation to the fact that a civil servant could have received the favour as a private person, the Minister has answered that for the criminal responsibility of a civil servant it is not relevant whether the civil servant has received the gift or the promise in his position as a civil servant.

56 HR 25 April 1916, NJ 1916, 551.
57 HR 21 October 1918, NJ 1918, 1128.
60 HR 10 April 1893, W 6333.
The term ‘promise’ has a broad meaning and is considered to include the notion of offering. In a judgement by the Supreme Court\footnote{HR 25 April 1916, Nj 1916, p. 300.} it has been explicitly determined that offering falls under the making of a promise. Another element is ‘any undue pecuniary or other advantage’ – Articles 177.1(1), 177a.1(1) and 178. But what type of advantage is here prohibited? Only the term ‘service’ conveys the substance of the advantage that is prohibited, and, as mentioned above, the legislator chose to add this term to the listed offences because practice had shown that the previous language (i.e. ‘makes a gift or a promise’) did not necessarily include the notion of services. In the notes on the law it is indicated that the term ‘service’ would, for example, cover ‘participation in ‘freebie trips’, providing a holiday bungalow for a ‘derogatory price’ or offering a seat on the Board of a company’. The term ‘service’ was added for linguistic reasons and for the purpose of codifying the law; it does not affect the broad scope of the provision. The term ‘gift’ is understood to mean ‘something that has value to the recipient’, and the term ‘promise’ conveys the same notion, but that it will be carried out in the future. Thus, the advantage does not have to consist of money, goods or services, but may be of a non-material nature. In the notes on the law it is provided that ‘bagatelle (trivial) gifts’ have not been expressly exempted from the reach of the offences due to the drafting difficulties that would arise, and doubts as to whether an express exemption would create greater transparency. Although it is not the intention to exclude facilitation payments from the offence, under certain circumstances it would be possible to consider not prosecuting a case involving a facilitation payment. The intention of the Department of Public Prosecutions is to issue guidelines for corruption cases, including facilitation payments. The final aspect to be considered here is ‘whether directly or through intermediaries’. Articles 177, 177a and 178 do not expressly apply to bribes made through intermediaries. It was decided that an amendment to this effect was not required. The term ‘to make a gift or a promise to a public servant or renders or offers him a service’ is intended to be interpreted in a broad, functional sense, and thus it would cover the case where an intermediary receives or transmits the payment or offer or the advantage is paid into an account which is accessible to a foreign public servant. This was the interpretation provided by the Minister of Justice and it has also been accepted in a judgement of the Supreme Court.\footnote{HR 21 October 1918, Nj 1918, 1128.}
2.6. **International Rules**

More specifically in relation to corruption, on the international and European level we can see several sources of these norms. Developments in regional and international policy on corruption have been taking place which are in particular relevant for the Netherlands. And there are specific agreements to which the Netherlands is a party. The Netherlands signed the OECD Corruption Convention on December 17, 1997 and deposited the instrument of ratification on January 12, 2001. The Ratification Bill and Implementation Bill were enacted on December 13, 2000 and came into force on February 1, 2001. These Bills have been passed by Parliament in relation to the obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and three other treaties on controlling fraud and corruption. But there are other more relevant treaties on Corruption to which the Netherlands is a party.

The United Nations Convention against Corruption (UNCAC) of December 2003 will enter into force on 14 December 2005 and that is important because bribery payments, the laundering of corrupt income and the flight of corrupt officials are cross-border phenomena which demand an

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64 These activities gave rise to the development of Transparency International 2001. But also international conferences on corruption were important, for example the Anti-Corruption Conference (IACC), 1983; the Anti-Corruption Conference Amsterdam: 1992; the 11th International Anti-Corruption Conference; the Global Forum on Fighting Corruption and Safeguarding Integrity (The Hague 2001).


international solution. The Convention will: a) accelerate the retrieval of funds stolen by dictators and other public officials via quicker and better cooperation between governments; b) encourage banking centres in countries to become more responsive to such investigations and to take action to prevent money laundering and enable global judicial action against those who are corrupt, no matter where they are hiding, and nations will be able to pursue foreign companies and individuals that have committed corrupt acts on their soil; c). result in a prohibition on the bribery of foreign public officials, thereby drying out a major channel for ‘dirty’ money. This convention provides a framework for domestic anti-corruption legislation, introducing, in particular, whistle-blower protection, freedom of information and accountability systems for the public sector. Thus far, 129 countries have become signatories, thereby giving it an unprecedented geographical reach. Yet only a quarter of them have ratified the Convention, meaning that widespread adoption into national law is still a long way off.

3. Rules Safeguarding Transactions

3.1. Public Procurement Policy and Regulations

The Dutch Public Procurement Policy complies with the requirements of the GATT/WTO Agreement on Public Procurement and with EU public procurement legislation. The aim is to enable cross-border competition between suppliers and service providers from the different EU member states. Bidders and interested parties must have equal opportunities to compete for public contracts and the general principles of transparency and non-discrimination must be observed. The implementation of these obligations has contributed to greater transparency at the central and local government levels. The Netherlands follows the approach of prohibiting restrictive agreements and the abuse of a dominant position and in 1998 a new Competition Act was adopted; within the framework of this Act also the new competition authority, the Netherlands Competition Authority (NMa), was established. The interdepartmental project unit for public procurement and tendering began its work in 2000. Its purpose is to improve both procurement and tendering within central government. Further efforts to encourage European tendering are needed, given that the value of European public procurement (as a percentage of GDP) in the Netherlands is slightly above the EU average. The interdepartmental project will also initiate measures designed to have electronic tenders introduced.

3.2. Public Authorities and Public Tendering Procedure

Often public authorities want to award a specific contract for public facilities and they will have to issue an invitation to tender in accordance with the rules defined by the European Public Procurement Directives. The different Directives specify that contracting authorities, such as provinces, waterboards, cities and bodies governed by public law, must comply with specific procedures when the estimated value of the contract to be granted exceeds certain threshold values. In most cases the public tendering procedure must be observed. This procedure starts with an announcement of the contract (the ‘tender notice’) in the Official Journal of the European Communities. This tender notice must contain the grounds for exclusion and the requirements for eligibility that the bidders and their offer must meet in order to qualify for the contract. It must also be stated on the basis of what tendering criteria (the lowest price or the economically most favourable tender) the contract will be awarded.

3.3. Procurement Procedures

Contracting Authorities can choose between the public procedure and the non-public procedure to award a contract. Both procedures specify (minimum) terms and requirements with regard to the publication of the contract. The Utilities Directive also offers the possibility of the award procedure through negotiation. The Directives incorporate the negotiation procedure with and without a preliminary announcement (the tender notice). These last procedures can only be used if specific conditions specified in the Guidelines are met.

a. The public procedure. The public procedure starts with an announcement of the contract via the Publications Office of the European Community. This announcement must comply with certain requirements. The specifications must then contain the grounds for exclusion and the requirements for eligibility with which the bidders must comply in order to qualify for the contract. The specifications must also specify on the basis of what tendering criteria (the lowest price or the economically most favourable tender) their tender will be assessed. The public procedure comprises one round in which all interested parties may submit a tender. The suitability of the interested party to execute the contract and the compliance of the tender with the tendering criteria are assessed in one round. This assessment results in the selection of the successful bidder; the bidder who was found to be the most suitable and who submitted the best tender.

b. The non-public procedure. The non-public procedure is a procedure in two phases. In the first phase, every interested party can express his interest. The interested parties must demonstrate that they meet the
selection criteria which were published beforehand via the Publications Office of the European Communities. Furthermore, none of the grounds for exclusion may apply. On the basis of these selection criteria, the contracting authority initially selects at least five interested parties, who may then submit a tender. The contracting authority selects the winning bidder, which is awarded the contract, from the tenders on the basis of the award criteria (the lowest price or economically the most advantageous tender).

3.4. The Netherlands Competition Authority (NMa)

In 1998, the Netherlands enacted its first strong national competition law, which set up an entirely new enforcement authority, the NMa. Now that there has been some experience with using it, including several major actions against bid-rigging cartels in the construction sector, there are plans to improve the enforcement system, with stronger investigation powers and sanctions. Thus, for its first few years, much of the NMa’s enforcement effort was devoted to decisions about applications for an exemption from the law’s prohibitions. To get results, these cases were selected to avoid controversies about jurisdiction and difficult, complex, novel legal theories. To show that the law was relevant in the Netherlands, the cases would target anti-competitive codes of ‘unfair competition’ in industry associations and similar groups, because these industry associations and the ‘PBOs’ that organise several sectors of the Dutch economy were important elements of the traditional way of doing business, and their rules were likely to be an important source of constraints on competition. The NMa is now, since recently, no longer an agency of the Ministry of Economic Affairs, but an autonomous administrative organisation (in Dutch terms, a ‘ZBO’). The legislation has also changed the structure of the NMa, replacing the single Director General with a 3-person Board of Directors. That structure provides some assurance against arbitrariness, which may be considered prudent for a more formally independent body.

3.5. Enforcement by the NMa

To step up enforcement against construction industry cartels, the NMa set up a 30-person task force, including detectives, investigators and information-technology specialists to search computer records. The initial focus was on public projects, following up on the information that had sparked the Parliamentary inquiry: access to one firm’s ‘accounts’ of how the market division pool was monitored. Since then, the NMa has followed tips, carried out dawn raids to examine company records, and commissioned a systematic canvassing of large-scale public construction projects to assess the market conditions that support co-operation and make anti-competitive arrangements feasible. The process took about two years, from the time the
key evidence became available in December 2000 until sanctions were imposed in the large-scale cases at the end of 2003. The administrative fines against 22 companies for price fixing, market division, and bid rigging in large infrastructure projects, road maintenance, and other areas, totalled EUR 100.5 million. Six firms were fined over EUR 10 million each. One case was small in scale but nonetheless deserved increased attention because the parties had entered into their agreement after the Parliamentary inquiry was already underway and after the NMa had publicly announced its intention to take enforcement actions. Enforcement has not been limited to the construction industry. Other sectors in which firms have faced substantial penalties for horizontal collusion include cleaning services (total, EUR 17.0 million), shrimp production (total, EUR 13.8 million), mobile phones (between EUR 6 million and EUR 24 million), and veterinary services (between EUR 750,000 and EUR 9.7 million). Most of the NMa’s recent formal enforcement initiatives – 14 out of 16 ‘reports’ concerning violations in 2003 – have been aimed at horizontal restrictions. A number of vertical restraints have been considered in the context of applications for exemptions, and vertical price fixing and similar practices have attracted fines in a few cases. The sanctions that are potentially available against actual violations appear to be generally adequate.

3.6. Legal Protection in Public Procurement Matters

The European Remedies Directives\(^{68}\) specify minimum requirements with which the national legal systems must comply concerning the protection of rights in procurement affairs. These minimum requirements mean that injured companies must have access to the courts and that there must be specific remedies to which injured companies can refer. The administrative appeal process in relation to the use of enforcement instruments is evidently becoming cumbersome. There were over 140 administrative appeals processed in 2003, most involving energy decisions. Legislation is being prepared to streamline this process, principally by providing means to get cases into the courts more quickly. Appeals lie to the Rotterdam District Court, and from there to the Regulatory Industrial Organisation Appeals Court. Judges are showing an increasing interest in the economic motivation and reasoning of competition cases. Their interest may have been awoken by attending course programmness that were aimed at educating them about the subject.

4. **The Investigation of Potential Corruption: Investigators, Procedures and Penalties**

4.1. **Administrative Law: Investigators, Procedures and, Penalties**

4.1.1. The Administration

The coordinating role of the Minister of the Interior is related to the work of the civil servants. In terms of policy at the initiative of this Minister, some policy papers have been published and also the Civil Servants Acts has been amended. Mostly the Minister speaks about integrity and not about corruption. When serious cases of corruption are at issue and the penal enforcement law has a role to play, and the Minister of Justice plays a coordinating role. At the administrative law level there is also the responsibility of the individual administrative authorities on the central and decentralized level. On the national level we find individual ministers and functional decentralisation and on the territorial decentralized level we find the various provincial, municipality and waterboards levels.

*The Integrity Bureau of the City of Amsterdam*

The city of Amsterdam employs some 20,000 civil servants for a population of about 800,000. Following the Parliamentary Investigation Committee’s results on organised crime and methods of detection, the City Council of Amsterdam has developed quite a wide range of plans and actions aimed at more effectively preventing and fighting corruption within the municipality. A three-year research programme was carried out from 1997 to 2001 in order to identify the most vulnerable persons and fields. The main risk areas were identified in the procurement field and at the managerial level. It was also decided to create the Integrity Bureau whose main aim is to develop and monitor municipal integrity policy. To date, a public prosecutor (seconded, temporarily, from the PPS, but without the powers of a public prosecutor) appointed for three years by the Central Public Prosecutors Office manages the Bureau and 15 other people who work there. The main activities of the Bureau are prevention (charting risks and vulnerabilities, providing assistance by means of risk-analyses and preventive investigations), compliance (internal investigations into suspected breaches of integrity: during these investigations the Bureau can use those investigative powers that belong to the employer of the civil servant investigated) and awareness (providing training courses – ‘dilemma-training sessions’ – to all civil servants and managers). A code of conduct for all civil servants of the City of Amsterdam is the core written document upon which the courses are based. The Bureau also organises the activities of the Central Registration Office for fraud and corruption, where all the integrity-related situations are registered, and the Report Desk for breaches of integrity which was expressly set up for
those who suspect that a case of fraud or corruption has occurred within the administration or who wish to report an integrity-related problem.

4.1.2. The BIBOB Mechanism; Integrity Evaluations by Government Bodies

In 1999, the Ministries of the Interior and Justice introduced the ‘BIBOB’ Act which was a response to the results of the Parliamentary fact-finding Committee (the ‘Van Traa’ Committee) which, in 1996, investigated the scope and influence of organised crime in the Netherlands. The Committee concluded that criminal organisations often rely on public services to carry out their illegal activities. The BIBOB law provides for the setting up of a central BIBOB Office within the Ministry of Justice and which supports authorised local authorities in enforcing the BIBOB law. By order of these local authorities, this Office investigates the integrity of applicants for licences and subsidies. In order to do this, the Office has numerous sources of judicial, financial and police information. As a result of its investigations, the Office assesses the risks and likelihood that applicants will abuse the required facility. These findings will be formulated in a written advice for the local authority. In this advice, the Office indicates the severity of the situation: the threat of abuse is either very serious, serious or not serious.

4.1.3. The Police: Administrative and Criminal (Preliminary) Procedures

The formal structure of the Dutch police is regulated by the Police Act of 1993. The police are organized, under the supervision of the Ministry of the Interior and Kingdom Relations and the Ministry of Justice, in 25 regional forces and one national force, the KLPD (National Police Agency) that has various supporting divisions. The regional forces are divided into districts and units and are under the administrative management of the regional police force manager, the mayor (‘Burgomaster’) of the largest town in the region. In total there are about 45,000 police officers.

As the person responsible for allocating the budgetary resources over the different regional forces, the Minister of the Interior is directly involved in managing the police on a national level. The chiefs of the regional police forces formulate rules regarding the administrative management of the regional police forces and receive all relevant information from police administrators and mayors and they can establish policies on regional police force cooperation. When matters also concern the enforcement of penal law, the Minister of Justice has to be consulted. When enforcing activities to maintain public order and to provide assistance, the police operate under the authority of the mayor of the largest town of the region.

A penal procedure is commenced with the pre-trial investigation carried out by the police when there exists a reasonable suspicion that a criminal offence has been committed (Art. 132a of the Penal Procedure Act).
The purpose of the pre-trial investigation is to gather information on the offence and the suspect. At the end of their investigation, the police prepare a written report containing the allegations regarding the suspect and other persons and other relevant findings. The police reports may be used as evidence by the court. When the police investigation is terminated, the reports are forwarded to the prosecutor for a decision on an eventual prosecution. If the police investigation cannot be finalised because some further specific investigative activities need to be undertaken, the public prosecutor may request the investigative judge to commence judicial preliminary investigations. He can notably order a witness to make a deposition, allow the use of some special investigative means (telephone tapping, interception of mail) and order a psychiatric examination of the suspect.

In addition to the regional forces, the police have organised six so-called ‘Core teams’ consisting of about 50 to 90 persons recruited from the regional police forces. These teams are designed to investigate cases concerning serious and organized crime in cooperation with the regional forces. Another specialised unit (the National Investigation Team) pays special attention to financial and economic crime and international requests for mutual legal assistance. This team mainly has expertise in financial and fiscal investigations and large-scale fraud cases. It is organized under the KLPD. The KLPD employs a staff of over 3500, and supplies the regional forces with specialised experts and other resources.

4.1.4. The (Administrative Law and Penal Law) Courts

In the Netherlands there are 19 District Courts (for administrative law and penal law cases), 5 regional Courts of Appeal for criminal cases and 3 national courts (the judicial division of the Council of State, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal)\(^9\) of (final) appeal for administrative affairs and 1 Supreme Court for penal cases. The regional Courts of Appeal and the Supreme Court each have a procurator general’s office attached to them. The judiciary largely manages its own work.

To this end, a Council for the Judiciary has been established consisting of three judges and two representatives of the business sector. The Council is informed of financial requirements and submits a budget proposal for the courts to the Minister of Justice. This is then forwarded to Parliament for a decision. The Council is also responsible for selecting judges. The Council for the Judiciary has no disciplinary powers. However, it ensures that the rules

\(^9\) The Central Appeals Tribunal is the appeal court in civil servants’ labour disputes. The Trade and Industry Appeals Tribunal is responsible for all disputes concerning organs like the Socio-Economic Council, product boards, Chambers of Commerce, etc. The judicial division of the Council of State is in general for other administrative law affairs.
relating to the courts are complied with and supervises events in the courtroom and the development of the courts. It also promotes the further modernisation of the judicial system. There are no specialised courts for dealing with economic crime, but there is one for cases involving competition law. According to the Code of Penal Procedure, minor penal law cases are distributed to individual judges, and panels of three judges deal with more serious cases. The question of experience naturally plays a certain role here. Each of the 19 District Courts has investigating judges who deliver the decisions requested by the Public Prosecutor’s Office.

4.1.5. The Ombudsman Institutions: Central and Decentralised Level

The National Ombudsman (NO) Act came into force on 1 January 1982 and from 25 March 1999 the NO has been enshrined in the Constitution (Art. 78a) in Chapter 4 that deals with the High Councils of State, together with the Council of State and the Netherlands Court of Audit, which are also independent bodies. Article 78a reads as follows: ‘The National Ombudsman shall investigate, on request or of his own account, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament’.

The NO is appointed, for six years renewable, by Parliament upon a recommendation by a Committee composed of the Vice-President of the Council of State, the President of the Supreme Court and the President of the Netherlands Court of Audit. The NO may be dismissed by Parliament only on the grounds laid down in the Act, which are similar to those that apply to members of the judiciary. About 115 staff is employed at the NO Office.

There are two ways that can lead to a NO’s investigation: by a petition from anybody (who has the right to complain about the actions of an administrative authority or a civil servant) or on his/her own initiative. When investigations are terminated, the NO prepares a report with recommendations. It is up to the administrative authority to decide what action should be taken. Sometimes reports contain a recommendation in which there is explicit advice for an administrative authority to act in a certain way. These recommendations are not enforceable by the Courts, but as they are always brought to the attention of Parliament, they do have substantial influence. In his annual report of 2001 the National Ombudsman gave an explanation of four reports about integrity in relation to the police.70

On 22 February 2005, the External Complaints Procedures Act was published.71 The Act prescribes uniform arrangements for external complaints procedures and a countrywide system of independent external complaints bodies on central and decentralised levels. The Act is particularly important for municipalities and joint bodies not yet falling within the ambit.

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of the National Ombudsman, because they have to create - from January 1, 2006 - their own external complaints procedure, and, if not, local authorities will automatically fall within the ambit of the National Ombudsman. Most of the rules for external complaints procedures have been integrated in the General Administrative Law Act. In addition, most of the provisions in Chapter II of the National Ombudsman Act are to be transferred to the General Administrative Law Act.

4.1.6. The Netherlands Court of Audit

The Netherlands Court of Audit (NCA) is an independent body, consisting of a board, which is made up of a President and two members, and it employs about 320 staff and produces 60 reports per year. The NCA derives its statutory basis from the Constitution, which stipulates that the Court examines revenues and expenditures of Ministries and, more generally, whether Dutch public funds are collected and spent properly and effectively. The NCA does not have any specific competence or power to investigate cases of corruption like in some other countries, but several reports on corruption, fraud and integrity have been published during the last few years. As regards the fight against corruption, the NCA focuses on preventive measures. These include regularity audits and examining the orderliness and audit ability of financial management on an annual basis and audits of a specific nature, such as: the performance of vital institutions, auditing integrity policies and responding to requests from Parliament. In December 2000 the NCA published an audit report concerning ‘Investigation and prosecution on fraud’. The aim of the report was to clarify central government knowledge of the outcome of investigations on fraud (tax evasion, social insurance fraud, fraud in connection with tender procedures) and it revealed that in most cases no prosecutions were carried out. There are a certain number of cases where serious and major irregularities have been discovered. The Minister of Education, Culture and Science and the NCA were asked by Parliament to audit some alleged irregularities. Certain Dutch authorities are not included in the list of agencies submitted to the Court of Audit’s auditing activities. They have their own internal auditing bodies, especially the larger cities.

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institutions for Higher Education were suspected of having enlisted a larger number of students in order to receive more state funds.

4.2. Penal Law: Investigators, Procedures and Penalties

Relatively speaking, investigations into corruption are frequently conducted by the regular police. The National Police Internal Investigation Department (NPID) is also an important player in this field. In addition to regular police authorities, Netherlands law enforcement consists of numerous special agencies. One third of the investigations into corruption result in the prosecution of one of the primary suspects. On average, every year 33 persons receive a subpoena in relation to corruption. The main reason for the public prosecutions department to waive prosecution is the execution of a disciplinary sanction by the employer of the corrupted public servant. If the latter is suspended or fired, and the public prosecutions department is convinced that prosecution is not in the general interest, the (criminal) file will be closed. In nine out of ten cases the prosecution of a suspect leads to a criminal conviction. Most people who are convicted of corruption are sentenced to probation and/or a fine. Over a period of ten years, only 77 persons have been incarcerated, most of them were sent to prison for a relatively short period of time. The Amsterdam study reveals a gap between the sentence that the public prosecutor has in mind and the final decision by the judge. The latter takes several circumstances into account – i.e. publicity, organisational chaos at the workplace of the public servant – and tends to interpret these elements to the advantage of the convicted persons.

4.2.1. The Public Prosecution Service; the Principle of Prosecution and Immunities

Article 124 of the Judicial Organisation Act provides that the Public Prosecution Service (PPS) is responsible for the criminal enforcement of the legal system and for other tasks as established by law. The Minister of Justice is politically responsible for the Public Prosecution Service. The PPS consists of (Art. 134 Judicial Organisation Act): the Board of Procurators General and its Office, the district Public Prosecutors Offices, the National Office of the Public Prosecution Service and The Public Prosecutors Offices at the Courts of Appeal.

The PPS is headed by a Board of Procurators General (BPG), which consists of three to five members, and takes its decisions collegially. The BPG determines policies with regard to investigations and prosecutions. It also supervises the National Public Prosecutor for Corruption and the NPID.

The BPG may give instructions to the chief public prosecutor of the district Public Prosecutors Offices concerning their tasks and powers in

relation to the administration of criminal justice and other statutory powers, i.e. the supervision of the police. Such an instruction may be of a general criminal policy nature or concerning an individual criminal case. Prosecutors are legally bound by these instructions. According to Article 127 of the Judicial Organisation Act, the Minister of Justice is empowered to give general or specific instructions on the exercise of the PPS’s tasks and powers. Those instructions can also relate to the investigation and prosecution of individual cases. Prosecutors are required to follow these instructions. A ministerial instruction not to investigate or not to prosecute a criminal offence has to be sent to Parliament together with the BPG’s opinion. The BPG is responsible for 19 regional departments. There is a Public Prosecutor’s Office in every town, which is the seat of a court. A Chief Public Prosecutor, who is responsible for ensuring that the policy of the PPS is implemented in his or her district, heads it. The public prosecutors’ offices employ some 2,000 staff, 500 of whom are public prosecutors. The five courts of appeal are each assigned their own Public Prosecutor’s Office. There is also a ‘prosecution office’ at the Supreme Court, the Procurator General. At the regional public prosecutors’ offices there are currently seven centres with experts for certain types of fraud-related crime, for example in Haarlem for economic crime and public health crime and in Rotterdam for fraud causing damage to the European Union and for combating crime in connection with animal feed. Furthermore, there is a National Office of the Public Prosecution Service in Rotterdam for the prosecution of serious international organised crime.

The tasks of the public prosecutors’ offices include responsibility for police work in criminal investigation proceedings. According to Article 149 of the Code of Penal Procedure (‘investigations, preliminary inquiries’), the public prosecutor institutes an investigation after being informed of a criminal offence, provided the case is within the jurisdiction, and is responsible for both that investigation and the police work involved. The police is required to refer cases involving specific types of offences to the public prosecutor, who decides whether to institute investigations or exercise his or her discretionary prosecution powers. Although there are currently no firm rules in the Netherlands for deciding in what cases a criminal offence must be prosecuted, a Directive by the BPG ‘on the investigation and prosecution of corruption of officials’ was adopted on 8 October 2002 and came into force on 15 November 2002.

4.2.1.1. Prosecution Principle

In the Netherlands prosecutions are discretionary. Prosecutions are conducted according to the principle of expediency or advisability. Article 167 of the Netherlands Code of Penal Procedure allows the public prosecutor to discontinue proceedings in the public interest. The Public Prosecutor has discretionary powers to dismiss cases and also has the power to settle cases out of court by the use of a ‘conditional waiver’ or ‘transaction’. A ‘conditional waiver’, which is not regulated by law, is given when the
prosecutor believes that an alternative to a criminal trial is preferable. Such a waiver could, for instance, be conditional upon alcohol or drug treatment, community service, or restitution to the victim. A ‘transaction’ is governed by Article 74 of the Penal Code, and essentially involves the payment of a sum of money by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or the surrender of objects that have been seized and are subject to forfeiture and confiscation, or the payment of their assessed value.

The principle of discretionary prosecution is very often applied to cases involving relatively petty offences, such as shoplifting or minor damage to property. This principle has been applied in the past to terminate investigations into certain offences – including cases of corruption. This has been done, for example, in cases involving the awarding of public contracts. In this case a transaction procedure was followed. The decision to follow this procedure was based on the estimation that a trial before the courts would lead to the same result in terms of the punishment (the amount of the fine) level. The senior staff of the BPG or the Ministry of Justice, at least in important cases, carefully monitor the application of the principle of discretionary prosecution.

The Directive by the BPG ‘on the investigation and prosecution of corruption of officials’ leaves quite a broad autonomy to the public prosecutors in the decision-making process. In addition to the Directive, there is also a set of policy rules for the PPS (‘Guidelines for the handling of sensitive cases’) that came into force on 15 June 2001. According to these Guidelines, the public prosecutor cannot take a decision completely autonomously.

4.2.1.2. Immunities

For immunities from investigation, prosecution and adjudication for corruption offences Article 42, second section, of the Dutch Constitution stated, ‘the King is immune’. This means that the King enjoys complete immunity and therefore proceedings cannot be brought against him for any crime whatsoever. Article 71 of the Constitution states that Members of Parliament, Ministers, Under-Secretaries of State and other persons taking part in the deliberations may not be prosecuted or otherwise held liable in law for anything they say during Parliamentary sessions or any meetings of its committees or for anything that they submit to them in writing. This form of immunity relates to prosecution for deeds in the exercise of the above-mentioned persons’ functions.

The Dutch Constitution recognises, as a general rule, also the possibility that political officials may be investigated, prosecuted and arrested just as any other citizen. Nonetheless, Article 119 contains an exception:

‘Members of the States General, Ministers, Under-Secretaries of State shall be tried before the Supreme Court on account of a serious offence involving abuse
of office, during and after their period in office. The instruction to prosecute shall be issued by Royal Decree or by decision of the Second Chamber'.

The decision to prosecute the persons mentioned in Article 119 for serious offences involving abuse of office thus remains entirely in the hands of political bodies: the government ('by Royal decree') or Parliament ('by decision of the Second Chamber'). The expression 'Serious offences involving abuse of office' refers notably to Title XXVIII of the Penal Code and includes also the passive bribery of domestic public officials (Arts. 362 and 363). Article 119 was established for two main reasons: 1) to set up a special procedure aimed at providing political officials with protection against prosecution ‘for rash reasons’ and 2) to guarantee that a prosecution (against a political official) which is deemed necessary is certainly initiated. The government and the Second Chamber are only entitled to instruct the prosecution of those persons mentioned in Article 119. This means that the Public Prosecutor cannot in any case initiate prosecutions.

4.2.2. The National Public Prosecutor for Corruption, the Netherlands National Police (NNP) and the National Security Service (AIVD); Investigative Means and Witness Protection

In 2000, the Ministry of Justice created a National Public Prosecutor for corruption and the Netherlands National Police (NNP). The National Office of the Public Prosecutions Service appointed, within the National Organised Crime Prosecution Unit, a Public Prosecutor as the national corruption officer as of 1 December 2000 and he/she has no more powers than any other Public Prosecutor. This person directs investigations into the corruption of foreign public officials and can advise, assist or direct national corruption investigations. Furthermore, this person is responsible for the coordination and control of the Criminal Intelligence Unit (CIE) of the NNP and works very closely with the NNP. The NNP is responsible for investigating cases of corruption involving police officials (usually senior officials), members of the judiciary and prominent office holders. The NNP is involved in the investigation of about 75 corruption cases per year. About 40% of these cases concern police officers. The task of the National Security Service (AIVD, the former BVD) is to protect national security. This also covers taking security measures for the protection of the democratic legal order. The AIVD is also involved in promoting integrity within the public administration. The powers are anchored in the Intelligence and Security Services Act (Wiv) and the Security Investigations Act (Wvo).

Since the act governing special investigative means (BOB Act) came into force, a large number of special investigative means have been regulated in the Code of Penal Procedure. The rule for all these powers is that their use must be in the interest of the investigation and a Public Prosecutor must give an order to apply a particular measure. They can almost always be used within the framework of corruption investigations. In practice they are
usually recommended for a period of four weeks and around the time that the order is coming to an end, an assessment of the situation and as to whether the order can be extended is made. The following special investigation means can be used: systematic observation; infiltration; pseudo-purchase or pretending to provide a service; systematically obtaining information; entering secure establishments; direct monitoring; telephone tapping; telephone prints. The law also permits the deployment of a citizen for the benefit of systematically obtaining information, for the infiltration of citizens and citizens making pseudo-purchases or pretending to provide a service.75

Persons who play a role in penal investigations can be subject to protective measures prior to, during and after a penal procedure. The measures cover a wide range of possibilities, which make it possible to create specific circumstances for every case, including corruption cases. A special witness programme was designed in 1995, following a report from a special working party. A public prosecutor is specifically charged with nationwide authority over the activities. The Dutch authorities have been working specifically with the witness protection programme in which the measures that can be taken are very varied and range from a witness ‘going into hiding’ in a safe place for a short time, to moving the witness and his family to a different country, and changing his identity.

4.2.3. The Fiscal Intelligence and Investigation Service and the Economic Investigation Service

The FIOD/ECD is a special unit under the Ministry of Finance whose main tasks are: a. to investigate fiscal, financial, economic fraud and customs fraud; b. to trace, collect, process and provide information concerning tax and customs; c. to contribute to the prevention of and combating organised crime. The FIOD/ECD employs about 1100 officers. They concentrate their investigative activities on: integrity in the financial markets, combating money laundering, VAT fraud, drug trafficking and misuse of beneficial ownership. In addition to the responsibility for tracing corruption ‘in society’, they are also responsible for internal investigations within the tax and customs authorities. The FIOD/ECD also conducts investigations into integrity breaches by tax officials. On average (over the last four years) the integrity investigations have resulted in approximately 35 reports per year, which include: disciplinary actions, examination of the facts and criminal investigations. One or two cases of corruption per year are revealed, so that corruption is not perceived to be a big problem.

75 Articles 126v up to and including 126z.
5. Conclusions and Recommendations

In the Netherlands there are more corruption cases than penal law court decisions on corruption; the administrative law approach in corruption policy was underestimated for a long time. The Netherlands Parliament and the Fourth Power institutions have played an important role by producing investigation reports. Also there are critical signals to the Dutch Government’s anti-corruption policy. Now the Dutch Government should develop a real preventive and repressive anti-corruption policy with clear definitions of acts of corruption and the norms of Good Governance. On the national, regional and international level these norms are completely accepted. This anti-corruption policy contains norms for the administrative authorities and civil servants, which can be elaborated by using administrative law instruments for implementation and enforcement. The GALA should be the main general framework for this and it can be elaborated in specific acts like the Civil Servants Act and the Competition Act. The administrative instruments and enforcement mechanisms used by the Netherlands Competition Authority (NMa) illustrates the success of the new administrative law developments. Also the activities of the administrative authorities at the decentralized level, the effectiveness of the BIBOB mechanism, the work of the police and the Courts make an integral approach to anti-corruption policy necessary. Reports by the Ombudsman institutions and the Netherlands Court of Audit on corruption and fraud and the development of norms of good administration makes the administrative law approach complete. Only when the administrative law method will be completely developed will not only the most serious penal law cases of corruption be on the table, but also the less important cases. That is crucial for the future of the Dutch administrative authorities and their civil servants.
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1. The Concept of Regulation

Discussing the regulatory powers of Dutch quangos, one easily runs the risk of mixing up different concepts of regulation and rule-making. In the Netherlands a definition of regulation usually covers more than just the promulgation of (generally binding) rules. In the context of government policy and public services, regulation is normally considered to be the control of something by rules, as opposed to its prohibition. In this respect, regulation is not limited to rulemaking. It is also about licensing, inspection and enforcement, and sometimes even dispute resolution. In relation to market failure, regulation is normally the opposite of deregulation and liberalization. Regulation in this sense includes setting standards that determine the ‘rules of the game’ on markets for public services. As far as administrative law is concerned, regulation is in some countries narrowly termed as the legal restrictions promulgated by administrative agencies in contrast with statutory law or case law. This paper deals with regulation in a broader sense. Besides government agencies, other non-governmental bodies are engaged in standard setting to create a level playing field on globalizing markets. Hereafter regulation may comprehend:

- public statutes, standards or statements of expectations;
- establishing policy rules that limit the executive powers of quangos;
- a process of registration or licensing to approve the operation of a service;
- a process of inspection or other form of ensuring standard compliance, or reporting and management of non-compliance with these standards;
- a process of de-licensing whereby that organization or person is judged to be operating unsafely and is ordered to stop operating at the expense of acting unlawfully;

1 Van der Meulen 2003, p. 26 and Meuwese 2004, p. 1127-1128. The latter author points out rightly that in regard to market regulators the notion of ‘regulation’ may refer to all three pillars of the Trias Politica. At the same time, the notion of ‘regulation’ in practice often refers to technical executory rules and policy rules rather than general statutory rules.
- dispute resolution by quangos in case of conflicts between providers of public services and/or consumers;
- imposing sanctions in case of continued non-compliance with laws and (other) regulations, like licensing conditions.

One has to bear in mind that even quasi-public activities often know a limited form of (self-) regulation. For example, the Dutch Association for Professional Soccer (KNVB), has an important role to play in setting standards relating to the safety of soccer matches. The KNVB can even impose penalties as soon as regional clubs break these rules. A penalty by the disciplinary commission of the KNVB can, for instance, be that a soccer game has to be played without supporters.2 In this case, however, regulation is a synonym for the production of (ethical) codes of conduct. When we use the word regulation hereon after, we are not referring to self-regulation except in case we explicitly determine otherwise.3

2. Central Research Question

For the demarcation of the scope of this report, we would like to suggest the following central research question:

To what extent do quangos possess (autonomous) regulatory powers, and are there any principles of good governance that can and will be used to master these powers?

For the explanation of principles of good governance, we refer to the rules, processes and behaviour that affect the way in which regulatory powers are exercised by quangos, particularly with regard to openness, legitimacy, effectiveness, coherence and accountability.4

As far as openness is concerned, we consider this to be more than just the right to have access to information. Quangos that provide important public services should also inform the public voluntarily about their activities and the way they are operating. For that reason, some of them have established a protocol or a manifest that explains how the organization wants to present itself to the outside world. When it comes to legitimacy, this does not refer to the exercise of control by Ministers and Parliament. Legitimacy also covers aspects of recognizability as a public authority and acceptance by

3 Self-regulation and co-regulation are becoming more and more important instruments in legislative policy on both the national and the European level. See for an overview in relation to the national context: Baarsma et al. 2003. On the European level, the interinstitutional agreement on ‘Better lawmaking’ (2003/C 321/01) is highly relevant. See also Senden 2005.
4 A similar governance concept was adopted in the white paper on European Governance by the European Commission. COM(2001) 428 final.
clients and the public in general. The effectiveness of a quango’s operations refers to the question: does liberalization work and has the quality of public services improved? This concerns, for example, the number of mistakes and the timeliness of decisions. Efficiency, in its turn, relates to matters of costs and benefits, price-quality ratio. An example of improved efficiency is the tariff for services of the Land register (Kadaster). These have decreased considerably since this organization became a quango in 1994.5 Finally yet importantly, there is the question of accountability. An important issue here is the responsibility towards Ministers and Parliament on the one hand, and the accountability towards society and professionals in the sector on the other hand.6

3. A short History of the Quango Debate

One can roughly discern three major developments in the rise of the number of quangos over the last few decades.

3.1. Shifts in Governance from the Private to the Public Domain

First, there has been a shift in governance from the private to the public domain. In 1952, for example, the Organization Law on Social Insurances (Organisatiewet sociale verzekeringen) laid down the foundations for the implementation of the law on social insurances for workers. Responsible for the implementation of this legislation were a number of private trade and profession societies (bedrijfsverenigingen). In these organizations, representatives of social partners formed the board of directors. Every professional branch had one of these societies and the law determined that employers were automatically signed up as members of the public body for the professions and trade in their sector. Gradually the societies of private trade and profession became more and more important in the execution of administrative laws on social insurances for sickness, unemployment and incapacity for work.7 Among other things, they were entrusted with judging the legitimacy of social security claims, taking care of the distribution of payments and monitoring compliance.8

5 Before this period, Kadaster was part of the Ministry of Finance until 1970. After that, Kadaster was reorganized (a cut back from 57 regional to 15 regional offices) and became a part of the Ministry of Housing, Spatial Planning and the Environment from 1982 until 1994. See for a short overview of the history of Kadaster <http://www.kadaster.nl>.

6 One can experience a lot of private initiative here, such as: consultation by stakeholders, quality control manuals etc. See <http://www.publiekeverantwoording.nl>.

7 Concerning social insurances we have to discern between employee insurances (werknemersverzekeringen) and insurances for the general public (volksverzekeringen), like the basic insurance provisions for retirement.

8 Berkhout et al. 2003, p. 7.
Unlike the social insurances for the general public (volksverzekeringen), the execution of workers insurances was first and foremost a matter of private initiative. During the eighties and nineties, however, the costs of social insurances increased tremendously. An inquiry by the Dutch Parliament showed that the public bodies for the professions and trade had not taken adequate measures to prevent abuse and figurative use of workers insurances. The public bodies for the professions and trade had been preoccupied with paying allowances on time at the expense of attention for reintegration and volume control in social security policy. Ultimately, the debate in Parliament about the parliamentary inquiry by the Buurmeijer Commission resulted in a motion to marginalize the influence of the social partners and establish a more independent organization for the monitoring and inspection of unemployment and incapacity allowances. Because of this debate, the implementation of social insurances for workers was allocated to a quango. Since January 1 of the year 2002 the responsibility for unemployment allowances, claim-assessments, and the collecting of insurance contributions is accommodated in the Executive Office for Workers Insurances (Uitvoering Werknemers Verzekeringen, or UWV). Besides this, the UWV is now responsible for reintegration of unemployed and incapacitated workers. The UWV is positioned as an independent organization with public authority, which is not subordinated to the Minister of Social Affairs and Employment.

3.2. Outsourcing of Public Tasks by Departments

A second major development in the trend towards quangocratization has to do with the political wish for a ‘smaller government’. Ministers should concentrate themselves on the core business of their department and outplace public services that can be performed more efficiently by specialized organizations. A prominent example is the establishment of a special organization for the granting of student loans and, more in general, information management by the Minister of Education, Culture and Science. Previously, a special unit inside the Ministry called the Directoraat Studiefinanciering performed these tasks. In the early nineties, the Dutch government decided that it would be more efficient to transform the Directoraat into a quango, and to outsource the information management to a special agency, called the IB-group (hereafter § 6.2).

The Dutch Forest Preservation Council (FPC: Staatsbosbeheer) is yet another example of outsourcing public duties. The FPC’s mission is threefold:

- maintaining, restoring and developing woodland, natural heritage, landscape and cultural-historical values at FPC’s sites;
- promoting outdoor-recreation at as many FPC’s sites as possible;

Commissie Buurmeijer 1993.
- contributing to the production of environmentally-friendly, renewable raw materials such as timber.

Until 1998, FPC was part of the Ministry of Agriculture, Nature and Food Quality (LNV). FPC is now an independent administrative body.10 Since FCP's independence, annual agreements have been made with the Ministry, which list the objectives and the price at which these are to be realized. FPC annually reports to the Ministry of LNV and to the parliament on the results achieved.

3.3. Competition Authorities

A third development is the explosion of new competition authorities caused by the trade liberalization on European markets for energy, post and telecom, and financial services.11 In the past, the European Commission had an important role to play in this context. Lately, member states have gotten more responsibility on matters of enforcement of competition rules. EC-Regulation 2003/1, for instance, creates a system of parallel competences in which the Commission and the member states' competition authorities are competent to apply the articles 81 and 82 of the EC-Treaty. National competition authorities and the Commission have formed a European Competition Network (ECN) of public authorities, which cooperate closely in order to enforce competition laws. Through cooperation, this network tries to maintain a level playing field for companies on the internal market. In the Netherlands, most competition authorities like the Netherlands Competition Authority, the Post and Telecom Authority, and the Netherlands Authority for Financial Markets, have been positioned as quangos. This has been done to safeguard their independent position towards the political domain on the one hand, and the private companies in the sector they have to supervise on the other hand.

3.4. Some Facts and Figures

The climax in the increase of the number of quangos has to be situated in the eighties and nineties of the past century. During the heydays of privatization and liberalization of markets (post, telecom, energy etc.) the mainstream of policy analysts and lawyers believed it would be wise to separate the implementation and monitoring of administrative laws from political interference. Later on, the epicenter of the debate about the pros and cons of quangos shifted from a pragmatic perspective on matters of feasibility and efficiency, towards a more fundamental discussion on constitutional issues. One of these issues is without doubt the inevitable field of tension between

10 Wet Verzelfstandiging Staatsbosbeheer, Staatsblad 1997, 514.
11 Visie op marktoezicht, Kamerstukken II 2003/04, 29 200 XIII, nr. 50.
the accountability of Ministers towards Parliament versus the independent position of quangos with executive and regulatory powers, which fall outside the scope of the traditional democratic complex.

Recently the quango-debate in the Netherlands seems to focus more on the costs and benefits of strengthening the independent position of specialized inspection agencies, like the Netherlands Competition Authority and the Netherlands Authority for the Financial Markets. Some people argue that these quangos are becoming too powerful without a proper structure to deal with governance issues, liability problems, and aspects of legitimacy and accountability. On the other hand, there are also experts who claim that European legislation could force these agencies to move even further away from the political influence of national Ministers.12

In the meanwhile, one could easily forget that quangos are all but a new phenomenon in the Netherlands. The University of Leiden (1575), for instance, was one of the first quasi-autonomous public bodies in our country. Around 1900 there were already about 75 quangos in the Netherlands. According to the Netherlands Bureau for Economic Policy Analysis (CPB), their number increased from about 300 in 1960, towards 550 in 1993, with a slight decrease down to 431 in 2000. Due to the ongoing debate about an appropriate definition of quangos (hereafter) these numbers should not be taken too seriously. A few years ago, research performed by the Netherlands Chamber of Audit (Rekenkamer) claimed that in 2000 there were about 3200 corporate persons with one or more public duties. In total, they should be held responsible for the spending of approximately 119 billion euros of taxpayer’s money. About 80% of them were also supposed to be quangos, according to the Court.13

Looking at the gap between these calculations, it is fair to say that the CPB and the Court of Audit probably have a different view on the kind of organizations that should (not) be called quangos. Fortunately, the Ministry of the Interior and Kingdom Relations issued a special quango-register.14 Consequently, it is now easier to get an overview of the expansion or decline of the total number of quangos. Yet, one still has to bear in mind that the quangos registered on this website are only the ones situated on the level of the central government. As Zijlstra has noticed earlier, this is only a tip of the iceberg. The Local Authorities Act (LAA) allows for a relatively broad delegation of powers from the Bench of Mayor and Aldermen to municipal commissions. The introduction of these commissions in 1964 was motivated

13 Rekenkamer 2002.
14 <http://almanak.zboregister.overheid.nl>. The register shows that most quangos are spread over the ministries of Agriculture, Nature and Food Quality; Education, Culture and Science; Transport, Public Works and Watermanagement, and Health, Welfare and Sports.
by almost the same arguments that are being used for the establishment of quangos on the national level.\textsuperscript{15}

**4. Definition**

Until today, there is no special framework law for quangos (later on we will elaborate on a draft for such a law) in the Netherlands, and the Constitution does not recognize quangos as a separate category of independent administrative agencies. Because of this, there is no legally binding definition of quangos. On the European level such a definition does exist when it comes to regulatory agencies. The Interinstitutional agreement on the operating framework for the European regulatory agencies defines an agency as:

‘any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy’.\textsuperscript{16}

This definition limits the scope of the operations of European agencies to the implementation of Community policies. Therefore, it is necessarily narrower than a description of the tasks of most quangos on a national level.\textsuperscript{17} Nevertheless, national quangos can be used for the monitoring and implementation of European laws. This is clearly proven by our national competition authorities. As we have noticed before, they are often cooperating with regulatory agencies abroad as part of a European network.

In the UK, the term quango is an abbreviation of the phrase ‘quasi autonomous non-governmental organization’. It is used to describe:

a public body that has responsibility for developing, managing and delivering public policy objectives at an ‘arm’s length’ from Ministers.\textsuperscript{18}

This description is also quite accurate when it comes to a characterization of the Dutch equivalent zelfstandige bestuursorganen (zbo’s). Nevertheless, almost every definition of quangos still seems to be somewhat controversial in the Netherlands. Zijlstra explains this by referring to the fact that definitions are often adapted according to the needs of those who have a special interest in

\textsuperscript{15} Zijlstra 1997, p. 484-485.
\textsuperscript{16} Interinstitutional agreement on the operating framework for the European regulatory agencies, COM (2005)59 final.
\textsuperscript{17} At the same time, the explanatory memorandum of the Interinstitutional agreement certainly contains some meaningful lessons for the setting up of quangos on a national level on good administration, accountability, participation and openness.
\textsuperscript{18} House of Commons, Research paper 05/30, 11 april 2005. Website: <http://www.parliament.uk>.
not) decentralizing administrative powers.19 Zijlstra himself describes zbo’s as public non-advisory bodies (on the level of the central government) within the meaning of Article 1:1 General Administrative Law Act (GALA), which are not subordinate to any Minister in the sense that he is not entitled to give specific instructions in individual cases that have to be followed by the agency.20 Other definitions include that quangos are not embedded in the traditional democratic complex, because they are not accountable towards elected and representative democratic institutions (Parliament, Provincial Councils, City Councils etcetera).21

According to the draft for a framework law on quangos and the General guidelines for legislative drafting (Art. 124e), quangos should always be established by, or, in special cases, in virtue of, an Act of parliament. This demand is a consequence of the fact that quangos operate at arm’s length of Ministers. To counterbalance the decline in accountability towards Parliament once a quango has been established, there should at least be a form of Parliamentary consent beforehand.

5. The Quango Debate in the Netherlands

In recent years, quangos or zbo’s have been subject to increased public debate, both in the UK and in the Netherlands. The trend toward privatization of public services in the eighties and nineties has been an important amplifier for the growing agitation in the quango debate. Concerns have been expressed about their accountability, democratic legitimacy, diversity of members and independence. Some people even say we are moving towards a ‘quangocracy’ or ‘quango state’.22 While the current themes in the quango-debate in the Netherlands and in the UK show a lot of similarities, the historical backgrounds differ considerably.

In the Netherlands, M. Scheltema deserves credit for being the first scholar to start a serious academic debate about the advantages and disadvantages of quasi-administrative bodies on the level of our central government.23 In 1974, he held his inaugural lecture at the Law Faculty of the University of Groningen about independent administrative agencies, being the alleged stepchildren of Dutch constitutional and administrative law. Especially, the insulation to some degree from direct ministerial involvement

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19 Zijlstra 2004, p. 1980-1986. A similar definition can be found in article 124a of the General guidelines for legislative drafting in the Netherlands. These guidelines or so-called Aanwijzingen voor de regelgeving can be found on <http://www.justitie.nl>.
20 The issuing of general instructions, on the other hand, is not uncommon in relation to quangos. See for instance art. 16 of the Act concerning liberalization of the Informatie Beheer Groep (IBG is, among other things, responsible for the management of student grants in the Netherlands), Staatsblad 2004, nr. 593.
21 Raad voor het Openbaar Bestuur 2003, p. 45.
23 Scheltema 1974.
is sometimes believed to be a weakening of the scrutiny mechanisms laid down in the Dutch constitution. More in particular, the principle of ministerial responsibility and accountability contributes to the fact that the legal position of quangos remains highly controversial in the Netherlands.24 Recently, a study by an inter-departmental working group advised to abolish most quangos, and restore ministerial responsibility and accountability for most semi autonomous administrative organizations. Only a handful of the current quangos should be kept outside the range of political influence by Ministers to avoid conflicts of interests.25 The overall conclusion of the working group reads that a restoration of previous arrangements is in order.

According to Scheltema, however, it is a mistake to believe that every administrative act is covered by the principle of ministerial responsibility. The fact that a Minister has to answer questions of Members of Parliament about acts of, for instance, civil servants that work for him, does not imply that a Minister is also *qualitate qua* responsible for each mistake or wrong decision of government officials. Only to the extent that a Minister gave false instructions that caused the mistake or fault, he should be held accountable by Parliament. Scheltema also stressed, that quangos could serve an important role in the balancing of powers between the executive and the legislative competences of Dutch Ministers. Transferring certain executive powers to quangos might even prevent abuses of powers by Ministers in case there is a possible conflict of interests between their administrative and political roles. An example is the position of the Electoral Council. This council advises the Dutch government and both Houses of Parliament on practical matters relating to elections or questions of franchise. The Council also acts as the central polling station in parliamentary elections and elections to the European Parliament.26 It is probably wise that the Minister for the Interior in the Netherlands cannot give specific instructions to the board when it comes to topics, like: setting the date for new elections or determining the validity of the list of candidates for the various political parties. Otherwise, possible conflicts of interest between the Minister as a representative of the Crown, and as a representative for his political party, lie in wait.

6. Why Quangos: possible Advantages

According the General guidelines for legislative drafting, there are three legitimate reasons for the establishment of quangos. Article 124c of the guidelines reads explicitly that they should only be erected if:

24 One of many examples for this controversialness was the fact that the Dutch Senate postponed the draft for a framework law that was supposed to harmonize the establishing of quangos.
26 More information can be found at <http://www.kiesraad.nl/>.
1. there is a genuine need for independent decision-making, based on a special kind of expertise, which is hard to generate within the administration;
2. it concerns a strictly rule-guided way of executing administrative decisions in a large number of cases; or
3. it is useful from a public participation perspective to invite private organizations to the decisions making process to perform a specific administrative task, which outweighs the disadvantages of a loss of control by the Parliament.

6.1. Independent Decision-making: the Case of CBS

A typical example of the first motive to erect a certain quango, is the position of the Central Bureau for Statistic research in the Netherlands (CBS). This institution conducts an incredible amount of, especially socio-economic, research for all branches of government. Article 3 of the Statistics Netherlands Act therefore reads that it is the task of CBS to carry out statistical research for the government for practice, policy and research purposes and to publish the statistics based on such research. While CBS may occasionally carry out statistical research for third parties, it does most of its work in favour of various governmental institutions.

The independence of CBS is guaranteed in several ways. First, the Central Commission sets both the long-term statistical programme and the annual work programme for Statistics. This is an independent commission that watches over the independence, impartiality, relevance, quality and continuity of the statistical programme. The Director-General decides autonomously which methods are to be used to make these statistics, and whether or not to publish results. Secondly, CBS became an autonomous agency with legal personality in 2004. So there is no longer a hierarchical relationship between the Minister of Economic Affairs and the organization. One of the reasons for this is that CBS is responsible for collecting, processing and publishing important statistical information for policy makers, like macro-economic indicators for consumer prices and economic growth. One can imagine that these statistical facts and figures may sometimes contain sensitive information, at least from a political perspective. That is why decisions about the collecting and publishing of this information should be kept away from the Minister of Economic Affairs. However, the Minister stays responsible for setting up and maintaining a system for the provision of government statistical information; in other words the Minister is politically responsible for legislation and budget, for the creation of conditions for an independent and public production of high quality and reliable statistics.

Even the costs of tasks and activities undertaken to put this legislation into practice are accountable to the government’s budget.

27 <http://www.cbs.nl>.
However, when it comes to decisions that concern the content, timing and publishing of the information flow, the Minister has no authority to influence the decision making process that goes on within the CBS.

6.2. Rule-guided Decision-making: the IB-group

A second example of a typical quango-type organization is the so-called IB-group. This quango is responsible for the implementation of several education laws on behalf of the Minister of Education, Culture and Science. Among other things the IB-group:

- distributes student grants for both national and foreign students and is responsible for season tickets for students to be able to use public transportation facilities (trains, metros, busses etc.) to get to school;
- takes care of the applications, selection and admission of students in the sphere of higher education law;
- is responsible for the issuing of student loans;
- has an important role to play in the information management of basic education data, like keeping record of student administration numbers etcetera; and
- functions as an accreditation body for the recognition of student diplomas;
- organizes state exams and other nation wide public and private school exams.

Because of the sheer number of administrative orders IB has to take every day it would be virtually impossible for any Ministry to carry out these tasks in an orderly fashion. It not only demands specific knowledge, but it also requires a specialized and well-organized administrative machinery. Locating these tasks within the body of the Ministry of Education would mean that the priorities of the organization have to be balanced with lots of other public interests that need attention on a daily basis. Moreover, because the IB-group has an independent position, the Minister of Education, Culture and Science may only give general instructions. He is not allowed to interfere with the way the agency handles specific dossiers. Of course citizens do have the right to address an administrative court if they do not agree with the administrative orders taken by the IB-group. The Act on the liberalization of the former predecessor of IB also explicitly states that IB-group has to have a special organization structure (with a board of directors, an obligatory information statute and a supervisory board) which guarantees maximum public accountability and transparency of all of its operations.28

28 Wet verzelfstandiging informatiseringsbank, Staatsblad 1993, 714.
6.3. **The Public Participation Model: the Health Care Insurance Board**

A third example, in this case of private involvement in the public decision making process, concerns the Health Care Insurance Board (CVZ). This organization, founded in 1999, co-ordinates the implementation and funding of the Sickness Fund Act (*Ziekenfondswet*) and the Exceptional Medical Expenses Act (*Algemene wet bijzondere ziektekosten*). The CVZ has an independent position between the central government on the one hand and the health insurers, care-providers and citizens on the other. Together with the Ministry of Public Health, Welfare and Sports and three other independent government organizations (the Supervisory Board for Health Care Insurance, the Health Care Tariffs Board and the Hospital Provisions Board) CVZ plays a part in ensuring an affordable, reliable and efficient system of health care insurance in the Netherlands. Some of the most well known tasks of CVZ are:

- providing advice on the sum of the contributions and budgets for sickness funds;
- managing contribution funds and distributing them over the sickness funds;
- providing guidelines for carrying out new and existing legislation;
- informing care-insurers, care providers and citizens;
- monitoring the feasibility and efficiency of government plans concerning health insurance;
- detecting and reporting bottlenecks in the implementation of Sickness Fund Act and the Exceptional Medical Expenses Act.

CVZ has an executive board appointed by the Minister of VWS and a supportive organization under the guidance of a management board. The executive board comprises seven independent experts, who have their roots in the health care or insurance sector. The main goal of CVZ is to enhance the efficiency and transparency of the implementation of the overall system of health care insurance. For that purpose, CVZ is closely co-operating with organization in the health care sector, like hospitals, insurance companies and associations of patients. Most activities of CVZ ultimately lead to the promulgation of policy rules and executive orders.

29 *Kamerstukken II* 1999/00, 27 038, nrs. 1-2.

30 Article 1:3 of the General Administrative Law Act defines a policy rules as: ‘an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority. An administrative order means: ‘a written decision of an administrative authority constituting a public law act’.
7. Legal Position and Framework Legislation on Quangos

7.1. Quangos: a blind Spot in the Dutch Constitution?

The Dutch constitution does not refer to quangos at all. So there is no constitutional basis for their establishment, nor for the necessary democratic control of powers and the accountability of quangos in this respect. However, there have been several attempts in the past to embed the different roles that quangos play in the public domain in the text of our constitution. While in 1980 the Dutch government still thought it would be too early for a revision of the constitution, some scholars, like J.M. Polak, already begged to differ on this point. Polak referred to Article 87 (old) of the Dutch Constitution. This Article carries back to the revision of the constitution in 1922. Article 87 (today Article 79 of the constitution) serves to prevent an excavation of the powers of Parliament by advisory bodies, established by the government. In the roaring twenties of the previous century, fear did exist that important advisory bodies would be able to capture government officials and by-pass the position of Parliament. Therefore, Article 87 decided that advisory bodies shall not be established without previous consent through an Act of parliament. Polak argued that, if Article 87 serves to protect the primacy of parliamentary control of power against advisory bodies, it should a fortiori pertain to non-advisory bodies with executive powers.

In 1997, the government switched positions and proposed to alter Article 134 of the constitution to give quangos a special position next to the public bodies for professions and trades. This time, however, the Dutch Parliament acted obstructive. Most political parties in Parliament took the view that it would make more sense to establish a framework law on the position and functions of quangos before an alteration of the constitution might be in place.

In 2003, the Dutch Council for Public Administration (ROB) attempted another time to embed quangos in the constitution. The Council proposed to amend the constitution in a way that left no room for quangos on the level of the central government, except for those established by, or, in virtue of, an Act of parliament. According to the Council there were two good reasons to create a special position for quangos in the constitution. First, they have become such an important factor in the administrative organization that it would be unreal to leave them out of consideration when it comes to the constitutional ground-rules concerning the organization of government. Second, quangos are an exception to the basic rule that Ministers are responsible for the way executive powers have been exercised by the

31 Huart 1925, p. 122-123.
33 Special provisions were proposed for quangos on the decentralized level of government.
administration. Such an exception to a fundamental constitutional rule has to be founded in the constitution itself. Nevertheless, the Dutch government rejected all the proposals of the Dutch Council for Public Administration without a proper explanation. Apparently, politicians do not want to burn their fingers on this topic anymore. For this reason alone, it seems unlikely that quangos will be embedded in the constitution on a short-term.

7.2. Quangos and Public Corporations

From a legal point of view, the Netherlands are structured as a nation state. The country is divided into decentralized entities, generally known as ‘public corporations’. First of all, these corporations can be defined by territory, like the provinces and the municipalities. Within their territory these organizations possess a certain amount of regulatory autonomy. They are more or less free to rule their own household, unless the law determines otherwise. Secondly, public corporations can also be defined by their function, like the public bodies for professions and trades mentioned in Article 134 of the constitution. Their regulatory autonomy is tied to functional issues. As a consequence, they have no autonomous regulatory powers.

Public corporations themselves do not possess rulemaking powers. They consist of administrative bodies with executive, regulatory or judicial competences. Characteristic for a public corporation is that it contains a system of checks and balances between these bodies. Furthermore, there usually is a representative body elected by the members within each territory or functional region. By that manner there is always some kind of democratic representation for executive and rule-making powers within each public corporation. Quangos, however, do not fit into the traditional democratic complex. Their popularity can be explained by the fact that they are associated with a more efficient and smaller government. Moreover, it is not impossible that quangos are able to, more or less, compensate their lack of democratic legitimacy. Especially in the public participation model, the executive board of quangos often represents all kinds of private interest groups. In those cases there is a kind of bottom up process of democratic representation. Besides this, citizens who do not agree with decisions that have been taken by a quango can often address an administrative court to require an independent judgment. Of course this is not an equivalent for democratic representation, but it does contribute to the control the power over quangos by citizens and supports the idea that quangos are governed by the rule of law.

34 See Kortmann 2005, p. 479 et seq.
35 Van Wijk et al. 2005, p. 86.
7.3. Quangos and their Legal Form

Quangos can be established in different ways. Most of the time, they do possess some kind of corporate personality either in a public or in a private law context. Corporate personality implies that a quango can, for instance, enter into a contract, be the owner of property, or address a court of law. In case a quango has no corporate personality of its own, it is automatically part of the corporate personality of the Dutch State. This indicates that the quango cannot hire its own personnel or otherwise take part in economic transactions. Without corporate personality this prerogative belongs to the Minister.

Quangos with a corporate personality under public law have to be established by an Act of parliament. This act will then determine its powers and duties and, to some extent, even the organizational structure of the quango. An example of a quango with corporative personality according to public law is the Central Bureau for Statistic research, mentioned earlier. Most universities also belong to this category.

In case a quango has corporate personality according to private law, it can only have administrative authority for one or more special purposes as determined by law. These quangos can be shaped as a private company limited by shares (N.V.) or as a company with limited liability (B.V.), and even as an association or a foundation. Nevertheless, Article 124b of the General guidelines for legislative drafting states that corporative personality according to private law is only to be used when that form is more adequate for the activities of the quango. In that case they are also governed by Article 59 of the so-called Comptabiliteitswet. This suggests, among other things, that they are under supervision by the Dutch Audit Council. An example is the foundation responsible for the collecting of reproduction fees for the copying of books, video’s etc. (Stichting Leenrecht). It seems fair to say that the nature of these activities justifies a corporate identity according to private law.

7.4. Access to Justice

The liability for unlawful governmental acts normally has to be established by an administrative court. The jurisdiction of these courts relies on the General Administrative Law Act. According to this act, courts are allowed to judge the legality of administrative orders. Administrative courts will not only check if written laws are obeyed but also if principles of proper

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37 Nevertheless the form of the foundation, established by a minister, is chosen many times (around 200 times in the last decade): see Kamerstukken II 2004/05, 25 268, nr. 21.
38 Algemene Rekenkamer 2000.
administration have been followed, such as the principles of due care, proportionality, good faith, legal certainty and equality.

When a decision conflicts with one of these principles, courts will approve the appeal and annul the order. The administrative authority then has to take a new decision respecting the court’s decision. In some cases, the judicial decision can even replace the annulled administrative order, but this does not happen often. Dutch administrative courts can also order a quango to pay compensation for the damage that is suffered by the public. In case a quango has corporative personality, according to private law, it cannot shift the paying of damages to the state treasurer. However, not all administrative orders can be brought before an administrative court. Article 8:2 GALA states that ‘no appeal may be lodged against: (a) an order containing a generally binding regulation or a policy rule, (b) an order repealing or laying down the entry into force of a generally binding regulation or policy rule, (c) an order approving an order, containing a generally binding regulation or a policy rule or repealing or laying down the entry into force of a generally binding regulation or a policy rule’. Because of this it is important to determine the legal nature of the order that may have caused liability.39

7.5. Harmonization

Then there is the matter of how quangos are structured and organized. Daily practice in the Netherlands shows a variety in organizational shapes and design. Since the second half of the nineties, there is a call for harmonization and coordination of the legislation concerning institutional issues relating to quangos. As a result, the General guidelines for legislative drafting were extended with special rules for the establishing of quangos.40 But from the start, most politicians thought this would not be enough, not in the least because the guidelines are non-binding. In the year 2000, a draft for a framework law on quangos saw the light.41 The aims of this law are (1) to sort out the present situation; (2) to clarify the issue of ministerial responsibility; (3) to provide rules for financial control; and (4) to increase the public insight. The concept of a framework law used the same definition of a quango as the General guidelines. Both discern between three sorts of provisions: there are (a few) Articles about quangos in general, Articles written especially for quangos with a public legal organization form, and some about those that are

39 Legislation made by government and the parliament together, as well as legislation from other authorities (for instance regulations by the city council or a quango), can be addressed before a civil court. However, the Supreme Court of The Netherlands has decided that article 120 of the Dutch constitution indicates that formal legislation cannot be held unconstitutional or against unwritten law, including general principles of law.
40 Staatscourant 1996, nr. 177.
41 Kamerstukken II 2000/01, 27 426, nrs. 1-2.
corporations according to private law. Most of the articles have the same
purport or are an exact copy of the guidelines.

There has been a lot of discussion about the current concept of a
framework law. In general there are two opposite opinions. One could say
that the ‘pluralists’ are in favour of diversity. They believe that it is
impossible that all quangos, regardless of their size, function and historic
background, should have to live up to the same set of (minimum) standards.
On the other side are the ‘unionists’. They feel that a framework should be
established setting out uniform conditions relating to the creation, operation
and control of quangos. At this time it is hard to say which party is going to
win the battle over the framework law. Peters has characterized the current
draft as a ‘careful compromise’ between the wish for a law that consists of
strict rules and obligations and a more flexible approach that provides non-
binding guidelines, like the General guidelines for legislative drafting are
doing.

At the moment it looks as if the framework law will only apply to
quangos if and when the law that institutes a quango says so. Furthermore,
the draft for a framework law offers ample room for dissenting
arrangements. Nevertheless, the current text does provide some general rules
on issues like the legal status of personnel working for quangos and,
especially, about monitoring compliance and financial control. Ministers are,
for example, given the right to demand certain information that is necessary
to monitor compliance and to annul decisions taken by quangos in case of
gross neglect of their duties. Unfortunately a number of rather important
matters will probably stay unregulated. Perhaps the Dutch government can
learn something in this respect from the European legislator. Looking at the
draft for an Interinstitutional agreement on the operating framework for
European agencies, might learn that it could be a good idea to be more
explicit on certain accountability issues. The Interinstitutional agreement
demands, for instance, that before an agency can be established an impact
assessment has to be undertaken by the European Commission. This impact
assessment has to take several factors into account, including: the problems
which must be resolved and the needs which must be met in the short or
long term, the alternatives for establishing an agency, any benefits in terms of
expertise, visibility, transparency, flexibility and timeliness, coherence,
credibility and effectiveness of public actions etcetera. Moreover, the draft
agreement offers interesting ideas on obligations concerning good
administration.

For the time being, however, the draft for a framework law has been
adjourned because the Dutch government wants to reconsider the whole
quango issue. This reconsideration was announced in the plan towards a

43 Peters 2000, p. 4-9.
‘Different government’. This is supposed to be the master plan of the (second) Balkenende administration. It provides us with five action points: (1) optimizing public service; (2) less bureaucracy; (3) a more efficient public organisation; (4) better cooperation between governments; and (5) better listening to citizens. Many projects were defined to realize this master plan and its goals. One of them was the assignment to a study group ‘Privatised Organisations on a central governmental level’ (called after its chairman: the Kohnstamm committee). This committee was asked to come up with a strategic advice on the future of quangos in the Netherlands. It turned out that, according to the Kohnstamm committee, most of the quangos should simply return under the ministerial responsibility. Recently the government has given its reaction on this advice.45 It has asked the Senate to carry on with the discussion that was adjourned. Furthermore, a new committee will be installed to perform a screening on the existing quangos (Commissie Doorlichting ZBO’s). This screening is supposed to shed more light on the question if the motives for a special status of quangos in the governmental organization are still relevant. If none of the motives are still relevant, the committee will make a cost-benefit analysis to decide if a quango must ‘return’ to the departmental organization or not.

8. Regulatory Powers, Executive Ordering and Dispute Resolution


In general, Article 124f of the Dutch guidelines for legislative drafting covers the attribution of regulatory powers to quangos on the level of the central government. The article reads: regulatory powers are only conferred to quangos:

- as far as it concerns organizational and technical matters; or
- in special cases, on the condition that a Minister keeps the authority of (dis)approving the rules made by quangos.

Unfortunately, the guidelines do not clarify what is meant by organizational and technical matters. As a consequence a margin of appreciation is left to quangos, to decide in which cases ministerial approval of their rules is absolutely necessary. At the same time, quangos do not possess autonomous regulatory powers attributed to them by the constitution, like for instance provinces, municipalities, and water boards (Art. 124 of the Dutch constitution). These bodies always possess the authority to enact rules on matters belonging to their local autonomy, unless the constitution or a statutory law determines otherwise.

Besides this, quangos are not to be confused with public bodies for professions and trades (Art. 134 of the Dutch constitution). The duties and organization of these bodies, the composition and powers of their administrative organs and the public access to their meetings is regulated by a statutory law (Wet op de bedrijfsorganisatie). As a consequence, the rule-making powers of quangos always have to rest on a delegation of regulatory powers by an Act of parliament for a special purpose. A so-called ‘blank delegation’ of rule-making powers towards quangos, even by an Act of parliament, is without doubt against the constitution.

All in all, the regulatory powers of quangos remain controversial. While the involvement of Parliament in the granting of legislative powers to quangos is guaranteed, this does not solve every problem. Once a quango has the power to enact generally binding rules, there is no longer a political control over the content of the rules. As we have seen, ministers sometimes have the right to approve or disapprove quango-regulations. However, they cannot alter these rules. So the power to disapprove is inadequate as a steering mechanism. Together with the fact that quangos are not subordinate to the authority of Ministers, the only thing that rests for a Minister, who wants to influence the course of a quangos policy, is using his right to give general directions to the board of directors. No one knows exactly how ‘general’ these directions have to be, to prevent Ministers from putting unauthorized pressure on quangos.

8.1.1. Rule-making Powers in Practice

In the year 2002, the University of Groningen conducted a research that covered the way quangos handle their rule-making powers. The researchers discovered 153 (clusters of) quangos, from which about 40% (61) are entitled to enact rules on the basis of a statutory law. Within this group of 61, 39 refer to rule-making in special cases, and are therefore in need of ministerial approval. An example of the sort of regulatory authority we are talking about here, are the regulations that concern the providing of subsidies. In 30% of the cases where ministerial approval was obliged, such an approval did not exist in practice. Perhaps even more alarming, however, is the fact that 40% of the total number of quangos claim to have regulatory powers, while in reality they do not possess such powers or vice versa.

A possible explanation for this confusion is the rather complicated distinction that exists in Dutch administrative law between policy rules and generally binding regulations. On the outside, both look very much alike (general formulation, suited for repeated application, aimed at an indefinite number of addressees etc.). Nevertheless, policy rules are based on an
executive power, while generally binding regulations always have to be based on a specific delegation of legislative power by an Act of parliament or, otherwise be founded on a direct attribution by the constitution. A mix-up is easily made in case the legislator leaves a margin of appreciation for agencies to interpret open-ended clauses in the law. Quangos often fill in this margin by setting technical standards for the benefit of a consistent application of the law. These standards, however, are the derivative of the power to implement and execute statutory laws. They do not arise from an autonomous lawmaking power.

8.2. Executive Powers

The executive powers of most quangos in the Netherlands do not differ substantially from those of ordinary administrative authorities. Quangos, like the Dutch Competition Authority and the Authority for the Financial Markets, can grant or withdraw permits, which are required to operate on markets for financial institutions (stock exchange, insurance, casino’s etcetera). The Dutch Emissions Authority is responsible for the granting of permits concerning tradable greenhouse gas emission rights for installations under the regime of European directive 2003/87 EC. Many other examples could be given about quangos with the authority to grant permits or sign releases.

A second category of executive powers originate from quangos responsible for the monitoring and enforcement of, especially, competition laws. The independent Post and Telecom Authority (OPTA), for instance, supervises compliance with legislation and regulations in the areas of post and electronic communications. In particular this involves the Postal Act, the Telecommunications Act, and delegated regulations based on these acts and on European laws. Laws and regulations are intended to promote competition on these markets, giving consumers more choices and fair prices. OPTA can take enforcement measures against a provider if the party holds an excessively strong market position. In order to enforce legislations, OPTA, is authorized to collect information and demand access to relevant documents, issue (administrative) fines in the event of a violation, issue threats of fines in order to force compliance with legal obligations, and retract previously issued telephone numbers. Furthermore, OPTA regulates the

48 According to article 1:1 of the GALA, an ‘administrative authority’ means: (a) an organ of a legal entity which has been established under public law, or (b) another person or body which is invested with any public authority.
50 Staatsblad 2004, 189. Wijziging Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees geharmoniseerd regelgevingskader voor elektronische communicatienetwerken en -diensten en de nieuwe dienstenrichtlijn van de Commissie van de Europese Gemeenschappen.
tariffs of former public corporation KPN, because this party holds significant market power on the telecom market. However, according to the draft for a framework law on quangos any decision about tariffs, ultimately, has to be approved by the Minister responsible for the policy field in question. In this respect the ‘independency’ of OPTA vis-à-vis the Minister of Economic Affairs is limited.

Other possible administrative competences of quangos are, for instance, the power to issue directions. The Dutch Central Bank (DNB), for instance, evaluates the financial household of pension and saving funds. Research may prompt the DNB to make recommendations to the board of directors of such a fund in case of breaches of the Pensions and Savings Fund Act. If these recommendations are not followed in a satisfactory and timely manner, the DNB may issue a direction. This direction must then be followed up by the board of directors, otherwise a fine or a cease and desist order under penalty, or an administrative fine, can be imposed upon the organization. At the same time, one has to be careful to treat directions as a mere equivalent of administrative sanctions. Truly, sometimes a direction may be a sanction in itself because it can be seen as a mandatory reaction to an offence. In other cases, however, the direction is simply an instrument to warm financial institutions for future developments that could jeopardize their liquidity or solvability, or otherwise cause disturbances to the management of daily operations. In those cases, there does not have to be any breach of the law.

8.3. Dispute Resolution: the Law in the Books

Last but not least, quangos are also active on the third pillar of the Trias Politica, namely in the area of settling disputes. Although dispute resolution is a relatively rare phenomenon amongst Dutch quangos, there are some examples in the field of energy law and, again, telecommunication law. Article 20(3) of Directive 96/92 EC concerning community rules for the internal market in electricity, for instance, determines that:

‘Member States shall designate a competent authority, which must be independent of the parties, to settle disputes relating to the contracts and negotiations in question. In particular, this authority must settle disputes concerning contracts, negotiations and refusal of access or refusal to purchase’.

The disputes referred to in this directive shall be settled by the Director-General of the Dutch Competition Authority, according to Article 51 of the Electricity Act 1998. A similar provision can be found in Article 19 of the Dutch Gas Act. This Article also states that disputes in relation to the application of Articles 11, 14 and 15 shall be settled by the Director-General on the basis of the Competitive Trading Act. However, Subarticle 3 of Article

51 Kaderwet Zbo’s article 17.
52 See Verhey & Verheij 2005, p. 158.
19 adds to this, that if a dispute relates to a condition or a tariff for the
transmission of gas or for a service necessarily related to this, the Director-
General may determine the said condition and the said tariff for a period
decided by him. This shows that dispute resolution may also include a
binding decision about conditions and tariffs. Yet another example can be
found in Article 71 of the Railway Act. Subarticle one of this act enables
interested parties to address the board of directors of the Dutch Competition
Authority to investigate if a railroad company or the railroad administration
has acted against directives 91/440 EC and 2001/14 EC. The board can also
be asked to decide if an agreement about access to the rail network has been
violated. If the board decides that the complaints are valid, a duty backed by
a penalty can be imposed on the condemned party.

Although other examples of dispute resolutions could be given, Ottow
describes them as an atypical task for quangos. According to him most
quangos do not have the equipment, nor the financial resources, to
investigate complaints thoroughly and to fulfil a proper role as independent
arbitrator.53 Nevertheless, in a certain way almost all quangos play some part
in settling disputes. The reason for this is that, according to Article 7:1 of the
GALA, before an appeal against an administrative order to an administrative
court is possible, one normally has to lodge objections against the order. This
means addressing the administrative authority and asking for a review. In
fact this is already a sort of quasi-judicial procedure to settle disputes outside
of court. Lodging objections is supposed to work in a low-threshold-way.
Especially when a quango is set up as an inspection agency or a competition
authority responsible for the upholding of anti-trust laws, some people claim
that the benefit of a low threshold procedure might very well be rather
imaginary. It seems not unlikely that citizens or companies, who have to deal
with the agency on a regular basis, will be hesitant to file an objection in fear
of a disturbance of good relations for the future.

A more prominent way of dispute resolution is assigned to the OPTA.
Article 12.2 of the Dutch Telecommunications Law (TW) states that:

If a dispute will rise among providers regarding access to, and interconnection
between, networks, the board of OPTA can pass a binding judgment to settle
the dispute on a formal request of one of the interested parties, unless the
legislator has assigned this task to another authority.54

The legislator has done his best to fit these provisions into the system of the
GALA. Because the decision of OPTA is binding, according to Article 12.6 of
the TW, the effect is that this decision has to be considered as an
administrative order in the meaning of Article 1:3 of GALA. The request to

53 Ottow 2003, p. 51.
54 Article 12.9 of the TW complements this task by giving consumers and providers of
electronic communication networks and services the right to address OPTA to settle a
dispute between them.
settle a dispute, therefore, has to be considered as an application by an interested party for such an order. As a consequence totally different competences (dispute resolution and executive decision-making) are getting mixed. Until recently, this meant that an objection could be lodged against the order in which a dispute was settled. Article 17(3) of the revised TW made an end to this. It would be strange if OPTA had to decide on an objection against one of its own previous settlements. One could hardly claim that OPTA would have been totally objective in the process of reconsidering its previous decision. More in general, this contributed to a change in the GALA. Since the first of September 2004 it is possible to skip the objections procedure (Art. 7:1a GALA) if all interested parties agree on this.

8.3.1. Dispute Resolution in Practice

An important reason to entrust quangos with dispute resolution is that this should lead to a relatively simple, cheap, informal and competent way of settling disputes. Daalder has argued that, as far as competition authorities are concerned, this theory does not correspond with reality. Case law shows that dispute settlement procedures in this area are very often highly formalized, time-consuming and still resulting in a trip to court, afterwards.

To a certain extent, the problem of dispute resolution by quangos in the field of competition law has to do with the fact that the decision to settle a dispute is considered to be an administrative order. This means that the regular provisions of the GALA are applicable. As a consequence, frictions may arise between a quasi arbitration-like way of decision-making and a more hierarchical approach of taking an administrative order. OPTA, for instance, cannot deviate from the application to settle a dispute between telecom providers. In other words, the application dictates the scope of the dispute. If a dispute does arise between private parties about tariffs, and after the application the tariffs have gone up, OPTA can only decide something about the original tariffs. This is due to the fact that decisions about the legality of an administrative order have to be taken from an *ex tunc* perspective. Another consequence of dispute settlement through an administrative order is that courts have full jurisdiction over OPTA’s decisions, where usually some restraint will be shown. Last but not least, normally, administrative orders will only become invalid because of an annulment in court, or when the administrative authority itself revokes the order. In case of an order taken by OPTA, concerning dispute settlement, however, private parties are able to bypass the order retroactively if they can come to an agreement about their mutual rights and obligations.

In general one could say that dispute resolution by quangos does not necessarily fit into the procedural law laid down in the GALA.

56 Voorzieningenrechter Rotterdam 20 april 2004, LJN-nr. AO 8431.
9. Ministerial Control over the Regulatory Powers of Quangos; General and Specific Directions

Article 124l(5) of the guidelines for legislative drafting decides, among other things, that depending on the nature of a quango, the following instruments of control will be attributed to ministers:

- establishing generally binding regulations, which have to be observed by quangos, concerning matters mentioned by an Act of parliament;
- the power to give general instructions or make policy rules that have to be followed by quangos;
- the power to approve, adjourn or annul certain administrative orders coming from quangos.

Originally, the draft for a framework law on quangos kept silent on this subject. Following the advice of the High Council of State, the Dutch government refrained from a general regulation about the authority of ministers to give policy rules or general instructions for quangos. The government thought a general provision on this matter could easily conflict with the independent position and expert role of certain quangos. Kummeling on the other hand, argued that this is not a good excuse. A differentiation between various types of quangos could have solved this problem, according to him. It would have been easy to make an exception for quangos, which have to be able to come to an independent judgment without political interference. The category which first comes to mind then are, again, the competition authorities whose job it is to keep an eye on the way public authorities operate on markets for public services. In the meanwhile, the draft for a framework law has been altered. As a result of an amendment in Parliament, the government switched positions and introduced a new Article in the draft framework law on quangos that offers Ministers the power to give general directions to quangos. According to the Dutch government, Ministers also have the authority to make policy rules that are binding for competition authorities. Verhey and Verheij have argued that this does not have to cause any problems from a separation of powers perspective as long as competition authorities have the authority to deviate from these policy rules in unexpected circumstances and Ministers refrain from interference in individual cases.

57 Kamerstukken II 2000/01, 27 426 A, p. 5.
60 Verhey & Verheij 2005, p. 214. Interference in individual cases is also prohibited by Article 124l(6) of the General guidelines for legislative drafting.
10. Accountability

For the work of quangos in the field of public policy-making the transparency of their decision-making is an important topic. All sorts of decisions and activities in the public field have to meet basic standards and principles of good governance. This is of course the case for public authorities and civil servants in the domain of the government, but also for the working-field of the quangos. One of the fundamental rules of Dutch Constitutional Law is ‘No Authority without public Accountability’. This adage rules also the field of quangos. Thereby we have to realize that there are different ways of organizing accountability. One important kind is the accountability towards the parliament; which – in the Dutch constitutional system – can be activated by the responsibility of the ministers for the functioning of quangos and the legal framework that rules their authority. This top-down approach of accountability is part of the functioning of the traditional democratic and political system.

But we have to admit that this kind of accountability within the political framework is not the only way to follow and control the quality of the work of quangos. Also other forms of accountability can be used to create a good view on the results of the activities of quangos. These forms are a more horizontal and deliberative approach of accountability. We can mention in that sense various kinds of professional accountability, like peer review-procedures and audits and visitations on behalf of professional standards. A few years ago a group of Dutch quangos formulated a charter on public accountability. The charter covers issues, like: publication of annual results, a code of conduct for quangos and procedures for the handling of complaints by clients and citizens. The members that drew up the charter have committed themselves to establish certain quality control mechanisms and guarantees for responsiveness towards society.

There is also a third way to organize accountability, which we can call social accountability. In this approach a quango is in contact with the relevant actors in the field, such as councils and organizations of users of the services of the quango. Sabel has written about this form of accountability to the civil society actors. He advocates forms of deliberative democracy to stimulate the process of learning in the field of public services. Sabel especially draws attention to ‘learning through monitoring’ and opening up

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61 See for instance the report of the Dutch Audit Council, *Kamerstukken II 1999/00*, 27 045, nrs. 1-2, about the Forest Preservation Council. In 2000, the Audit Council concluded that, both the financial accountability and the justification over policy results by the FPC have been inadequate since FPC became a quango. The Audit Council labeled the information flow from FPC towards the Ministry as being far too general and vague to be useful for a serious performance track.

62 One can find the charter on public accountability at <http://www.publiekverantwoorden.nl>.

63 Sabel 2004.
to public scrutiny. Furthermore benchmarking results between quangos and/or public authorities could contribute to a better performance track-record of quangos.

In practice it is important to realize that there are no Chinese walls between these diverse forms of organizing accountability. Perhaps politicians should be more interested in the results of the professional and the social forms of accountability and even more the effectiveness and efficiency of the operations of quangos. This attitude could also help to bridge the current gap in public trust between government and citizens.

11. Conclusion

Turning back to the title of this report we can conclude that the image of quangos as being Trojan horses, which are invading our democracy, represents a gross exaggeration of their functioning in daily practice. Although there seems to be a growing aversion among politicians and legal scholars against quangos, there is no sound empirical evidence that their performance is, in general, worse than that of the average administrative authority. Moreover, we do believe that the way in which quangos are functioning right now does not necessarily cause infringements on the rule of law, at least as long as the legislator determines the room for manoeuvre in the exercise of its rule-making powers. Of course, we have to admit that it is virtually impossible to specify the limits to a quango's powers in every detail, but this is also true for 'regular' administrative agencies. Besides, legislation is perhaps not the only instrument to ensure legitimacy and enhance the level of public accountability.

Over the years we have observed a growing variety of quangos with different tasks and also a diversity in terms of rule-making powers. Overall, however, the power to promulgate generally binding regulations concentrates itself mainly to competition authorities. This is not surprising because they have to be able to set tariffs for public services in case of an abuse of market power. In our opinion the Dutch debate about a proper control of quangos focuses too much on the possibilities and constraints for Ministers to influence the decision-making by quangos. Sometimes the formal instruments to monitor and control their performance have, in fact, become meaningless because Departments do not have the knowledge nor skills to evaluate the quality of the public services performed by quangos.

Does this mean that all is good that ends well? It is probably too early to draw this conclusion. One cannot deny that there are still some questions that need to be answered in relation to the accountability of quangos. Because of the variety of motives for the establishment of quangos and the wide range of functions they have to fulfil, it seems fair to say that we do need a framework law on quangos to set some basic rules concerning the public or private design of quangos, the need for a certain standardization of best practices in the field of quality control and benchmarking, and some ground rules about
principles of good governance to guarantee a minimum-level of transparency and accountability for all quangos. Recently the parliamentary debate about such a framework law has been reopened. Let us hope that soon agreement will be reached about these ground rules. In the meanwhile the story about quangos is to be continued.
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RESTRICTING THE LEGISLATIVE POWER TO TAX∗

J.L.M. Gribnau & R.H. Happé

Nothing of value – not life itself – could go without taxation1

1. Introduction

While legal scholars often view taxation as a technical area of law reserved to the specialized scholars and practitioners, constitutional restrictions on taxing power offer an opportunity for more generalized theoretical debate in an area with broad practical impact. Clearly, constitutional and statutory restrictions may affect tax policy of national governments. In theory, the legislature’s power to tax might seem to be its most uncontrolled power. Furthermore, the imposition of taxes is founded on the idea that the legislature is constitutionally authorized to disregard ownership rights.2 ‘After all, a tax is a form of expropriation without compensation, where not even the public purpose for which the tax was collected need be given’.3 The basic principle of representative democracy – no taxation without representation – requires only that taxpayers participate through their representatives authorising the legislature to impose taxes. The citizens authorise the legislature indirectly to expropriate without compensation. However, the principles of a state under the rule of law prevent the imposition of taxes being solely a matter of government politics and wholly within the sphere of legislative freedom.

The rule of law aims at protection against arbitrary interferences. Part of the ideal of the rule of law is the idea of government per leges. Government must function through laws, i.e., through general and abstract norms rather than specific and concrete decrees. Laws cannot refer to one particular person or case. The abstract, general, and impartial character of the legislative process attributes to a certain degree of rationality of law.

General and abstract laws, which set out the conditions of the encroachment upon the liberty of the citizens, are supposed to promote certainty and equality. By nature, the law must be general, and not any kind

∗ The authors wish to thank Ineke Sijtsma for patiently correcting the English spelling and grammar.

1 Kateb 1992, p. 21.
3 Sajó 1999, p. 159.
of individual command. The capacity of law to promote equality stems from this formal characteristic of law, viz., the nature of the general norm as one which applies not just to an individual but to a class of individuals and which can even be formed by all the members of a social group. Furthermore, legislation providing a public duty or a benefit that affects only a small group of citizens may be deemed to violate equality, if it is discriminatory. The legislator, therefore, cannot inject whatever content it supposes to be right into the positive law. Since taxation has become a very important instrument of national governments for large-scale social (redistributive), economic, cultural, and even environmental policies in the regulatory welfare state, tension arises between the legislature’s power to tax and the constitutional restrictions on taxing power.

In Dutch tax law, the principle of equality has been developed into the most important instrument of judicial review. This principle enables the courts to offer taxpayers a certain degree of legal protection. As such, the principle of equality embodies an important additional protection to the principle of legality in restricting the legislative power to tax. Nowadays, tax legislation provides fewer safeguards as regards general principles of justice such as legal certainty, equality, impartiality and neutrality. By reviewing tax legislation, the Dutch Supreme Court restricts the legislative power to tax. In doing so, it functions as a check on the democratically legitimized legislature. Thus, the indispensable concept of checks and balances is kept alive in tax law. Of course, parallel to national judgments is a growing body of decisional law from the European Court of Justice (ECJ) interpreting the Treaty of Europe and limiting the power of the member states to formulate their own tax rules, even if those rules apply to their own citizens only. However, here we do not focus on the decisions of the ECJ.

In this contribution, we will start with a description of the fundamental protections of individual rights that exist under Dutch national law and the courts and administrative agencies and systems that have primary responsibility for protecting those rights. Next, we will describe the process for enacting tax legislation. Here, we will pay attention to the possible intervention of those courts and agencies in the legislative process for tax law proposals. Then, we will turn to the taxing power of decentralised authorities. After the legislative process, we will turn to the question: who may challenge tax laws on the basis that they conflict with fundamental rights? We will give an outline of the objection and appeal procedures available. Next, we will analyse the way in which the principle of equality restricts the legislative power to tax. In this context, we will discuss the different sources of the principle of equality in Dutch constitutional law and the (still) existing ban on constitutional review. With regard to the actual testing of tax legislation, we will draw attention to the method of judicial interpretation. Then we will turn to the case law concerning the principle of

equality in Dutch tax law, focusing on several issues the Dutch Supreme Court has dealt with. Here we will draw a parallel with the case law of the European Court of Human Rights. We will end with some conclusions.

2. Fundamental Protection of Individual Liberties and Rights

In Dutch constitutional law, the notion of fundamental rights (grondrechten) is generally used to refer to fundamental rights and liberties.5 Here, classic fundamental rights are conceptually distinguished from fundamental social and economic rights. The sources of fundamental rights are the Dutch Constitution, international conventions on human rights and European Union law.6

The Constitution comprises a catalogue of classic and social fundamental rights, included in Chapter 1 (Arts. 1-23) entitled 'Fundamental Rights'.7 Perhaps the most important classic fundamental right is provided by Article 1:

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.

The classic fundamental rights have the nature of self-executing safeguard standards and they can be invoked in court as such. This cannot be said of the majority of the social and economic fundamental rights, which are not enforceable in court. These social and economic fundamental rights concern, for example, employment, legal status, protection and co-determination of working persons (Art. 19) and means of subsistence and distribution of wealth (Art. 20). These provisions are instructions to the public authorities to take certain actions to enhance the economic, social and cultural well-being of individuals, and, they are, therefore, primarily programmatic provisions.

The other important source of fundamental rights in Dutch constitutional law is provided by the international conventions on human rights that have been ratified by the Netherlands. Particularly relevant in this context are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Here, it is important to note that the Netherlands adheres to a monist system for the relationship between international treaties and domestic law.

5 Kortmann & Bovend’Eert 2000, p. 145.
6 EC legislation and ECJ rulings are a source of fundamental rights, because by virtue of their supra-national character, EC law automatically becomes part of the Dutch domestic legal system. The influence of these fundamental rights established or recognized at Community level are at the same time domestic fundamental rights. However, they do not form the subject of this paper.
7 Incidentally, there are provisions elsewhere in the Constitution which can be classified as fundamental rights. Article 114, for example, prohibits the imposition of the death penalty.

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and domestic law. In general, monism means that the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals, regardless of whether or not the rules of international law have been transformed into national law. In this view, the individual derives rights and duties directly from international law, which must be applied by the national courts and to which the latter must give priority over any national law conflicting with it. This is the case in the Netherlands. Furthermore, Article 94 of the Constitution provides that no national regulation may conflict with treaty provisions ‘that are binding on all persons’. Most of the provisions relating to human rights in the ECHR and the ICCPR, according to the case law of the courts, are binding on all persons. Treaty provisions take precedence over Acts of parliament as well as over other generally binding rules. Consequently, the provisions relating to human rights in these treaties play a role in the judicial review by national courts. If treaties contain general principles of law, the Court can test provisions of Acts of parliament against these fundamental legal principles (see section 5).

However, enforcing fundamental rights is not solely the task of the judiciary. In the Netherlands, because of the decentralised system of fundamental rights enforcement, all organs responsible for applying the law, e.g., the tax administration, ‘may be confronted with the question whether an act of a public authority violates a fundamental right’. Unfortunately, there is one exception to this principle. Acts of parliament may not be tested against the Constitution, for one of the legislature’s prerogatives is to decide upon the question of whether a statute violates any fundamental right. Responsibility for law in accordance with fundamental rights is one thing; accountability and the possibility of evaluation by the courts is another. Both statutes and the Constitution, however, may be tested against provisions of international treaties that are binding on all persons. With this respect to the legal protection, therefore, treaty rights have added value.

Individual complaints about alleged violations of treaty rights may be lodged with the appropriate international bodies, in particular the European Court of Human Rights and the UN Commission on Human Rights.

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9 The Netherlands has also ratified the UN Covenant on Economic, Social and Cultural Rights and the European Social Charter. It is assumed, however, that, with a few exceptions, these provisions are not binding on all persons. See Kraan 2004, p. 599.
10 Gribnau & Saddiki 2003, p. 82 et seq.
12 In practice, though, the majority of the proposals are introduced by the government, while the percentage of success for government proposals is also considerably higher than that of the proposals presented by parliament.
However, an application may only be submitted after the individual has exhausted the domestic remedies (see section 4).

In passing, we draw attention to a fundamental element of the idea of the rule of law, i.e., the requirement to exercise power via general legislation. This requirement of general legislation serves as an important safeguard against arbitrary interferences with individual rights and liberties by the public authorities. As regards tax matters, the principle of legality is entrenched in the Dutch Constitution. Article 104 states that taxes imposed by the State must be levied pursuant to an Act of Parliament (uit kracht van een wet). Other levies imposed by the State must be regulated by an Act of Parliament. Article 104, therefore, does not cover taxation by lower legislative authorities.

Delegation or transfer of legislative power in the tax field is possible, but only to a limited extent. This is indicated by the use of the phrase ‘pursuant to an Act of Parliament’.

3. Legislative Process

According to Article 81 of the Constitution, the power to enact Acts of Parliament (wetten in formele zin) rests with the government and the States General jointly. Both may initiate towards legislation. The procedure for enacting Acts of Parliament varies depending on whether a bill is presented by the government or by the Lower House of Parliament. The general procedure is as follows.

A proposal initiated by the government is prepared by civil servants in a ministry or several ministries jointly. During the preparatory stage, the representatives of social groups, e.g., employers’ organisations and trade unions and experts are usually consulted.

The government may also ask the Supreme Court to give advice or information, according to Article 74 Judiciary Organisation Act (Wet op de Rechterlijke Organisatie), which, however, does not occur very often. If government does so, the Supreme Court is obliged to give advice or information. The same holds for the Procurator-General, the head of the Public Prosecution Service (Art. 120 Judiciary Organisation Act). The

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13 Kortmann & Bovend’Eert 2000, p. 175.
14 In some cases, the Constitution precludes the possibility of parliament taking the initiative, viz., for certain decisions concerning the King and the General Budget Bills. The Council for the Judiciary advises government and the States General in policy matters relating to the administration of justice (Art. 95 of the Judiciary Organisation Act). This council is an organisation for the operational and administrative managements of the courts and is responsible for the allocation of budgets. Furthermore, it may give the Minister of Justice, at his request, the information

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proposal is discussed, together with the accompanying Explanatory Memorandum, in the Council of Ministers. Then the bill, together with the authorisation of the King, goes to the Council of State (Raad van State) for advice (Art. 73 of the Constitution). Following this, the bill is brought before parliament, i.e., the Lower House, together with the explanatory memorandum. At the same time, the advice of the Council of State is published. This advice, together with the ministers’ answers to the Upper House’s questions, is laid down in a further report to the King.

The Lower House considers the bill in a committee before it is discussed in a plenary session. The committee presents one or more reports, to which the Minister gives a written answer where necessary. In principle, the plenary discussion starts with two rounds of general deliberations, after which the individual sections and the preamble of the bill are debated. Amendments can be made, which are discussed with the bill and put to the vote. If the (amended) bill is rejected, that is the end of the bill. The ministers may amend the bill at any stage up to the moment of the vote. The members of parliament may also propose amendments.

If a bill is approved by the Lower House, it is sent to the Senate. Again, it is examined by the relevant committee before the Senate starts discussing it at a public plenary meeting. The Senate does not have the right of amendment nor can it send back the bill to the Lower House; it can only accept or reject a bill. The government may withdraw a bill as long as the Senate has not voted on it (Art. 86 of the Constitution). After a bill has been passed by the Senate, the King must ratify it (Art. 87). This ratification makes the bill an Act of Parliament. It is extremely rare for this ratification to be refused (the ministers bear responsibility for such a refusal). After its publication in the Official Gazette (Staatsblad), the Act enters into force at a time to be determined by or pursuant to the statute. The average time for getting a bill passed by parliament is fairly long, partly because of the unlimited validity of bills that have been introduced; it usually takes several years to get a bill of some magnitude passed by parliament. A notable exception was the Personal Income Tax Act 2001 (Wet op de Inkomstenbelasting 2001), which was adopted within a year. Apart from that, it seems that tax proposals take less time to be approved, one of the main reasons being the budgetary effect involved.

Parliamentary bills are treated in the same manner as government bills. Only the Lower House has the right to propose bills (Art. 82 of the Constitution). Every member of the Lower House can lodge an initiative.

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16 Here, one should also read Article 15, Council of State Act (Wet op de Raad van State).
17 Article 7 of the Publication Act (Bekendmakingswet) provides that an Act which does not contain a provision to the contrary shall enter into force on the first day of the second calendar month after the date of publication.
18 Kraan 2004, p. 623. See also Besselink 2004, p. 87 et seq.
Government tends to involve itself only to a moderate extent in the discussion of parliamentary bills in parliament. After its approval by the Senate, the bill is considered in the Council of Ministers. After ratification by the King, the Act of Parliament is published.

In practice, government plays a pre- eminent role in the legislative process. Most Acts of Parliament are the result of government initiatives. Because most legislative proposals pass parliament without essentially being changed, government determines the content of Acts of parliament to a large extent. This also holds for tax legislation. Here, the State Secretary (staatssecretaris) of Finance plays a pivotal role. In his capacity of co-legislator, he is responsible for the continuous initiating activity of government in tax matters.

The increasing amount of legislation is partly due to the efforts of the tax legislator striving for effective and timely control of the growing complexity of society. Tax avoidance, for example, often leads to detailed legislation and may even lead to an overkill in anti-abuse provisions. As a result, tax legislation is often amended in order to adapt it to changing circumstances. Furthermore, the legislator increasingly interferes with the liberties of citizens in order to steer society. Through a wide range of activities, the social welfare state tries to create substantive freedom and equality for its citizens. In the Netherlands, the use of tax legislation for non-fiscal goals is ‘an integral part of government policy’.

The State Secretary of Finance’s tax bills mostly pass through parliament essentially unchanged. Here, it is important to note that the perspective of the tax administration often prevails in tax legislation. The content of the tax statutes is often largely shaped by the interests of the tax administration. This is not surprising, the State Secretary of Finance is not only co-legislator but also head of the tax administration. As such, he is politically responsible to the Chambers. As a result, the legislator often adopts the perspective of the tax administration to advance the efficient implementation of legislation. Besides, the tax administration has an interest in legislation without many technically sophisticated provisions. Simple legislation is a blessing for the tax inspector. As a result, tax legislation provides fewer safeguards with regard to general principles of justice like legal certainty, equality, impartiality and neutrality.

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22 Cf. Gearty 2001, p. 12: ‘The executive branch is voracious in its search for new powers, and it is always simpler to plan new legislation than to ask why the old powers have not achieved what they were designed to do’.
4. The Taxing Power of Decentralised Authorities

In the Netherlands, several layers of government exist in addition to central government. There is no hierarchical relationship between central government, on the one hand, and the decentralised authorities, on the other hand. The lower public bodies are autonomous public institutions with their own legal personality. There are several kinds of decentralised authorities. Here, territorial decentralisation and functional decentralisation are to be distinguished. Like central government, territorial decentralised authorities, i.e., the provinces and municipalities, possess general rule-making and administrative powers. Conversely, functional decentralised authorities represent particular interests. As such, their administrative and rule-making powers are connected with particular matters. Here, with respect to taxation, we should mention the water boards (waterschappen), their historical tradition dating back to the Middle Ages.

With regard to legislative powers of decentralised authorities, the provinces and municipalities possess the competence to issue bye-laws (verordeningen). The Constitution attributes legislative power to the organs of lower public authorities: provincial states (provincial staten) and municipal councils (gemeenteraden); Article 127. With respect to taxes, the kind of tax and the competence of the administrative organs of provinces and municipalities to levy taxes are to be regulated by Act of Parliament (Art. 132, paragraph 6 of the Constitution). The Provinces Act (Provinciewet) and the Municipalities Act (Gemeentewet) contain the basic provision with regard to the (autonomous) authority to issue bye-laws. These bye-laws may not conflict with higher rules, e.g., the Constitution or Acts of parliament.

However, water board taxes are not explicitly mentioned in the Constitution. The legislative power of water boards to levy taxes is based on Article 133 of the Constitution that deals with the powers of these boards in general. It goes without saying that the bye-laws of water boards may not conflict with the Constitution and Acts of parliament.

With regard to what is liable to be taxed, municipalities and provinces are not allowed to levy taxes according to individual financial capacity, be it income, profit or wealth (Art. 219, paragraph 2 of the Municipalities Act and Art. 221, paragraph 2 of the Provinces Act). According to the explanatory memorandum, this prohibition of municipal taxation, which is based on the ability to pay principle, not only regards the rate of the taxes, but also other elements, e.g., exemptions, in the tax bye-law which determine the amount of taxes. The use of the ability to pay principle in municipal taxation would thwart the income policy of the central government.

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24 Kortmann & Bovend’Eert 2000, p. 43 et seq.
26 See Monsma 1999, p. 77-78; Van der Burg et al. 2002, p. 39 and 266.
The water boards have the legislative power to levy taxes which are related to the task of the water board, notably the protection of the polder and the water management of it. The taxpayers have an interest in these activities of the water board. Consequently, also the measure of interest in or profit of the taxpayer is, to a certain extent, relevant for the amount of tax to be paid.

5. Challenging Tax Statutes: Objection and Appeal Procedures

Taxpayers can challenge tax statutes without being obliged to enlist the support of an administrator or administrative agency in order to advance the challenge. They have a right to appeal an assessment or an order (decision) in court. Therefore, in order to challenge tax statutes by filing a suit against the tax administration, taxpayers do not depend on any kind of permission of the tax administration. There is no constitutional court in the Netherlands. Every individual, therefore, can go to an ordinary court with respect to a claim based on the violation of an international treaty, for example, the European Convention on the Protection of Human Rights and Fundamental Freedoms, but not with respect to a claim based on the Constitution. This is the case, as we will see in the next section, because of the ban on constitutional review: Acts of parliament are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 ICCPR. Before describing this system of indirect constitutional review (section 6), we will first turn to the appeal procedure.

With regard to the legal framework of the appeal procedure, it is important to note the applicability of general administrative law in the field of tax law. General administrative law is the *lex generalis* and administrative tax law is the *lex specialis*. Tax law is part of administrative law, so the General Administrative Law Act (*Algemene wet bestuursrecht*) applies. This statute contains the uniform law of administrative procedure which applies to tax procedure. However, for tax procedures some provisions in the General Taxes Act (*Algemene Wet inzake Rijksbelastingen*) contain exceptions – in favour of the tax administration. These exceptions have decreased in the past ten years.

An important part of general administrative law are the general principles of proper administration, These general principles of proper administration, which have been developed in case law, protect people against illegitimate government intervention – in addition to the principle of legality. Government, including the tax administration, has to take these principles into account in applying tax legislation. Note that a taxpayer invoking a principle of proper administration, e.g., the principle of equality or the principle of legitimate expectations, does not challenge tax legislation itself, but the way the tax inspector applies a tax statute.

Taxpayers can appeal to an independent judge. However, before lodging an appeal, the taxpayer has to object to the tax inspector. Without an objection, no appeal is possible. The objection procedure is an ‘administrative phase’ which implies a possible revision of the assessment rule. Within six weeks of the date of the assessment, the taxpayer may file a notice of objection with the inspector. As a rule, if a taxpayer lodges an objection, tax collection is suspended. However, the financial consequences are limited because the taxpayer or the tax administration has to pay interest, depending on which of the two parties is successful. The objection must be sent to the tax administration that made the disputed assessment (itself). There is a regulation that provides for a hearing of the taxpayer at his request. In most cases, the taxpayer will be heard. Unfortunately, there are no sanctions against the tax inspector if he refuses to apply the obligation to hear. Officially, a different person from the one who raised the assessment must treat the objection but, in practice, this regulation is often ignored.

The taxpayer may appeal to a District Court against a decision on an objection. The Dutch adjudication in tax law is conducted by independent and expert judges. The judges of the Tax Divisions of the courts have specific expertise in the field of taxation. The Tax Division is part of the Administrative Division in the District Courts (rechtbanken). All seventeen District Courts have a tax division, but only five of them are competent in matters relating to state taxes. All the courts are competent for the provincial, municipal, and water board taxes. They have territorial jurisdiction. These courts of first instance deal with questions of fact and law. The term for appeal is six weeks. Taxpayers have to pay court fees.

An important issue here is the equality of arms principle: the taxpayer and the tax inspector are in the same position in the trial. After the taxpayer has lodged his appeal, the tax inspector loses his power to request information.

Judgments of the administrative court in first instance may be appealed to the Tax Division of the Courts of Appeal (gerechtshoven – there are five Courts of Appeal, which have territorial jurisdiction). Both the taxpayer and the tax inspector may appeal to the Court of Appeal. Like the courts of first instance, these courts deal with questions of fact and law.

Both the taxpayer and the tax inspector may appeal to the Supreme Court (Hoge Raad) against a decision of a Court of Appeal. This appeal in cassation may be lodged with the Tax Division of the Supreme Court. Note that the Supreme Court judges only the law; not the facts. Here, the Advocate General has a right to state his opinion on the case.

28 See also Sommerhalder & Pechler 1998, p. 310 et seq.
29 Article 8:1 read in conjunction with Article 7:1 of the General Administrative Law Act.
31 HR (Dutch Supreme Court) 10 February 1988, BNB 1988/160.
These ordinary provisions and procedures apply to taxpayers who challenge tax laws on the basis that they conflict with fundamental rights. The Dutch courts exercise *a posteriori* control *in concreto* with respect to the compatibility of the Acts of parliament with the constitutional equality principle. Therefore, the statutory rule is considered in the actual context of a specific case. The concrete judicial control procedure arises out of an ordinary law suit ("concrete norm control").

Thus, taxpayers can appeal to national judges to challenge a violation of the principle of equality, especially the principle of equality of Article 14 ECHR and Article 26 ICCPR. In the next section, we will elaborate on the ban on constitutional review, because of which Acts of parliament are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 ICCPR.

6. **Fundamental Legal Principles and the Testing of Tax Legislation**

6.1. *The Ban on Constitutional Review*

In contrast to the idea of checks and balances, the Dutch Constitution contains a provision which prohibits judicial (constitutional) review: the courts are not allowed to test Acts of parliament and international treaties against the Constitution. This special feature of the Dutch Constitution constitutes an exception in the international legal order; in most other countries, it is possible to test Acts of parliament against the Constitution. Article 120 of the Constitution reads as follows: ‘The constitutionality of Acts of parliament and treaties shall not be reviewed by the courts’.

However, in April 2002, a memorandum was sent to the two Houses of the States-General in which the issue of reviewing constitutionality was discussed. In the same month, MP Halsema put forward a bill in Parliament in order to mitigate the ban on constitutional review. The bill proposes to add a paragraph to the present text which prescribes that ‘Acts of parliament will not be applied if application is not compatible with the classic fundamental right enshrined in the Constitution’. If this bill is passed, the courts will be allowed to test statutory (tax) laws against ‘classical’ constitutional rights. The social rights of Articles 16-23 will remain within the scope of Article 120. Consequently, the Dutch courts will then be able to test tax legislation against the constitutional principle of equality enshrined in Article 1 of the Constitution.

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32 Gribnau & Saddiki 2003, p. 85 et seq.
33 For a dynamic model of the separation of powers (and checks and balances), see Gribnau 1999, p. 24 et seq.
For the time being, however, Article 120 contains an absolute ban on constitutional review. This means that only the legislature can assess whether or not it has remained within the limits set by Article 1 of the Constitution. The Supreme Court has reaffirmed this ban on judicial review in its case law. In its fundamental Harmonisation Act judgment, for example, the Supreme Court answered the question of whether courts of law were permitted to examine the Student Finance Act (Harmonisatiewet) of 7 July 1977, Bulletin of Acts and Decrees 334, for compatibility with fundamental principles of law in the negative. The Court argued that the ban on judicial review in Article 120 of the Constitution prohibited such examination of legislation.

This constitutional ban on testing only applies to Acts of parliament and international treaties. Thus, the Supreme Court can test subordinate legislation, such as ministerial regulations and bye-laws of lower government bodies, against the principle of equality. It can do so on the basis of the unwritten principle of equality, as well as on the basis of the principle of equality in Article 1 of the Constitution. The Court formulated its argument as follows:

‘No legal rule prohibits a court from considering a generally binding regulation, not promulgated by the government and the States General jointly ... non-binding in the event of a violation of the general principles of law, including the principle of equality’.

As a result, when administrative decisions based on bye-laws are disputed, the (Tax Divisions of) administrative courts may be called upon to adjudicate the binding nature of these bye-laws. The courts may test decentralised tax legislation for compatibility with fundamental rights, especially, fundamental principles of law, such as the already mentioned principle of equality, but also the principle of legal certainty. Thus, tax bye-laws of decentralised authorities, the provinces and municipalities, and water boards are subject to judicial review.

As regards Acts of parliament, the courts do not have this competence. The ban in Article 120 of the Constitution prevents this. However, the principle of equality is one of the universal legal principles which are enshrined as fundamental rights in international conventions. Here, Article 94 of the Constitution plays an important role. This Article reads as follows:

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34 See, for example, HR 21 March 1990, BNB 1990/179; and HR 23 December 1992, BNB 1995/104.
35 HR 14 April 1989, Harmonization Act Judgment (Harmonisatiewetarrest), NJ 1989, 469.
36 HR 1 December 1993, BNB 1994/64.
'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.'

Article 94 of the Constitution provides that no national regulations may conflict with treaty provisions. This goes for Acts of parliament as well as for generally binding rules. If treaties contain principles of law, the Court can test provisions of Acts of parliament against these fundamental legal principles. In this respect, Article 26 of the International Covenant on Civil and Political Rights is an important instrument. It contains the principle of equality, which enables the Court to test Acts of parliament against the principle of equality. Since the Darby case, Article 1 of Protocol No. 1 to the Convention in conjunction with Article 14 of the Convention gives the same opportunity by testing Acts of parliament by the Court.

Thus, the ban on the testing of Acts of parliament against the Constitution does not apply in practice. Article 94 of the Constitution obliges the Court to test Acts of parliament against the equality principle of these international human rights treaties. The result is indirect constitutional review of tax legislation. This Dutch constitutional conception of the direct effect of international law means that the techniques operated by the Dutch courts are exactly the same as those developed by constitutional courts of its continental neighbours in reviewing the constitutionality of statutes. As we will see, this also holds for the testing of tax legislation.

### 6.2. Article 26 of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (ECOSOC Treaty) were adopted by the General Assembly of the United Nations on 19 December 1966. Human rights are laid down in both treaties. The Dutch ratification of the ICCPR was on 23 March 1976 and the ECOSOC Treaty was ratified on 3 January 1976. Both treaties came into effect in the Netherlands on 11 March 1979. Article 26 of the Covenant reads as follows:

> 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

39 Koopmans 2003, p. 84.
Tax law is not excluded from the scope of Article 26 of the Covenant. This Article has an independent character. This means that it can be invoked not only if one of the other rights of the treaty has been violated, but also if there is a possible violation of Article 26 in any other way. The decision of the United Nations Human Rights Committee in *Broeks v Netherlands* made this broad scope of Article 26 clear.

In a decision of 27 September 1989, the *Dentist’s Wife* judgment, the Supreme Court endorsed this independent character as regards tax law by dismissing the view of the Court of Appeal that Article 5 of the Personal Income Tax Act 1964 did not contain any provisions on issues regulated in the Covenant.

In fiscal literature, criticism has regularly been expressed concerning the judgments of the Supreme Court Tax Division. The main point of this criticism is that the Court applies Article 26 of the Covenant in situations for which it is not meant. In other words, critics argue that Article 26 of the Covenant can only be invoked if one of the Human Rights has been violated, such as race, sex, religion, etc. However, Article 26 of the Covenant offers considerably more scope, and it also includes issues of tax law.

Another important characteristic of Article 26 is its direct effect. This means that ‘on the basis of its content, this treaty provision can be applied directly by a national court without first requiring further elaboration of that content by an international or internal body’. The Supreme Court concluded in its judgment of 2 February 1982 that Article 26 of the Covenant, because of its character, is suitable to be directly applied by the Court. Thus, in the *Dentist’s Wife* judgment, for example, the Supreme Court could proceed to test against Article 26 without further ado.

### 6.3. Article 14 of the European Convention on Human Rights

This Convention is of an earlier date than the ICCPR. The ECHR was adopted on 4 November 1950. The Netherlands ratified this treaty on 28 July 1954, and it came into effect on 31 August 1954. The text of Article 14 reads as follows:

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40 Happé 1999, p. 130.
41 The Committee was set up pursuant to Article 28 of the Covenant. Its task is to deal with the complaints of individual persons concerning the alleged violation of rights laid down in the treaty (ICCPR).
45 See Wattel 1995.
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

An important difference can be seen between the text of Article 14 and that of Article 26 of the Covenant. The principle of equality formulated in Article 14 of the Convention has an accessory character. This means that it is restricted to the rights and liberties laid down in the treaty. This is shown by the words ‘set forth in this Convention’ in Article 14.

The Darby case of the European Court of Human Rights of 23 October 1990 put the accessory character of Article 14 of the Convention in perspective in the field of tax law. In the Netherlands, this case did not become known until 1995 when it was published in the tax case journal ‘BNB’. In this case, the European Court decided that Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 to the Convention, prohibits discrimination in matters of taxation. Article 1 of Protocol No. 1 to the Convention states the following:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.

Regarding tax law, Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 to the Convention, currently offers the same possibilities as Article 26 of the Covenant to bring an alleged violation of the principle of equality before a court. In a judgment of 12 November 1997, the Dutch Supreme Court formulated this as follows:

‘Unequal treatment of similar cases is prohibited by Article 14 of the Convention and Article 26 of the Covenant if there is no objective and reasonable justification, or, to put it differently, if no justifiable purpose is pursued or if the unequal treatment is in no reasonable proportion to the intended purpose. The legislature is entitled to some latitude in this matter’.

Thus the principle of equality has a fundamental position in the Dutch Constitution. Its main importance is that it requires the legislator to make law in accordance with the principle laid down in Article 1 of the Dutch Constitution. Article 26 of the Covenant and Article 14 of the Convention offer the Court an actual opportunity to test Acts of parliament against the

principle of equality. Thus, there are three legal sources of the equality principle, but the judiciary can only use two of them to check tax legislation.

6.4. The Principle of Ability to Pay

The Dutch Supreme Court, however, does not use the principle of ability to pay to test the law. This court does not read the principle of ability to pay as a general rule of taxation in the non-discrimination principle of Article 14 of the European Convention on Human Rights. As Van den Berge suggests, the reason for this decision might be that the ability to pay principle cannot be regarded as the one and only rule by which taxes should be levied, because it can only be applied to the taxation of individuals. Even then, the principle provides only a vague indication of how personal taxes should be levied. Compared to the four roots of the principle in Germany, derived from several codified legal principles, the Dutch ability to pay principle does not seem to be specific enough to test the law against, it is not anchored well enough in the Constitution or an international treaty. Van den Berge rightly regrets this point of view because the social and economic situation in the Netherlands is quite comparable to Germany. One wonders what the reasonable justification is for the difference of treatment in the levying of taxes on a point like this.

7. The Principle of Equality: The Method of Judicial Interpretation

Now we will focus on the case law of the Dutch Supreme Court concerning the principle of equality. The principle of equality has a long tradition in Dutch fiscal law. As early as 1815, the Dutch Constitution contained a provision that no privileges regarding taxes could be conferred (Art. 198 Dutch Constitution (1815), lastly Art. 198 Dutch Constitution (1963)). When the Constitution was amended in 1983, the ban on privileges was removed. The Dutch legislator wanted to give the principle of equality a fundamental position in the Dutch legal order (in Art. 1 of the Constitution). A separate principle of equality for taxation was no longer considered necessary. Article 1 of the Constitution, therefore, implies a ban on tax privileges. Nonetheless, an important exception is to be found in Article 40, paragraph 2 of the Dutch Constitution which states that the payments received by the King and other members of the Royal Family from the State, together with such assets as are of assistance to them in the exercise of their duties (the so called civil list), is exempt from personal taxation. In addition, anything received by the King or his heir presumptive from a member of the Royal

50 HR 29 September 1999, BNB 1999/423.
51 Van den Berge 2003, p. 58 et seq.
Family by inheritance or as a gift shall be exempt from inheritance tax, transfer tax, or gift tax. Of course, this tax privilege could be abolished. It is, however, a matter of expediency; if the King was obliged to pay tax on his personal income, government would approximately double his income. So, it is six of one or a half a dozen of the other.

Turning to the case law of the Supreme Court: how does the Court determine whether a violation of the principle of equality has occurred? The standard judgment that is expressed in the Dentist’s Wife case.\textsuperscript{53} It contains all aspects of this method of judicial interpretation. This judgment shows that a violation of the principle of equality occurs when the two following requirements are met: the unequal treatment of equal cases and the absence of a reasonable and objective ground for unequal treatment. Below we will deal with these in more detail.

7.1. Unequal Treatment of Equal Cases\textsuperscript{54}

To be able to qualify discrimination in tax legislation, we should first turn to the matter, or rather the necessity, of classifications in law. To legislate is to discriminate: the legislature imposes special burdens upon or grants special benefits to special groups or classes (categories) of persons. These classifications imply inequality, because these special burdens or benefits of a law do not apply to all individuals. Here, the demand for equality is confronted with the right to classify. The principle of equality does not require that all persons, regardless of their circumstances, should be treated identically before the law, as though they were (exactly) the same. The principle of equality, however, does require that those who are similarly situated be similarly treated. Consequently, a classification must be reasonably justified; the similarity of situations determines the reasonableness of a classification.

The democratically legitimized legislature has this important task of determining ‘rational’ classifications in (tax) law. The legislature has to define a class by designating ‘a quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class’.\textsuperscript{55} This act of legislative classification, incidentally, must be distinguished from the act of determining

\textsuperscript{53} HR 27 September 1989, BNB 1990/61.
\textsuperscript{54} Other forms of possible violations of the principle of equality are (a) the unjustified equal treatment of unequal cases, (b) the unjustified unequal treatment of unequal cases, and (c) indirect discrimination. The latter form occurs when a regulation contains a feature that in itself cannot be considered discriminatory, but whose factual consequence it is that a number of citizens are affected who share a (another) different feature. The discriminatory character resides in the fact that it is precisely this group of citizens who are affected by the regulation. See Happé 1999, p. 142 et seq.
\textsuperscript{55} Tussman & tenBroek 1949, p. 344.
whether an individual is a member of a particular class. In order to apply the law, the administration or the judiciary has to classify in this second sense, that is, to determine whether the individual possesses the traits which define the class.

The legislature defines a class with respect to the purpose of the policy laid down in the law. Consequently, a reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The principle of equality’s focal point, therefore, is the purpose of a law or regulation. This purpose is the perspective from which it can be determined whether cases are equal on the basis of relevant aspects.

Of course, cases are never completely equal. The occurrence of two completely identical cases is impossible in our world, if only because each case is situated at a different point in the coordinate system of time and space. Still, also in a legal context, it is practical to speak of equal cases. Equality, therefore, exists from a certain perspective. In the case of tax legislation, the perspective is shaped by the purpose of that legislation or, more specifically, of a provision. The legal regulation propounds the equality of cases by attaching the same legal consequence to cases that share particular relevant features. They are relevant from the perspective of the legal regulation.

The purpose of the regulation concerned is therefore essential for assessing the equality of cases. It is from this perspective that we can determine whether cases are equal on the basis of relevant aspects. It should be borne in mind, however, that the purpose of the legal regulation should not be conceived of as a static factor. It cannot ‘simply’ be distilled from the regulation’s legislative history. Later social developments should also be taken into account.

In Dutch case law, the Dutch Supreme Court always has the same approach. The most famous case is the Dentist’s Wife mentioned above. In this case, the question was whether the Dutch Personal Income Tax Act (Wet op de Inkomstenbelasting 1964) was in conflict with the principle of equality of Article 26 ICCPR because the provisions in that Act treated married couples less favourably than unmarried taxpayers having a joint household. Unequal treatment originated from the fact that the incomes of the spouses were added up, whereas the incomes of the unmarried couples were not.

It is remarkable that, in a separate part of its considerations, the Dutch Supreme Court paid a great deal of attention to the legislative history of the legal provisions on which it was to judge. The intentions of the legislator are described in great detail. The Court accurately defines the purpose of the provisions. In later decisions, it has become clear that this is a constant

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58 See Happé 1996, p. 41 et seq.
element of the method of the Court. It is characteristic of the scrupulous way in which the Dutch Supreme Court applies the principle of equality.

When the Dutch Supreme Court subsequently addressed the above-mentioned question, it stated that the legislator had been particularly aware of the fact that married people constitute an economic unit from a fiscal point of view and that adding up their incomes is justified by the circumstance that the financial capacity of a married couple is determined by the joint income. Further, the financial capacity of unmarried couples that actually have a long-lasting, non-marital relationship is also enhanced by their having a joint household. However, there are financial differences for married couples, for example, the obligation to pay maintenance in the event of a divorce. According to the Court, the legislator could reasonably have argued that married taxpayers and unmarried cohabiting taxpayers could not be considered to be in a similar situation in every way, and therefore it continued the system of adding up the incomes of spouses that had been in force since 1973 without being in conflict with the principle of equality. In short, in the light of the purposes of the regulation concerned the Dutch Supreme Court held that there was no relevant feature for adding up the incomes of unmarried couples. In other words, there was no unequal treatment of equal cases.

7.2. The Absence of Reasonable and Objective Grounds for Unequal Treatment

In the Dentist’s Wife judgment, the Dutch Supreme Court stated that the ICCPR does not prohibit every unequal treatment of equal cases, but only the type of unequal treatment that must be considered to be discrimination because there is no objective and reasonable ground for unequal treatment.

In the first place, it is now clear that unequal treatment actuated by arbitrariness or prejudice cannot be justified. The text of Article 26, second sentence, of the ICCPR mentions a number of factors such as race, colour, sex, etc., which immediately appear to be discriminatory. However, other distinctions made by the legislator must also be able to stand the test of the criterion of objective and reasonable justification.

In this context, the case law of the European Court of Human Rights (ECtHR) is important. As regards Article 14 ECHR, the ECtHR also applies the requirement of objective and reasonable justification. According to the ECtHR, this requirement is met if the following two conditions are fulfilled:

a. a legitimate aim of government policy is pursued;

b. there is reasonable relationship of proportionality between the means employed and the aim sought to be realized (principle of proportionality).

59 Similarly, Article 14 ECHR lists a number of largely parallel factors.
60 ECHR 23 July 1968, Belgian language issue, Series A, no. 6, s. 10, p. 34.
In a 1997 judgment, the Dutch Supreme Court stated that it had applied those conditions. The Court argued:

‘Unequal treatment of equal cases is prohibited on the basis of Article 14 ECHR and Article 26 ICCPR if no objective and reasonable justification exists, or, to put it differently, if no legitimate aim of government policy is pursued or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised’.

The Dutch Supreme Court also held that there was an objective and reasonable justification for this inequality of treatment. According to the Court, the legislator was justified in reasonably selecting one of the spouses – the husband – as the taxpayer, for the sake of simplicity and practicability of the law. The legislator’s purpose of efficiency is a legitimate aim of government policy.

In the Dentist’s Wife case, application of the (second) condition of reasonable proportionality between the means and the aim is in line with what has been discussed just now. The fact that the Personal Income Tax Act 1964 classified certain parts of the wife’s income as part of the husband’s income resulted in the fact that the wife herself did not have the possibility of lodging a notice of objection and an appeal. Thus, certain categories of taxpayers were denied the right to object and appeal, even though tax was levied on parts of their income. According to the Dutch Supreme Court, this constituted unequal treatment of equal cases that could not be justified. This case involved a violation of the requirement of proportionality. The circle of those eligible to lodge an appeal or an objection under the General Tax Act (Algemene Wet inzake Rijksbelastingen) was too small to serve the aim of the regulation on objections and appeals properly. In terms of the U.S. doctrine concerning the principle of equality, the regulation was ‘underinclusive’.

The Dutch Supreme Court always employs this method to decide whether a tax statute violates the principle of equality, which is in conformity with the method applied by the ECtHR. Consequently, the Dutch Supreme Court followed the case law of the European Court in deciding the question of whether a justification existed for a distinction made by the legislator. The next aspect of the judicial process of deciding this type of cases shows a comparable influence of the Strasbourg court.

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64 Recently, HR 26 March 2004, BNB 2004/201.
7.3. Testing Tax Legislation of Decentralised Authorities, Municipal Councils and Water Boards

With regard to generally binding laws of municipal councils, the case law of the Supreme Court shows the same method of judicial interpretation. It is worth mentioning that the Court also checks whether the municipal council did not violate its municipal power of levying taxes. The council must respect the boundaries of the attributed power, which are laid down in the Municipalities Act (see section 4).

This aspect of testing the boundaries also emerges in connection with the Water Boards. With regard to the testing against the principle of equality, the Supreme Court has stated that the division of the polder area in different classes is in conformity with the principle if it happens in a reasonable way. This implies a considerable discretion for the Water Boards.

8. A Wide Margin of Appreciation for the Tax Legislator

Right from the start, the Dutch Supreme Court case law concerning the principle of equality has followed the case law of the ECtHR. In one of its first judgments, the Supreme Court explicitly stated that one of its points of departure is:

‘that the legislator is entitled to some latitude in answering the question of whether cases must be considered similar for the application of the treaty, and, if so, whether an objective and reasonable justification exists to nevertheless regulate those cases differently’.

A similar acknowledgement can be found in the case law of the ECtHR. In the Lithgow judgment of 8 July 1986, the Court observed:

‘The contracting states enjoy a certain margin of appreciation (our italics, RH/HG) in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law’.

However, more recently, in its 1999 Della Ciaja judgment the European Court of Human Rights permitted the member states a wide margin of appreciation with respect to legislation in the fiscal field.

‘[I]n the field of taxation the Contracting States enjoy a wide margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify a different treatment … In particular, it is not sufficient for the applicants to complain merely that they have been taxed more

66 ECtHR 8 July 1986, Lithgow, Series A, nr. 102, p. 66, par. 176.
than others, but they must show that the tax in question operates to distinguish between similar taxpayers on discriminatory grounds.67

The European Convention on the Protection of Human Rights and Fundamental Freedoms, therefore, does permit considerable room for deference by the courts to the views of the tax legislator.

The Dutch Supreme Court has adopted this formula, thus indicating that it will not be too readily inclined to invalidate tax legislation on the basis of the principle of equality.68 By following this line, the Court underlines its attitude of judicial constraint explicitly. Recently, the Supreme Court has added a nuance. It has stated that the Court will respect the legislature’s assessment in tax matters unless it is devoid of reasonable foundation. It derives this formula from a judgment of the ECtHR, the case M.A. and others against Finland.69 This judgment of the ECtHR was not about the principle of equality, but about the applying of a retrospective tax law. Furthermore, we prefer the Dutch Court should use the more accurate criterion ‘not manifestly illogical or arbitrary’. This one was used by the European Court in the Della Ciaja judgment. It fits better to the state of the case law of the Dutch Supreme Court concerning the equality principle. In this last wording the notion ‘illogically’ has an added value, for example when the legislator combines two different, contradictory policy aims in one regulation.

However, the Supreme Court also recognizes a threshold. Recently, the Court decided that the principle of equality of Article 14 ECHR and Article 26 ICCPR does not require that the Dutch legislator elaborates the law in such a way that every inequality or disproportionality is avoided in every thinkable situation.70 Especially considerations of feasibility or the wish to prevent abuse of the law are relevant in this context. The Supreme Court has explicitly accepted these considerations as grounds justifying an unequal treatment. Also, in a few earlier judgments, the Court has decided that the roughness of the law was acceptable, in some cases even without referring to the specific reason for the litigated classification. A certain measure of roughness had been a legitimate reason for the discrimination.71

The Supreme Court has also put up another barrier. This second category can be characterized by the expression ‘de minimis non curat lex’, the law does not concern itself with trifles. In case the discrimination under review concerns a rather little financial amount of money, i.e. the tax to be

68 HR 12 July 2002, BNB 2002/399-400. Incidentally, in our opinion the Dutch Court always adopted a very constraint attitude towards the legislator; in so far, the adapted formula does not actually imply a change of attitude by the Court.
69 ECtHR 19 June 2003, no. 27793/95, V-N 2003, 52.2.
70 HR 10 June 2005, BNB 2005/319.
paid, the Court decided that the legislator had no obligation to make the law too detailed in order to avoid the discrimination.72

9. Fundamental Rights and Technical Distinctions

As mentioned above, the Court allows the legislator a wide margin of appreciation in the fiscal field. On the whole, we consider this is a correct point of view. Tax laws are characteristically technical. They mostly concern businesslike matters and are financial or economic in nature. Therefore, tax laws make all kinds of technical discriminations, which have nothing to do with substantial issues, like race, religion and so on. They concern issues such as being an employer or an employee (wage tax), such as having less than 5% of the shares of a company or more than 5% (participation exemption) and such as costs which are deductible and which are not. The nature of these kinds of discriminations justify a wide margin of appreciation. No fundamental right is at stake.

Only a few cases touch upon a fundamental aspect. Before giving a survey of these judgments, we have to make an important preliminary remark. One should be aware that the Dutch Supreme Court can not test laws, being Acts of parliament, against the principle of ability to pay. The ban in Article 120 of the Constitution prevents this. Because the principle of ability to pay is not laid down in an international treaty, the Court is not allowed to test statutes against this principle.73 The Court also decided that the relationship between the principle of ability to pay and the principle of equality was not as strict such that causing a discrimination forbidden by Article 26 ICCPR had to be concluded to. This case concerned an interesting element of the income tax. In the structure of the tax rates, the necessary costs of living of children had not been adequately taken into account. As a result, there are no cases of the income tax being tested against specific aspects of the principle of ability to pay in Dutch tax law. This brings us to the notion of vertical equality, which implies that taxable subjects with a different financial or economic capacity must be taxed differently.74 Because the Dutch Supreme Court does not test statutes against the principle of ability to pay, it also cannot test against the principle of vertical equality, which is an element of the former.

Mutatis mutandis, with regard to Dutch Value Added Tax, there have been no challenges on the basis that it violates notions of vertical equality. Consequently, the degressive effect of the proportional rates of VAT, especially with regard to very low incomes, is not within the reach of the Supreme Court.

73 HR 29 September 1999, BNB 1999/423.
74 See, e.g., Birk 2003, p. 45.
9.1. Testing of Fundamental Aspects

In Dutch tax case law, only two fundamental aspects have been under discussion until now. The first aspect concerns the fundamental right of access to a court. Two cases touch upon this fundamental aspect. One of them is the Dentist’s Wife judgment. The fact that, as a result of the provisions of Article 5 of the Personal Income Tax Act 1964, parts of the income of one spouse were added to the income of the other spouse, while the first spouse had no right to lodge an objection or an appeal, was considered to be discriminatory.\(^{75}\) The other case involved the regulation regarding court registry fees in Article 17b of the Administrative Justice (Taxes) Act (Wet Administratieve rechtspraak belastingzaken). If a Court of Appeal gave a verbal judgment, the costs of instituting an appeal to the Supreme Court were higher than the costs in a case in which a written judgment had been handed down. In the former situation, the taxpayer had to pay DFL 150 (about € 70) in additional court registry fees to obtain a written judgment as well. The Supreme Court held that this constituted unequal treatment without any objective or reasonable justification.\(^{76}\) Both statutory provisions have been changed relatively shortly after the lawsuits.

This case law is an illustration of the fact that the Supreme Court allows the legislator relatively little margin of appreciation. Both judgments affected the fundamental right of access to court. In such cases, the Court has to do a close scrutiny, just because of the right involved. From the point of view of the legal protection of the individual, we consider this case law appropriate. In our opinion, the fundamental nature of these cases differ from cases concerning technical aspects. The ‘wideness’ of the margin of appreciation of the Della Ciaja judgment is not applicable to them.

The Dentist’s Wife judgment is also an example of the second fundamental aspect. This aspect concerns the treatment of married people in comparison with unmarried people who live together. Married people experienced certain financial disadvantages. In the Dentist’s Wife judgment the court decided that the income tax was not discriminatory, because the two cases, being married and not being married, were not equal. Married people formed a stronger social and economic unity. Like in many other democratic countries, the social views about marriage and not being married, but living together, have fundamentally changed in the Netherlands. The Dutch tax legislator has followed these changes in social views. For example, in 1998, the so-called registered partnership of non-married people had been equated with marriage.

\(^{75}\) The legislator amended the relevant provisions as a result of this judgment. HR 15 September 1993, BNB 1994/7 involved the same point with regard to levying income tax from married couples.

\(^{76}\) HR 30 September 1992, BNB 1993/30.
The Personal Income Tax Act 2001 goes even further. People who have not registered their partnership, but who live together, can also opt to be treated like married people and registered partners. These partners are permitted to share joint income (e.g., their taxable income from an owner-occupied dwelling, splitting mortgage interest deduction, child care expenses, taxable income from substantial participation, and the personal allowance) between them for their tax return. Of course, the law demands some conditions to be fulfilled, which must guarantee that the situations are more or less comparable in the relevant aspects. The most important conditions are having a joint household and having lived together for at least six months. As a result, these conditions being fulfilled, e.g., same sex (homosexual) couples enjoy the same tax benefits available to married couples or heterosexual unmarried couples. The same holds for a parent and an adult child or for other siblings or non-siblings who share one household. They can opt to be partners for tax purposes.

The Supreme Court has tested the legal provisions concerning the different treatment of married and unmarried people against the principle of equality several times, and never held any of them discriminatory. Interestingly, the case law of the Court reflects the above-mentioned social development, which had been laid down in legislation. In the beginning, married and unmarried people were not considered equal, the relationship between married people being financially and economically stronger. Clearly, in later case law, the Court saw more resemblances apart from the differences. Consequently, the resemblances becoming more dominant, the difference in treatment by the law had to meet the principle of proportionality. Evidently, the change in social views played an important role in these judgments. In a landmark decision at the end of 1999, the Court indicated in an obiter dictum, that taxpayers who have officially registered their partnership, would be legally equated to married taxpayers as of 1998. As a result, according to the Court, this category of non-married taxpayers is treated completely equally for income tax.

9.2. Testing Technical Aspects

As said before, most cases are related to technical distinctions in tax statutes. The Dutch Supreme Court acknowledges the wide margin of appreciation of the legislator, especially with regard to this technical distinction. It makes no

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77 When the Personal Income Tax Act was introduced in 2001, the wealth tax was abolished. The latter was replaced by a fictitious income of 4% on private property, i.e., savings and investments, in the new income tax (taxed at a rate of 30%).

78 For a comparison of the fiscal treatment of married and unmarried couples in several European countries, see Gribsnaü & Saddiki 2003, p. 96-98.


difference whether the legislation which is under review is directed to the essential goal of taxing, i.e., financing public expenditure, or is directed to other, non-fiscal goals. Dutch tax law contains all kinds of tax incentives, mostly in the form of tax reductions, e.g., for commuting by bike, employee training, day-care centres, the productions of Dutch movies, and so on.\footnote{Cf. Gribnau 2003a.}

Only in very evident cases has the Court decided technical distinctions in a tax statute to be discriminatory. The reason for that is the above-mentioned wide margin of appreciation (see section 8). It is important to realize that regulatory distinctions, also technical ones, always need an objective and reasonable justification. A distinction without justification is arbitrary and could not possibly fit in any legal system: it makes the legal system inconsistent. Usually, a court finds an adequate justification in the parliamentary history of the regulation. If this can not be found, it will search for a justification elsewhere. If it finds one, it will relate it to the legal distinction.\footnote{HR 14 June 1995, BNB 1995/252.}

Broadly speaking, we can make the following categorization of discriminatory cases. In the first place, cases in which the legislator has no or only irrelevant reasons for a distinction. An important subcategory consists of cases in which the legislator made a mistake in legislative design, i.e., in the technique of formulating the law. The legislator adds a new provision to an existing regulation with its own specific and adequate justification. In some cases, this added provision has its own goal. However, this new goal functions as a \textit{Fremdkörper} in the regulation. Due to this \textit{Fremdkörper}, the regulation has a legal consequence which is contrary to the main goal of the regulation with its original justification. As a result, the regulation with its two conflicting goals becomes discriminatory. A famous example is the judgment concerning the regulation on the standard deductible travelling allowance. At a certain moment, the legislator introduced an additional goal in the regulation, aimed at discouraging the use of cars by commuters. In the resulting regulation only one group of commuters had to pay the additional tax because of the new goal, while another group, which was identical in all relevant aspects, was not taxed. Since no justification could be found, the regulation was considered discriminatory.\footnote{HR 12 May 1999, BNB 1999/271. See also HR 15 July 1998, BNB 1998/293.}

A second category of discriminatory cases is the one in which the legislator deliberately favours a group of taxpayers compared to other taxpayers. By way of ‘private legislation’, the legislator grants a tax privilege. In one case, the regulation was undeniably influenced by the interference of pressure groups. During the legislative process, the government even warned Parliament of the risk of discrimination, but Parliament persisted.
and amended the law. A couple of years later, the Court unsurprisingly recognized the discriminatory character of the regulation.85

Finally, the third category covers the situation in which one group of taxpayers is taxed more than another group which is similar in all relevant aspects, the only reason being a budgetary one. According to the legislator, it simply costs too much to treat both groups equally. In a famous case, the legislation contained an unjustifiable unequal treatment of an owner-occupant concerning deductible costs of study at home compared to a tenant-occupant. The legislator decided to treat the two groups unequally because equal treatment would cost tens of millions of euros. The Supreme Court decided that the specific regulation was discriminatory.86

The fundamental question involved is whether the legislator is allowed to make differentiation in its regime solely for budgetary reasons. Is it acceptable for taxation, encroaching upon citizens’ property rights, to have a different impact on different categories of taxpayers without there being any justification, except for the budgetary aspect? This would mean that equal treatment of equal cases is ignored because the state would be deprived of too large a sum in revenues. In our opinion, the legislator does not have that freedom: it must choose between application of a regulation which is in conformity with the principle of equality and non-application of a regulation. The Supreme Court, too, appears to hold this opinion. The Court has stated:

‘Budgetary problems do not constitute grounds for non-application of a regulation that is necessary to avoid discrimination as referred to in Art. 26 ICCPR’.87

Naturally, the legislation of lower tax authorities has a technical character. The case law of the Supreme Court concerning these bye-laws has the same characteristics as described before, so there is no need for a separate description. However, in a few situations, the case law shows a specific aspect. An example is the case law concerning bye-laws of water boards. The Supreme Court has stated that both the division of taxpayers in categories (classes) and the division of the areas of the water board in these categories must be made in a reasonable way. If this is done, the principle of equality does not demand further equal treatment.88 It exemplifies that the Supreme Court respects a very wide margin of appreciation concerning the water boards.

85 HR 17 August 1998, BNB 1999/123. See also HR 14 July 2000, BNB 2000/306. Another rather old example of private legislation is the agricultural exemption: the change (mostly increase) in value of agricultural land is exempted from taxation (now Art. 3:12 of the Personal Income Tax Act 2001). This exemption, however, has so far gone unchallenged.

86 HR 17 November 1993, BNB 1994/36.


The famous Aristotelian formulation that things that are alike should be treated alike while things that are unalike should be treated unalike in proportion to their un-alikeness is a good starting point, but, as we have seen, it certainly does not resolve all the complex issues that arise. The next issue will be the remedy offered by the judiciary if it establishes a unjustified unequal treatment of equal cases. However, things will become even more complicated. For, having established unjustified discrimination, the judiciary again has to face the question of how it should respect the primacy of the democratically legitimized legislature in lawmaking. This primacy of the legislature is a result of the distribution of power in our democratic system. The judiciary, therefore, should certainly be very cautious in reviewing Acts of parliament – and a fortiori in offering remedies – which are a result of the political process. The political process is the legitimate forum for resolving disputes resulting from different views of the citizens on the relevant scheme of justice. It is important that citizens, losers in the political game, to a certain degree, abide by the outcome of the political process. However, in case of a serious violation of a fundamental right, for example, the principle of equality, citizens may challenge the outcome of the legislative process. Does judicial review, even in a very moderate form, thus constitute a violation of the principle of democracy? McLachlin points out that, if it is accepted that democracy at its best reflects a tension between majoritarian will and individual rights, then it is far from evident that the transfer of a measure of power from the legislature to the courts weakens democracy. 'The guarantee of equality before and under the law' is an essential condition of democratic government. A restrained attitude of the judiciary in testing tax laws, therefore, is no threat to, but an enforcement of, democracy.

Here, we should draw attention to the fact that, in Dutch constitutional law, no provision exists like the famous 'notwithstanding' or legislative 'override' clause of section 33 of the Canadian Charter of Rights. This provision enables the Canadian legislatures to override specified sections of the Charter and the rights they protect, although only for a renewable period of five years. The absence of such a clause in Dutch constitutional law may have contributed to the considerable restraint the courts show in offering the taxpayer a remedy at law once (unjustified) discrimination is established. As we will see in a moment, it is rare for the Dutch Supreme Court to decide in favour of the taxpayer. Without a legislative override clause as part of a broader constitutional scheme that encourages a 'dialogue' between legislatures and courts, the Court may see striking down laws because of violation with international treaties as an incompatibility of the principle of

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91 See, e.g., Goldsworthy 2003, p. 263 et seq.
democracy. On the other hand, there is no provision in the Dutch constitutional system which enables the Court to postpone the effects of a nullification of a statute. Even so, there is no constitutional possibility to modulate the temporal effects of its judgments that strike down statutes that conflict with international treaties. As a result, the Dutch Supreme Court sometimes seems to bow to the judgments of the legislature, as we will now show.

The number of cases in which the Dutch Supreme Court has found discrimination is small, both absolutely and relatively. The Supreme Court regularly motivates its judgments with reference to the wide margin of appreciation as introduced in the Della Ciaja case of the ECtHR. Especially in the case of technical distinction, the taxpayer does not stand much chance of winning the case. Nonetheless, the Dutch Supreme Court established unjustified discriminations in about fifteen cases.

If the Supreme Court establishes that there is unjustified unequal treatment of equal cases, then, in theory, its judgment is obvious: it does not apply the statutory regulation in question. The Court gives priority to the principle of equality of Article 26 ICCPR or Article 14 ECHR over Dutch regulation that is in conflict with it. Nevertheless, in practice, it is rare for the Court to decide in favour of the taxpayer. Consequently, the Court’s observation that a legal provision is discriminatory does not always mean that the taxpayer is successful.

The reason for this lies in the limits of the function of the judiciary to develop law. If the Court establishes unjustified discrimination, it has to bring the legislative provision in conformity with the principle of equality. The Court may arrive at a point at which its judgment involves a choice that does not fall within the scope of its lawmaking task. If the Court were to go beyond that point, it would usurp the function of the legislature. On the basis of the separation of powers and the system of checks and balances, the Court decides to leave the removal of the unjustified discrimination to the legislator. In the landmark case of the standard professional expense allowance, the Dutch Supreme Court argued that, if the removal of the unjustified discrimination was simple and an obvious solution existed, it would decide in favour of the taxpayer.

If there is no simple and obvious solution, the Court will decide against the taxpayer, although it has declared the law discriminatory. However, at the same time the Court requires the legislator to solve the violation of the principle of equality. It does this if removing the discrimination exceeds the Court’s task of developing new law. Especially politically sensitive issues, for which more than one solution is available, are left to the legislator.

92 On the Italian constitutional practice, see Rolla, & Groppi 2002, p. 152-153, also referring to the practice of the Austrian Constitutional Court and the German Federal Constitutional Court.

93 See Gribnau & Happé 2005, p. 140-142.

However, in exceptional cases the Dutch Supreme Court will decide immediately.

In the case of deliberately introduced discriminatory ‘naked preferences’ or deliberately maintained discriminations caused by lack of care in the legislative process, the Court may decide not to apply the discriminatory provision or to give a second chance to the legislature. The legislature may, of course, reject this judgment by overruling it through new legislation.

When the Dutch Supreme Court leaves it to the legislator how to resolve the unjustified discrimination, it expects the legislator to bring the legislation in accordance with the principle of equality in the short term (without mentioning a fixed term). Thus it grants the legislator a *terme de grâce*. The legislator is not obliged to introduce new legislation retroactively. If the legislator energetically replaces the discriminatory legislation by new legislation which complies with the principle of equality, the statute may enter into force for the future. In practice, though, the Court demonstrates a lenient attitude when it comes to the question of whether the legislator should resolve the unjustified discrimination in the short term.

The separation of powers in combination with a system of checks and balances thus implies that the Dutch Supreme Court carefully considers when it has to adopt a reticent attitude. The inevitable implication of this case law is that the taxpayer may be right but will not win. The importance of the effective legal protection of the taxpayer is sacrificed to the constitutional relationship between legislature and judiciary.

However, effective legal protection of the taxpayer is not always sacrificed. The Court draws the line where the legislator consciously introduced or upheld unjustified discrimination. If that is the case, immediate justice is done to the taxpayer and the Court removes the discrimination. In such a case, a *terme de grâce* is out of the question.

11. Conclusion

In this contribution, we started with a description of the fundamental protection of individual rights that exist under Dutch national law and the agencies that have primary responsibility for protecting those rights. Next, we described the process for enacting tax legislation, including the intervention of the courts and the Council of State and intermediary organisations in the legislative process for tax law proposals. Then we analysed the independent taxing powers of decentralised authorities. With regard to the outline of the procedure to challenge tax laws that conflict with

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95 ‘Naked preferences’ are obvious violations of the impartiality requirement in tax law: the distribution of resources or opportunities to one group rather than to another solely on the ground that ‘those favored have exercised the raw political power to obtain what they want’; Cass. Sunstein 1993, p. 25. Cf. Gribnau 2003, p. 30 et seq.

fundamental rights, it was shown that the taxpayer has a right to advance the challenge. He can do so without the support of the tax administration.

The way in which the principle of equality restricts the legislative power to tax in the Netherlands was the subject of the rest of this paper. This fundamental principle is the most important judicial instrument to check seriously flawed tax legislation. The judiciary has the task to ensure the legislature’s compliance with the principle of equality. Because of the (still) existing ban on constitutional review, Acts of parliament are tested against Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (in conjunction with Article 1 of Protocol No. 1 to the Convention) and Article 26 of the International Covenant on Civil and Political Rights.

As with regard to the method of judicial interpretation, the Dutch Supreme Court always demands an objective and reasonable justification for any inequality of treatment. This method to decide whether a tax statute violates the principle of equality is in conformity with the method applied by the European Court of Human Rights.

As for testing tax law against the principle of equality, the Dutch Supreme Court acknowledges the primary (wide) margin of appreciation of the legislator. This holds for judging the equality of cases as well as for judging whether there is an objective and reasonable justification for any inequality of treatment.

If the Court establishes a violation of the principle of equality, it acts very carefully. If no unambiguous resolution is available to eliminate the unjustified unequal treatment of equal cases, the Court leaves the choice to the legislator, which subsequently has to bring the legislation in line with the principle of equality in the short term.

Our analysis of several issues concerning the principle of equality in Dutch tax law which the Court has dealt with show that the Dutch Supreme Court has made a valuable contribution to the constitutional system of checks and balances. The Court underlines the significance of the principle of equality for fair tax legislation. After all, each violation of the principle of equality damages the quality of the tax system. However, in our opinion, the room for deference by the Supreme Court to the policy views of the tax legislator should be more limited.

To conclude, the Supreme Court shows much deference with regard to the question of whether legislative discrimination is unjustified (wide margin of appreciation). This is also the case with respect to the elimination of the unjustified discrimination (*terme de grâce*).
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CONSENSUAL CRIMINAL PROCEDURES: PLEA AND CONFESSION BARGAINING AND ABBREVIATED PROCEDURES TO SIMPLIFY CRIMINAL PROCEDURE

C.H. Brants-Langeraar

1. Introduction: the Essentially Inquisitorial Nature of Dutch Criminal Procedure

Before addressing the question of consensus in Dutch criminal procedure, a few introductory remarks on the essentially inquisitorial nature of criminal process in the Netherlands may serve to help understand why consensual elements such as plea and confession bargaining are at odds with the system (and frowned upon); they exist, but only to a limited extent. Indeed, the central role of the public prosecution service in criminal policy, and of the public prosecutor in individual cases, is at the heart of criminal proceedings in general and of any abbreviated procedures in particular. In the theory of comparative studies, it is commonplace to note that (nowadays) there is no such thing as purely inquisitorial or purely adversarial criminal procedure, and that even systems that belong to the same ‘family’ may differ considerably. Nevertheless, the dichotomy can provide an important theoretical tool of analysis, and it is as such that I employ it here. On the

* The most comprehensive textbooks on Dutch criminal procedure, from which the general data in this contribution have been taken, are: Cleiren & Nijboer, 2003, Melai c.s. s.d. (looseleaf) and Corstens, 2005. The Dutch Code of Criminal Procedure is referred to in the following pages by the abbreviation Sv – from its Dutch name Wetboek van Strafverordening. It dates from 1926 and has been amended and updated many times since. The Dutch Criminal Code of 1886 is abbreviated as Sr (Wetboek van Strafrecht); it too has been extensively modernised and amended. The case law of the Dutch Supreme Court (Hoge Raad) is cited in the usual (Dutch) way by the abbreviation HR, followed by the date and number under which it was published in Nederlandse Jurisprudentie (NJ). Parliamentary documents (draft legislation etc.) are referred to as Kamerstukken II, followed by the year and number; legislation by its publication reference Stb, followed by the number, or Stcrt, followed by the number.

1 Damaska 1973 and 1986. Common, internationally agreed standards of fair trial have introduced more adversarial elements into European continental procedure with its generally inquisitorial bent, while professionalised crime control by public authorities and, more recently, ever greater emphasis on law and order, have brought to countries with predominantly adversarial style procedures a pre-trial phase that has much of the inquisitorial (Delmas-Marty & Spencer 2002).
(theoretical) continuum between adversarial and inquisitorial, Dutch procedure comes out very much weighed toward the latter and that applies especially to the concept of truth finding in criminal cases, to the role of the prosecutor in that process, and to the hierarchically organised prosecution service that designs and controls criminal policy.

As in all modern inquisitorial procedures in continental Europe, the procedural and organisational arrangements that govern criminal justice in the Netherlands reflect how individuals define their relationship to, and expectations of, the state in terms of the modern Rechtstaat: the state is fundamental to the rational realization of criminal justice as part of the ‘common good’, and as such is expected (and trusted) to uphold both law and order and individual liberty. Nevertheless, given that the powers needed for the former may threaten the latter, their exercise is curtailed by the primacy of written rules of law, by entrenched abstract constitutional rights of the individual and by the division of power within the state. In this framework, the fair and accurate outcome of a criminal case depends less on the assertion of individual defence rights (as it would in an adversarial procedure), than on the integrity of functionaries of the state – police, prosecution, and judge – in performing their allotted tasks within the limits of codified criminal procedure.2

In the Netherlands, these fundamental assumptions translate into a procedure that is perhaps more inquisitorial than many on the continent of Europe. Truth finding – and therefore the legitimate outcome of any case – is regarded as a matter for professionals only, and best undertaken pre trial by a non-partisan state prosecutor who is in control of the police and will ensure that all evidence is gathered (both for and against the suspect), and at trial by an active judge. However, although the judge is expected to take an active truth-finding role in court, and although the defence has the right to contest the evidence, it is the prosecutor who sets the agenda with the trial ‘dossier’, compiled during a pre-trial investigation that is relatively closed to defence and completely closed to the public. The pre-trial role of the defence is not to gather evidence, but to point the prosecutor towards avenues of investigation favourable to the suspect, which the prosecutor has a duty to investigate. This notion of the prosecutor as impartial and non-partisan is crucial to the understanding of Dutch proceedings and cannot be overstated. It not only underlies the very powerful position of the prosecution, it also reflects and reinforces the fundamental confidence in the state as a guardian of justice and due process that is such a salient feature of criminal process in the Netherlands.

Dutch public prosecutors are trained in the same way as judges. Indeed, the Public Prosecution Service is regarded as part of the judiciary, known as the ‘standing judiciary’ because the prosecutor stands during his performance in court. The idea that the prosecutor is ‘really’ some sort of

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judicial figure, is reflected in the magisterial stance that prosecutors are expected to adopt in the execution of their most important tasks: controlling and monitoring an impartial pre-trial investigation by the police, compiling the dossier and deciding whether or not to prosecute on the basis of their findings. Guarantees that prosecutors will actually fulfil this non-partisan role are to be found in the hierarchical system of monitoring and control that governs both relationships with the police and within the prosecution service as well as with the trial court, and especially in the professional ethics that prosecutors internalise during training.

At the same time, while individual prosecutors may be judicial figures in this role, the prosecution service to which they belong is also very much part of the executive civil service, answerable in the final event to the minister of justice and greatly involved in shaping criminal policy. This has resulted in an elaborate system of internal directives (Aanwijzingen issued by the so-called council of procurators general – procureurs-generaal – in Dutch) that direct prosecutors to certain types of decisions in certain types of cases – in theory always taken after a judicial weighing of interests in individual cases – on whether or not to allow a case to go to the full blown trial phase. As most such decisions are a fairly routine matter, in practice this can set the written law aside for whole categories of offences, so that the prosecution service in the Netherlands is something of an anomaly in terms of the trias politica.

From the above we may distil two outstanding features of Dutch criminal justice. On the one hand, the fundamental belief in non-partisan truth finding by the prosecution as a prelude to trial (where the prosecutor’s version of events may be contested by the defence and is verified by the court), which precludes any notion that the ‘truth’ is something that may be arrived at through party-driven negotiation and agreement. On the other, the same judicial role of the prosecutor, combined with prosecutorial directives on non-prosecution, which affords the prosecution in general a vast amount of discretion in keeping cases out of court: full blown trials are very much the exception. Prosecutorial discretion therefore plays a very important role in streamlining the Dutch criminal justice system and in dealing with an ever-increasing caseload, but it does not include the authority to come to ‘arrangements’ regarding the truth (or the sentence, which is the prerogative of the court).

The organization of formal criminal procedure all the way down the line reflects the notion that ‘the truth’ in criminal cases is not open to negotiation. Neither in theory nor in practice is there much scope for formal or informal bargaining. Bargaining happens in practice only if the prosecutor finds himself somehow in a less powerful position than he theoretically has – namely if he is faced with powerful defendants such as white collar or

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3 At least not at present. As we shall see, there are important legislative changes in the making.
organised criminals. It occurs most especially in the areas where the prosecution has the discretion to decide on alternative ways of dealing with offences other than bringing them to court and/or for some reason needs the co-operation of the defendant. However, because – with one exception – there is no formal means of achieving a bargained solution, negotiations mostly take place behind closed doors are not subject to judicial control. This very fact has given rise to serious political debate, for it has been interpreted to mean that whatever goes on in the prosecutor’s office somehow cannot stand the light of day. In the following pages we shall see that court procedures in the Netherlands, which are public, also leave little to no room for negotiation, so that by definition any bargaining there is takes place pre-trial within the more or less closed ambit of prosecutorial investigation. We shall also see that, while new legislation, strengthening the position of the prosecution further, is aimed, among other things, at removing bargaining opportunities, it is questionable whether it will succeed in doing so.

2. (I) Organization of Criminal Procedure (more Serious Crimes)

2.1. Pre-trial stage

(1.) According to Article 148 Sv, the public prosecutor is in charge of all criminal investigations, and the pre-trial stage in the Netherlands usually consists of an investigation by the police under his/her direction. It may begin as soon as a reasonable suspicion has arisen that a criminal offence has occurred and be directed against a specific person suspected of that offence (Art. 27 Sv), or – in cases of serious (organised) crime – at an earlier point in time, namely if there is a reasonable suspicion that a person or persons are involved in or planning an offence (Art. 132a Sv). The aim is to explore all possible avenues of investigation, therefore also those that could point to a suspect’s innocence, and to collect evidence with a view to deciding whether or not to bring the case to trial. The threshold of ‘reasonable suspicion’ activates prosecutorial and police powers of investigation.

Prior to a fairly recent change in the law, it was not unusual for the prosecutor to involve an investigating magistrate (rechter-commissaris) and request the opening of judicial pre-trial investigation (gerechtelijk vooronderzoek). Indeed, he was obliged to do so if he wished to employ certain investigative powers, such as a house search. Originally, judicial pre-trial investigation was conceived of as an extra guarantee that the investigation

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4 For the sake of briefness, from now on I will use the masculine form to denote the prosecutor, although nowadays women are very much in evidence in the prosecution service. The same applies to judges.

5 Wet herziening gerechtelijk vooronderzoek, Stb. 1999, 243 and Stb. 2004, 243. This change coincided with a desire to strengthen the leading position of the public prosecutor with regard to the police in pre trial investigation, especially when the use of covert investigative methods is concerned. See Beijer et al. 2004.
would be impartial, investigating magistrates being ordinary judges at the
district court acting by rote in the role of investigators. They would
themselves undertake substantial investigations, directing the police,
conducting house searches, interviewing suspects and witnesses, etc. At this
stage, the defence also had more rights (for example with regard to
disclosure and confrontation) than during the prosecutor’s investigation.
Although judicial pre-trial investigation still features as a possibility in the
code of criminal procedure (Arts. 181-241c), over the years, the role of the
investigating magistrate has been substantially eroded. Partly, this was due
to an increase in criminal cases that made it virtually impossible for
investigating magistrates to adequately fulfil their investigative tasks.

At the same time, the Supreme Court ruled that the prosecutor could
continue with his own pre-trial investigation parallel to that of the
investigating magistrate, during which defence rights were (much more)
limited. In the much-reduced number of cases in which judicial investigation
nowadays gets underway, parallel investigation by the prosecutor is the
norm and it has been given a solid basis in law (Arts. 149, 177a Sv.). All of
this has rendered investigating magistrates somewhat superfluous as
investigators, and their role has undergone a substantial change in focus:
their main tasks are now the authorisation of telephone taps and bugs (Arts.
126l, 126m, 126n, 126t, 126s), and interviewing, under oath, witnesses
whom the defence wants to challenge but who will not be called in court.

This state of affairs, criticized by some legal scholars, defence lawyers
and investigating magistrates themselves as giving the prosecution too much
power, undermining defence rights and putting the investigating magistrate
at too great a distance from the actual investigation while still requiring that
he make important investigative decisions, is the legal consolidation of a
long standing practice. It is the police who do the actual investigative work
and in this they are fairly independent, although formally under the
supervision of the prosecutor. The latter, while keeping tabs on what is going

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6 HR 22 November 1993, NJ 1984, 805. The only limit is that the prosecutor may not use
his own investigative powers in this way solely in order to curtail defence rights,
although whether or not this occurs is very difficult to establish.

7 Because they rely so strongly on written evidence contained in the trial dossier,
Dutch trials very much ‘paper trials’ and many witnesses are not called to give
evidence in court. Article 6 of the European Convention on Human Rights and
Fundamental Freedoms, however, while not requiring that the evidence be
challenged in open court, does require that the defence have the opportunity at some
stage in the procedure, to confront and question witnesses (see eg. ECHR: 20
November 1989, A166 (Kostovski v the Netherlands) in which the European Court
found Dutch procedure wanting in this respect). This has put paid to a previous
practice of using non-contested (and sometimes anonymous) testimony in evidence,
and in cases in which it is judged undesirable and/or dangerous to call a witness at
trial, the investigating magistrate may hear that witness under oath in camera – where
the defence may put (written) questions – and produce a report in his findings: the
report may then be used in evidence (see e.g. Art. 226a ff Sv).

8 See for an overview, Beijer et al. 2004, ch. 3.
on, rarely becomes involved in any hands-on way. Prosecutors do not, for example, usually interview suspects or witnesses themselves, although they may tell the police to do so. The police also take the first steps in the compilation of the dossier, which is then handed over to the prosecutor for completion.

In practice, prosecutors tread a fairly difficult path in making sure that they are informed of progress (or the lack thereof) and that the investigation has not become one-sided and lost sight of the possibility that the suspect may be innocent, while being careful not to meddle in investigation tactics and techniques for which they have no training and which are the expertise of the police and forensic scientists. While the ordinary police have general investigative powers, the investigation of some crimes requires highly specialised knowledge. In these cases special officers (from the inland revenue service, economic crimes service, agriculture and fishery service, etc.) will undertake the investigation, again under supervision of the public prosecutor. Although this sometimes makes it difficult for the prosecutor to actually direct an investigation, there is specialisation within the prosecution service too, with some prosecutors concentrating on fraud, organised crime, insider dealing, crimes under international law and so on.

As in all countries, it is usually the police in the Netherlands who receive the first indications that a crime has been committed (or is being planned), either because it is reported by a member of the public, or through a tip off or open or covert police surveillance. By law, the opportunity principle (principle of expediency is a better term, in any event for the Dutch situation) governs the prosecutor’s decision to prosecute (Art. 167 Sv) and filters down to the police at the investigative stage. For this, there is no explicit legal basis, but in practice the police have considerable discretion in deciding which cases to pursue, sometimes even if serious crimes are involved. It is, of course, unlikely that they would ignore a murder, but they may well simply note a citizen’s report of a theft or burglary (usually for insurance purposes), perhaps visit the house and then take the matter no further if they feel it is unlikely that the case could ever be solved and that further investigation is a waste of time. Although the law makes no mention of such police-discretion, it is primarily based on prosecutorial directives. These may be regarded as quasi-law (and are so regarded by the Supreme Court, so that a defendant may invoke them in court) and it is in the directives from the prosecution service, themselves based on a generic form of the opportunity principle, that (non) prosecution policy – as opposed to decisions in individual cases – is formulated and anticipated by the police.

Sometimes, these directives will specifically require that certain types of crime be investigated as a matter of policy, but more often they explicitly allow or even require the prosecutor – and therefore the police – to refrain

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9 A few recent miscarriages of justice in the Netherlands have shown that in this they are not always successful.
from action in specific cases. Among these are some forms of drug crime (as most people would expect in the Netherlands), but there are many other examples. To name but two: before the law was changed to allow euthanasia by a doctor under certain circumstances, euthanasia-policy was governed entirely by a directive based on the case law of the Supreme Court; another, much less obvious example is that crimes committed by journalists in the course of their professional activities will also not be investigated with a view to trial, if they can be justified by necessity in connection with the freedom of expression. Decisions to investigate (further) or not will also depend on the offender and the circumstances. And finally, considerations of available manpower and the size of the existing caseload (or backlog) may determine the expediency of (further) investigation. The logic of the Dutch system and the hierarchical position of the prosecutor, dictate that he should be informed of any such police (non) action. In practice, this need not be the case although, again, serious crimes and certainly those involving (serious) physical harm will be brought to the prosecutor’s attention.

The nature of Dutch criminal investigations as the beginning of a truth finding process by the state in the form of the non-partisan prosecutor, determine the position of the defence at the pre-trial stage. The role of the defence lawyer is restricted to directing the prosecution to possibilities in the investigation favourable to his client that have been overlooked, and to making sure that due process is observed. In a sense, this could be described as ‘looking over the prosecutor’s shoulder’ and in that way ensuring that the eventual trial dossier will be a complete and accurate version of events. This is somewhat hampered by the fact that access to the full dossier only becomes a defence right 10 days before trial, before which the defence lawyer is dependent on permission from the prosecutor (or investigating magistrate, should he have become involved), and that permission may be withheld ‘in the interests of the investigation’ (Art. 30,2 Sv). What could be described as the watchdog role of the defence more or less precludes their conducting their own parallel investigations. Neither do they have the explicit right to do so.

Recent developments have forced lawyers to take a more adversarial stance, and have led to the first steps on the road to parallel defence investigations, with the defence sometimes hiring private investigators or employing independent forensic experts (although in the latter case they will not have access to the evidence itself – which is examined by the state forensic institute working for the prosecution – only to that institute’s report).

\[^{10}\text{Aanwijzing toepassing dwangmiddelen bij journalisten, Stcr. 15-01-2002, 46.}\]

\[^{11}\text{One is the virtual disappearance of the old-style investigating magistrate who would be more amenable than a prosecutor to suggestions by the defence for further investigation. Another is the case law led reduction of the active truth-finding role of the trial judge: in many cases, contra-expertise on forensic evidence or the calling of a witness at trial are now dependent on the defence’s making a reasoned request that demonstrates the relevance of such action.}\]
However, even such steps are rare and in any event, Dutch lawyers never conduct full investigations themselves and do not regard it as their task. Any evidence they may uncover or witness they may wish to have called cannot be introduced in court other than through the public prosecutor or, in the event of his refusal to do so, with the court’s permission. The Code of Conduct of the Dutch Bar Association is somewhat ambivalent on the matter of lawyers conducting pre-trial investigations and certainly there is a taboo on speaking to a witness pre trial; although not expressly forbidden, it is simply not done.

Neither do victims have official standing as a party in court in the sense that they could investigate and produce evidence. Again, recent developments and public dissatisfaction with the performance of the police and prosecution service have wrought a certain amount of change, albeit indirectly. It is now not unusual for a crusading journalist (of whom there are several) to take up and publish a victim’s case and try to uncover evidence of guilt. Although there is no legal basis whatsoever for this, apart from the freedom of expression, and anything they discover can only figure as evidence at trial if introduced by the prosecutor, in this way the media can put considerable pressure on police and prosecution, somewhat undermining the strict ideology of non-partisan truth-finding.

(2.) Articles 53 and 54 Sv give the police the power to apprehend a suspect and take him to a place for questioning by the prosecutor or the assistant prosecutor. Although these provisions certainly give him the right to do so, the prosecutor does not usually interrogate suspects himself. From a comparative perspective, ‘assistant prosecutor’ is a somewhat misleading translation of the Dutch hulpofficier, for this figure is always a police officer of a certain rank. The law therefore explicitly covers standard practice, namely that the police interrogate suspects during pre-trial investigations. The purpose of an arrest is interrogation, after which the prosecutor or assistant prosecutor may order that the suspect be held in custody for three days (with an extension of a further three days if strictly necessary) – but only if the arrested person is suspected of an offence punishable by more than 4 years imprisonment. A suspect has the legal right to counsel at any time (Art. 38 Sv), but there is a difference between indigent suspects and those who can afford their own lawyer. Although indigent suspects may request that a lawyer be assigned to them, counsel pro deo is not automatically assigned until the suspect is detained in custody after the initial interrogation (Art. 40 Sv) at the earliest and only in serious cases. The more well off may engage counsel whenever they want. The fact that there is a right to counsel at any

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12 They may produce witnesses in court, but the final decision whether they will be heard rests with the court itself.

15 Thereafter an investigating magistrate or a court is required to extend the period of custody.
time implies that these suspects also have the right to consult the lawyer of their choice when held for interrogation at a police station (Art. 50 Sv). Certainly in this respect non-indigent suspects are better off. However, whether or not counsel is assigned or privately engaged, and whether or not the suspect has been detained in custody, or for what offence, makes no difference to the situation during interrogation.

Dutch law does not give suspects the right to have a lawyer present during police questioning in the pre-trial stage. It does not explicitly say so. That this is the case (and it is standard practice not to admit counsel unless the police and/or prosecutor give permission) is deduced *a contrario* from Article 186a Sv that gives the right to have a lawyer present during questioning by the investigating magistrate, whereas no such provision exists with regard to questioning by the police. (As we have seen, investigations of this kind by the investigating magistrate are becoming increasingly rare and certainly the great majority of suspects in the pre-trial stage are questioned, at least at first, without a lawyer being present). The question of whether or not counsel should be admitted at this point has been a recurring theme of debate since the 1970’s. It has come up again recently, but as always the ministry of justice, the prosecution service and the police have resisted vigorously. The underlying arguments are that the presence of a lawyer would not only unduly hamper the police in their investigation (suspects would refuse to say anything), but also, given the guarantees of supervision by the prosecutor and in the final event the court, that a lawyer is unnecessary considering that the police can be trusted to duly carry out their duties of non-partisan truth finding within the legal limits of due process. A compromise solution of installing tape and/or video recorders during police interrogation has been reached, but there seems to be no hurry to implement it.14 It follows that the absence of a lawyer does not affect the status of evidence at trial obtained by the police during questioning.

That the police would be unduly hampered by the presence of a lawyer because suspects would refuse to speak, is a rather strange argument given that they have the right to remain silent and, according to Article 29 Sv, must be informed of that right before interrogation begins. What constitutes ‘interrogation’ has been interpreted by the Dutch Supreme Court to mean ‘questions concerning a specific offence with regard to which a reasonable suspicion exists against the person questioned’.15 There is therefore a certain leeway before interrogation proper begins and the suspect must be informed of his right to remain silent, during which the police may ask ‘prior informative questions’ not concerned with the specific offence. Statements given in answer to such questions, even if amounting to a confession, may be

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14 Things may now speed up a little given that recent miscarriages have shown that neither the police nor the prosecution are always as non-partisan as was supposed (*Evaluatieonderzoek Schiedammer Parkmoord* 2005).

used in evidence. If the suspect has not been informed of the right to remain silent, confessions or admissions of guilt given after interrogation has started are regarded as illegally obtained.

Whether or not illegally obtained evidence is excluded is a matter for the court to decide (Art. 359a Sv), namely whether it was obtained in serious breach of the defendant’s rights. A failure to observe Article 29 Sv is regarded as a serious breach, but that need not apply to indirect evidence resulting from such statements, which is certainly not automatically excluded. In any event, exclusion of evidence, even of illegally obtained confessions, does not automatically result in acquittal. Not only will the court always ask a defendant who claims he is innocent but has confessed while not being warned of his right to remain silent, whether he stands by his retraction of the confession, the rules of evidence are such that even after exclusion of the confession there may still be enough other evidence upon which to base a conviction. If, however, the breach of the defendant’s rights was such as to preclude a fair trial, the court also has the option of dismissing the prosecution altogether.16

The right to remain silent is interpreted in the Netherlands as prohibiting undue coercion during interrogation. This is based less on notions of fundamental human rights (although they do of course play a part) than on the idea that statements obtained by coercion are very often false and hamper the investigation. Combined with the obligations of the prosecution (and the police) to non-partisan truth finding, it follows that bargaining for confessions at this stage is not allowed. This is not to say that it does not occur, only that the police would not regard it as bargaining, but more as falling within the legitimate boundaries of reasonable pressure. Given the absence of lawyers and (as yet) of verifiable recordings of interrogations, it is impossible to know how often the police might suggest that early release is on offer in exchange for a confession. Every so often cases emerge in which defendants claim to have falsely confessed due to such pressure. Whether or not this could rightly be called bargaining is a moot question. In theory the police themselves have nothing to offer, as possible inducements are dependent on the prosecutor’s decision.

(3/4.) The decision whether or not to prosecute, and on which charge(s), is the exclusive prerogative of the prosecutor; no other person or organ of the state may bring a prosecution (known in Dutch law as the monopoly principle). There is no formal hearing (adversarial or otherwise) to assess the sufficiency of the evidence, although new legislation will soon require the prosecutor to inform the victim of the outcome of his deliberations.17 He must

16 The rules of evidence and of the exclusion of illegally obtained evidence contained in the code of criminal procedure are highly complicated, and have become even more so after a number of Supreme Court rulings that interpret them further.
17 Wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces, Kamerstukken II 2004/05, 30 143.
take his decision on the basis of two considerations. Firstly: is there sufficient evidence to warrant prosecution? If not, he must formally dismiss the case, for to pursue it would be an abuse of power. 18 If there is sufficient evidence, he comes to the second consideration: does the public interest require prosecution in the light of the interests involved (including those of defendant and victim)? This is where a specific interpretation of the opportunity principle comes into play. Originally, and the text of the relevant provision of the code of criminal procedure (Art. 167,2 Sv) still reads this way, the idea was that the prosecutor should prosecute, unless prosecution served no public interest. Nowadays, this is interpreted the other way round: no prosecution, unless it serves the public interest. 19 If he decides not to prosecute, the prosecutor has a number of options open: to dismiss the case or to deal with it himself out of court (in what way precisely will be discussed below under III, IV and V).

Although the decision (not) to prosecute is one that is made by the individual prosecutor on the case while the law binds him only to the very generally worded considerations of public interest, he is not entirely free in the way he uses this discretionary power. To start with, the minister of justice has the power to directly intervene in individual cases, although he cannot do so without informing parliament who can then call him to account (Art. 127 Wet rechterlijke organisatie). This power, recently introduced, has been criticised as bringing the prosecutor’s decision in individual cases (as opposed to generic decisions about prosecution as part of criminal policy) too much under political control; 20 it is to be expected (and hoped) that the minister will be exceedingly prudent in using it. But if prosecutors are unlikely to be too much bothered by intervention by the minister of justice, they are bound to the directives from the procurators-general. For many sorts of crime, these stipulate that the prosecutor must, or must not, prosecute under certain circumstances. A defendant may invoke them in court if he considers he has been prosecuted in violation of a specific directive, and the court will dismiss the case unless the prosecutor can show why, despite the directive, special circumstances warranted prosecution. 21 Conversely, if the prosecutor does not prosecute while a directive stipulates that he should, this could play a part if the victim or other interested party should attempt to compel prosecution.

In the exclusively professional system of Dutch criminal procedure, there is little scope for participation by citizens, be they victims or otherwise. There is no lay-participation at trial – no jury or mixed tribunal – and there is,

18 Prosecutors have been known to prosecute in the absence of sufficient evidence in cases of complicated white-collar fraud, the idea being that even without a conviction the defendant would have had his comeuppance in the media (see Brants & Brants, 1991). Simmelink 2004.
19 See inter alia, Reijntjes s.d. and contributions in Loof 1999.
among most legal scholars and professionals what can only be described as a
distinct aversion to the idea that the public should participate in any way in a
criminal case, other than as defendant or witness. 22 That also applies to
decisions on (non) prosecution. Pressure from victims’ interest groups has
brought about some change, although the basic rule of Dutch criminal
procedure still applies: a victim is never a prosecutor. 23 During the first
legislative process aimed at improving the position of the victim in criminal
process (the second is now underway), the Minister of Justice reiterated this
principle, adding that, were it to be otherwise, the victim would have too
great an influence on the procedure, thereby endangering the non-partisan
nature of prosecution that was in the hands of the prosecution service
precisely for reasons of objectivity. 24

There are, however, some small breaches in both the monopoly and
opportunity principles. Some crimes can only be prosecuted after a complaint
to the prosecutor, usually by the victim (e.g. libel, Art. 261 ff Sr). Previously,
some forms of sexual crimes concerning minors older than 12 but younger
than 16 also came under this category (in order to avoid prosecutions for
statutory rape/sexual assault if the minor had willingly and knowingly
consented). 25 Ideas about sex with minors have, however, changed since the
1970s when these provisions were in force. Nowadays, the prosecutor need
not await a complaint, but he must first allow the minor concerned to express
an opinion on the proposed prosecution (Art. 167a Sv in conjunction with
Arts. 245, 247 and 248a Sr). Prosecution on complaint is not a complete
breach of the opportunity principle: once received, the complaint in no way
obliges the prosecutor to prosecute it merely enables him to do so.

The victim or his/her surviving family can also attempt to influence the
decision on prosecution in another way, for nowadays they have the right to
request a ‘second opinion’ on the thoroughness of the pre-trial investigation
if the prosecutor has decided to drop the case for lack of evidence, while they
consider that the police have not done enough to find the perpetrator. This
right has not yet been consolidated in law, but follows from a prosecutorial
directive. 26 Again, this possibility does not detract from the prosecutor’s
monopoly on the prosecution decision, for it will still be for him to decide –
even after more and possibly sufficient evidence has been gathered – whether
or not it is expedient to prosecute. The only way that the prosecutor’s
decision not to prosecute can be reversed, is through a so-called Article 12-

22 Although there are calls from political parties to introduce lay participation, most
influential legal scholars still oppose it: see e.g. Groenhuijsen & Knigge, 2004. See for
an overview of the arguments for and against: Brants 2004.
23 See on the position of the victim in the Netherlands in comparison with other
countries: Brienen & Hoegen 2000.
24 Kamerstukken II 1989/90, 21 345, nr. 3, p. 3.
25 The age of consent in the Netherlands is 16.
26 Aanwijzing tweede beoordeling (second opinion) opsporingsonderzoek, Stcr. 2000,
43; see also Beijer 2001.
procedure. Article 12 Sv gives any person with a reasonable interest in prosecution the right to apply to the appeal court in order to have the prosecutor’s decision to either drop the case or to deal with it himself out of court, overturned. A ‘person with a reasonable interest’ not only (obviously) includes the victim (or his/her surviving relatives), but also legal persons such as corporations or interest groups (the latter if they can show a durable existence combined with a specific interest in the case).

Under Article 12 Sv, the appeal court reviews the complete case, hears all concerned (including the defendant) and then takes the decision on whether or not prosecution should follow as if it were the prosecutor; i.e., the court must take all of the interests involved into consideration and then decide, on the basis of the opportunity principle, whether prosecution is in the public interest. If it so decides, it may then order the prosecutor to prosecute. Whatever it decides (to order prosecution or to uphold the original decision) is open to appeal to the Supreme Court on points of law. Whether the authority of the court to review the prosecutor’s decision also extends to the charge, was a point of debate for a long time. The Supreme Court has however ruled that if an interested party considers the prosecutor has undercharged, it may request the appeal court to order that prosecution be brought on a specific, more serious charge.27 Article 12 Sv is the only way in which a private person (natural or otherwise) can formally influence the decision on prosecution, but the appeal court, not the interested party has the last word: if the court upholds the prosecutor’s original decision, there is nothing that anyone can do about it.

2.2. Trial Stage (Post-Charge)

(1.) The prosecutor at a Dutch trial is regarded as dominus litis; in other words, he controls proceedings in the sense that he determines not only whether adjudication takes place before the court, but also the charge upon which, if proven, that court will eventually pronounce sentence. The charge – telastelegging – is contained in detail in the summons to appear at a certain date – dagvaarding – (Art. 261 Sv). Until the president of the court opens the trial on that day (Art. 270 Sv), the prosecutor is free to change his mind, withdraw the charges or amend them. After that point, he may no longer withdraw the charge(s). He is also limited in any amendments he may wish to make and, now that the trial has started, dependent on permission from

27 This case concerned a motorcyclist who killed a child and was prosecuted for culpable homicide by reckless driving. The parents thought that the charge should have been intentional homicide, which carries a much greater penalty. After the appeal court had dismissed their request to amend the charge on the grounds that to grant it would mean violating the principle of the division of power, the Supreme Court ruled that Article 12 requires the appeal court to put itself in the position of the prosecutor with regard to all aspects of the case, therefore also the charge (HR 25 August 1996, NJ 1996, 714).
the court to make them (Art. 313 sub 1 Sv). Permission cannot be granted if the amendment means that the defendant would stand trial for a different crime altogether (Art. 313,2 Sv), but the court will usually permit amendments in order to repair insufficiencies in the charge (for example the prosecutor has forgotten an essential element of the crime, has got the date wrong or some such error).28

Once the trial has opened then, the prosecutor must proceed with the case, but that is not to say that he must go ahead and try to obtain a conviction if he now feels there are insufficient grounds. What he may always do, either immediately or at any point further on, is request that the defendant be acquitted or be dismissed from prosecution.29ler. This too is not his decision but the court’s, but it would be very surprising if a court were to decide otherwise (indeed, if the prosecutor presents no evidence they cannot decide otherwise). While formally the prosecutor cannot withdraw the charges after the trial has commenced, such decisions then being in the hands of the court, in practice amendments that amount to a substantial reduction (while not changing the nature of the crime charged) or a request for acquittal, really boil down to the same thing. The aggrieved party has recourse to Article 12 Sv (see above) if the charges are dropped and the summons withdrawn before the trial has commenced, but no redress if a trial, once started, ends with a conviction for a lesser offence or an acquittal: a retrial would be blocked by the principle of ne bis in idem (double jeopardy). It follows from the monopoly principle that no other official or private party can take over a prosecution if the prosecutor does not wish to proceed.

(2/3.) A guilty plea by a defendant does not exist as such in Dutch criminal procedure; at least not in the sense and with the connotations and legal consequences it has in many other jurisdictions (and notably adversarial ones). A defendant is not required at the beginning of trial to state whether or not he pleads guilty, but he can, of course, confess. Dutch defendants do so in a majority of cases and usually during pre-trial investigation. In theory, however, a confession provides no basis for allowing a defendant to control the adjudication of his case, let alone for bargaining. Under the rules of evidence, a confession is simply a ‘statement by the defendant’ and, although it forms legally admissible evidence, is in itself not enough to convict – however convincing it may be (Art. 341,4 Sv). The idea that a defendant who confesses should somehow be treated differently during trial, or that the

28 Given the codified nature of Dutch criminal law that requires a charge to contain all of the (written and often complicated) elements of a crime, such insufficiencies occur with a certain frequency.

29 The difference between an acquittal (case not proven for lack of evidence) and dismissal from further prosecution (the facts do not amount to a criminal offence or the defendant is not culpable) is substantial and complicated, and has a number of consequences. For the purpose of this contribution it is not necessary to go into the matter further.
truth finding exercise by the state that is at the heart of both pre-trial and trial procedure is now no longer necessary, is anathema in the light of inquisitorial ideology.

Meanwhile, despite the deep-seated notions that not the defendant but the prosecutor and in the final instance the court determine events at trial and that a confession cannot provide sufficient evidence of guilt, there is one situation in the Netherlands in which a defendant can prevent the hearing of evidence and judgement by the court. It has no basis in law, but is recognised as a legitimate means of adjudication by the Supreme Court and is known as *voeging ad informandum*.\(^{30}\) Literally, this means ‘addition with an eye to providing information’ and it occurs if defendants have committed, and admitted to, more offences than those with which they are charged. It comes very close to the English system of ‘taking other offences into consideration’, with the important difference that it is the prosecutor with the consent of the defendant (and not the defence) who will add to the dossier, for the court’s information, other offences with an eye to having them taken into consideration at sentencing. It has two, related aims: to allow the courts (and the prosecution) to deal with more offences than would otherwise be logistically possible, while still providing a punitive reaction to criminality. All involved (defendant, prosecutor and court) stand to gain from this system, for the defendant can start with a clean slate (and will incur a less severe penalty than the usual accumulation if each offence were to be tried and proven), the prosecutor can lighten his caseload and spare himself the trouble of proving each offence separately (the charge being the only offence that requires legal proof), and the court can use its time economically. The Supreme Court has stipulated a number of conditions to act as safeguards against coercion. The most important is that the defendant must not only have confessed to the prosecutor, but must reiterate that confession unconditionally in court before the tribunal that will pronounce sentence.\(^{31}\) No other prosecution is possible for an offence that has been dealt with in this way (*ne bis in idem*).\(^{32}\)

This is the only situation in which a court may take a confession as sufficient indication of guilt. Otherwise, even if a defendant admits guilt, the court must still establish, according to the normal rules, that there is enough evidence to convict. The evidentiary rules in the Netherlands constitute what is known as a negative system of evidence: the court must have a legal sufficiency of evidence of a certain legal sort and may not convict unless that evidence has convinced it of guilt.\(^{33}\) If this causal relationship is missing, in

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\(^{30}\) HR 13 February 1979, NJ 1979, 243.


\(^{32}\) HR 29 November 1983, NJ 1984, 277.

\(^{33}\) Acquittal therefore results if there is enough evidence, but the court is not convinced, or if the court is convinced of guilt but there is not a legal sufficiency of evidence: for example, a statement by the defendant (confession) or by a single witness is not enough. On the other hand, a sworn written report by a law enforcement officer is
dubio pro reo prevails. An extra safeguard requires the court to give a reasoned decision, setting out the (legal) evidence by which it has been convinced. In practice, a confession, although not legally sufficient, may carry a great deal of weight in convincing a court, so that the requirements of additional evidence are minimal. Moreover, a very recent addition to the code of criminal procedure allows the court in some cases to pronounce sentence without reasoning if the defendant has admitted guilt (see further § 6).

3. (II) Organization of Criminal Procedure and Variations for Lesser Crimes

3.1. Procedure for most Serious Crimes

(1.) The Dutch Criminal Code (Wetboek van Strafrecht) divides crimes into felonies (misdrijven) and misdemeanours (overtredingen), while municipalities may also stipulate misdemeanours in their byelaws. Separate statutes, dealing with special issues (drugs, social-economic crime, traffic crime, etcetera.) also contain provisions of criminal law, again divided into felonies or misdemeanours. This distinction determines before which court a case will be tried. With a few exceptions, misdemeanours are tried by a single judge (kantonrechter). Felonies are always tried in a district court (arrondissemmentsrechtbank), of which there are 19, spread around the country, sometimes by a panel of three judges, sometimes by a single judge.34

As we have seen, under the opportunity principle as it applies in the Netherlands, with its elaborate system of prosecutorial directives, not more than 4% of all felonies that come to the attention of the police, actually reach a court and the percentage of misdemeanours is even less. However, if they do, that same principle implies that the prosecution has taken a deliberate decision to prosecute on the basis of prior investigation. In principle, that investigation has the same goal whatever the crime: gathering evidence in the light of non-partisan truth finding, although obviously its scope and duration will differ according to the circumstances. The use of some covert investigation techniques is subject to (complicated) legal limitations (Arts. 126g-126gg Sv); the most important are that covert investigation involving a serious breach of privacy is only allowed in cases of felonies and sometimes only if the crime is punishable by more than 4 years imprisonment; bugging and telephone tapping have the extra requirement that they must be authorised by an investigating magistrate. Where felonies are concerned, it is

(Art. 344,2 Sv) is in itself sufficient – a provision that reflects the considerable confidence that the Dutch system places in the non-partisanship of the police.

34 The organisation of the Dutch judiciary still reflects the French situation under Napoleon, which was introduced at the beginning of the 19th century when the Emperor’s forces invaded the Netherlands. The occupation lasted only a few years, but left an indelible mark on Dutch justice.
the complexity of the specific case that determines the composition of the court.

(2/3.) Felonies of any complexity are tried before a district court consisting of a panel of three judges, all professionals (Art. 268 Sv). Sentence is usually pronounced no more than two weeks later. If the prosecutor feels that the crime will be simple to prove and that the sentence is unlikely to be more than 1 year imprisonment, he may bring the case before a so-called ‘police judge’ (politierechter), who sits alone and usually pronounces sentence immediately afterwards (Arts. 367-381). This judge is simply one of the judges accredited to the district court, who do a spell of several months (the duration varies) sitting alone instead of with two colleagues (the name, police judge, has no real significance). If the case turns out to be more complicated than the prosecutor originally surmised, it is referred to a panel of district court judges. Paradoxically, although these are the simplest cases, only the more experienced judges sit alone, the difficult task of truth finding that rests on the shoulders of a judge in an inquisitorial system being considered as best learned first in a group process. The procedural rules in court are mostly the same, whether or not a defendant comes before a panel of three or before a single judge, in any event with regard to evidential rules and confessions. Any differences concern matters of efficiency (such as a brief summons that is elaborated in court, a verbal sentence, etc.).

3.2. Different Procedures for Less Serious Crimes

(1/2.) Simple crimes require no more than simple investigation, but in principle the breadth of the preliminary investigation is a matter of police discretion – and in the final event that of the prosecutor. Misdemeanours rarely require any investigation at all. Whether or not a crime is simple does not affect the opportunity principle. Meanwhile, the existence of prosecutorial directives means that many if not most decisions on (non) prosecution are a matter of routine, although the magisterial role of the prosecutor in principle requires him to balance the interests in each specific case. The expediency of prosecution in simple cases of frequently committed offences is therefore mostly determined by directive, with discretion not to charge and to drop the case if individual circumstances so dictate.35 Lately, the procurators general have made it known that dropping the case entirely is to be discouraged: for a long time, more than 50% of all cases were simply dismissed without any action being taken at all. However, the Dutch criminal justice system has a range of out-of-court measures at its disposal – most of which are imposed by the prosecutor and in minor cases by the police – to

35 Given the extremely broad nature of prosecutorial discretion in the Netherlands, this not only applies to less serious cases, although obviously these are the most likely to be covered by a policy of non-prosecution.
which we shall come presently. For a number of political and policy reasons, prosecutors are directed to make use of such measures. They are now used in about 30% of all cases, and can be imposed for offences that carry up to 6 years imprisonment. An aggrieved party who feels the case should, nevertheless be tried by a court, has recourse to the procedure under Article 12 Sv (as described in § 2.1, 3/4 above).

(3.) We have already seen that the less serious felonies may be heard by a single 'police judge', rather than by a panel of three. Misdemeanours (with one or two exceptions that need not concern us here) are heard by a single cantonal judge. Many of these cases concern persons who have not complied with one of the out-of-court measures and who are then be summonsed to appear before this judge (a substantial number of defendants apparently feel no inclination appear and many such cases are tried in absentia). The main difference in procedure concerns the manner of the summons, but the essentials of the Dutch inquisitorial trial (the powerful position of the prosecutor, the active truth-finding judge and the requirements of legal evidence) remain theoretically intact.

One of the most time-consuming activities of the cantonal judge used to be traffic offences (most usually hearing cases in which imposed traffic fines had not been paid). Since 1990, traffic offences that do not result in injury to persons or damage to goods have been taken out of reach of the criminal courts and are now administrative offences, punishable by fines of not more than € 340 only (comparable to the German system of Ordnungswidrigkeiten). Municipal traffic wardens, not the police, monitor these very minor offences. Appeal against the administrative decision can be lodged first with the public prosecutor who has discretion to overturn the original decision as being unreasonable considering the circumstances in which the offence took place, or to lower the fine given, as the law puts it, the circumstances of the person concerned. Appeal to an independent tribunal against the prosecutor’s decision can be lodged with the cantonal judge, against whose decision further appeal is possible to one of the five courts of appeal (namely in Leeuwarden, a town in the north of the country). Despite the involvement of the prosecutor, this procedure is more administrative than criminal.

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36 This would include grievous bodily harm, some cases of manslaughter, incitement to or assistance with suicide, theft, breaking and entering, fraud, intimidating a witness, blackmail, and many other offences of a more or less serious nature.
38 Thereby bringing this procedure into line with the requirements of the fair trial provision, Article 6, of the European Convention on Human Rights and Fundamental Freedoms.
4. (III/IV/V and X) Formal and Informal Ways of Avoiding Trial

It will be obvious by now that the Dutch prosecutor is a powerful figure in Dutch criminal procedure, with an immense amount of discretion. The interpretation of the opportunity principle in the Netherlands and the part played by the heads of the prosecution service in issuing directives on (non) prosecution for categories of offences, have long been the main means of streamlining criminal procedure and ensuring that the courts do not become overburdened. The essentially inquisitorial nature of truth finding and the attendant systemic roles of the impartial investigating prosecutor and the defendant as an object of investigation, leave little room for the latter as an autonomous, let alone consenting party to proceedings. While a case can be prevented from going to trial in several ways, this is essentially not the defendant’s but the prosecutor’s decision.

To this end, the prosecutor has a number of measures at his disposal, many of which would come under the heading of diversion in other jurisdictions. They differ, however, from the concept of diversion in, for example, England and Wales, in that they are not aimed at removing offenders from the criminal justice system as such, merely at keeping them away from court while still keeping them within reach of the prosecutor and allowing for a punitive reaction on the part of the state. At the time of writing, the situation is one of transition, as the law is about to undergo some very substantial changes. The following therefore describes first the law as it now stands, then the reason for the changes, and finally the new provisions, which are expected to come into force in 2006 – all of which bear directly on the position of the prosecutor and the scope for bargaining and consensus in Dutch criminal procedure.

At present, a prosecutor, acting on the opportunity principle, may decide to drop the case entirely (Arts. 167,2 and 242,2 Sv) or to prosecute on the basis of the most serious form of the offence, but he may also decide to employ one of the possibilities that the law allows which is somewhere in between: to prosecute for a less serious form of the offence, or to drop the case conditionally (conditional waiver of prosecution). But whatever he decides, an aggrieved party (although they must be informed) has no way of preventing this, except through an Article 12-procedure. The monopoly principle also prevents the court from intervening in the decision in any way (other than the appeal court under Art. 12 Sv): it cannot therefore force the prosecutor to prosecute or change the charge, even if it feels that a more serious form of the offence would be more appropriate.

Dropping a case conditionally can take different forms. The first is that the prosecutor informs the suspect that he will not prosecute if the suspect

40 This option is not based on any specific legal provision other than Article 167,2 Sv (the opportunity principle), but is accepted practice (Corstens 2005, p. 503).
fulfils one or more stipulated conditions: for example restores any damage caused by the offence, apologizes to the victim, undergoes treatment for substance addiction, etcetera. The second is known as transactie, which literally means transaction: non-prosecution is conditional upon the suspect’s paying a certain sum of money (Art. 74 Sr). The prosecutor may decide to employ these options at any time in the procedure up till the point at which the summons has been issued. Although strictly speaking the law allows him to do so only after pre-trial judicial investigation (Arts. 242,2 Sv ff), conditional wavers outside of judicial pre-trial investigation are simply based on the opportunity principle. The only restriction is that there must be sufficient evidence to prove the offence in court: to get a suspect to agree to a conditional waiver when there is no right to prosecute in the first place, would amount to an abuse of power. Article 74c Sr also gives the police the authority to issue transaction-proposals to those suspected of misdemeanours and of simple felonies. In the latter case, the suspect must be more than 18 years of age and the transaction sum may not exceed € 350. Both the so-called police-transaction (often used for first time shoplifters) and transactions by the prosecution are governed by prosecutorial directives.

4.1. Conditional Waiver of Prosecution

Conditional waivers of prosecution entail rights and obligations on both sides: the prosecutor waives his right to prosecute in exchange for the suspect’s fulfilling the conditions, while the suspect waives his right to a fair trial, namely the right to have the case heard in public by an independent and impartial tribunal (Art. 6,1 ECHR), in exchange for the case being kept permanently out of court (the principle of ne bis in idem will prevent further prosecution as soon as the agreement has been reached and the conditions fulfilled). Because of the waiver of such fundamental rights on the part of the suspect, it is standard case law of the European Court of Human Rights that conditional waivers of prosecution require his informed and willing consent: there must be no suggestion that they are ‘tainted by constraint’. Whether or not that is the case in the Netherlands, is a moot point, for it is doubtful to what extent conditional waivers are actually – as opposed to theoretically – consensual criminal procedures. In any event, the powerful position of the prosecutor means that conditional waivers are not normally negotiations between equal parties. While they do allow the prosecutor to shift a larger case load than would otherwise be possible so that he stands to gain in this sense (and at the same time they allow the courts to use their time efficiently for other cases), the suspect always has much more to lose if he refuses to agree. It should also be noted that it is presumed that a suspect

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41 However judicial the role of the prosecutor might be in Dutch criminal procedure, he does not form an impartial tribunal, and he is certainly not independent.

42 ECHR 27 February 1980, A 35 (De Weer v Belgium).
who agrees to a conditional waiver is guilty, but that an admission of guilt is not required. 43 This has always been a somewhat contentious point, especially where transaction is concerned, for although transaction is not prosecution and is regarded theoretically as an agreement under civil law, it is to all intents and purposes (and certainly according to the ECtHR) a criminal sanction – albeit not one imposed by a court. 44 For that very reason it is not entirely discretionary in so far as the offences for which it can be imposed are limited.

Since 1986, transactions have been possible for both misdemeanours and for felonies that carry up to 6 years imprisonment and/or fines of the highest category – which in cases of compounded felonies or social economic crime may run into millions (Art. 74,1 Sr). The most common condition is payment of a certain sum (from € 2,- to the maximum fine that could have been imposed had the suspect been found guilty in court). In order to induce the suspect to agree, the transaction-proposal is always less than the maximum, but is accompanied by the warning that, should the prosecutor bring the case before a court, he will then ask for a much higher penalty. Other conditions are possible, including the Dutch equivalent of community service orders (Art. 74,2f Sr) and the payment or handing over of illegally obtained assets (Art. 74,2d Sr). In most run-of-the-mill-cases, suspects are more than willing to agree, for the simple reason that the transaction will be the end of the matter and they will avoid the public stigma of a court appearance. Although the law stipulates that the prosecutor may not refuse when the suspect offers to pay the maximum fine if the offence is punishable by a fine only, and also offers to fulfil any other conditions the prosecutor may wish to impose (thereby implying informed consent) in practice transaction is very much a matter of ‘take it or leave it’. There is, however, one category of offenders who are in a position to negotiate and it is here that we find what amounts to plea and sanction/sentence bargaining in Dutch procedure.

4.2. Transaction and White Collar and Corporate Crime

From the 1980's onwards, the prosecution service has increasingly turned its attention to white collar and corporate crime (since 1976 corporations have been directly criminally liable under Dutch law, as are corporate executives

43 There is one form of conditional waiver that is reserved for juveniles, the so-called HALT-programmes, which are administered by the police and involve juveniles, usually first offenders, being ordered to perform some sort of community service. They are seen as deserving a second chance and it is regarded as especially important to keep them out of the juvenile courts and young offenders institutions wherever feasible. To be eligible for a HALT-programme, the offender must admit to the offence.

44 It is intended to be punitive and deterrent and involves the deliberate infliction of (financial) pain: EcHR 21st February 1984, A 73 (Öztürk v Germany).
for crimes committed by corporations under their control), concentrating especially on fraud, insider dealing and environmental crime. Finding enough evidence for a conviction, however, has often proved considerably more difficult than taking corporations and their executives to court. Such crimes will usually fall within the category for which transaction is allowed, but it is not always take it or leave it in these cases. The defendants are often as powerful as the prosecution, for they can engage specialised – and expensive – legal counsel, as well versed in the legal ins and outs of fraud as any prosecutor. Increasingly, such lawyers are becoming specialised in bargaining techniques too, skills that are not normally needed in the Dutch inquisitorial setting and that many ‘ordinary’ criminal lawyers lack. Moreover, the difficulties of proof mean that such cases require a great amount of time and manpower on the part of the prosecution, with no certainty of conviction – indeed, they have very often resulted in (partial) acquittals.

These are cases that attract a great deal of publicity once they reach the court stage. Corporate criminals are keen to avoid negative publicity, both for themselves and for their business, and would rather not stand on their right to a public hearing and an impartial tribunal.\(^{45}\) They are also prepared to pay to stay out of court, sometimes regardless of whether or not they consider themselves guilty, or indeed are guilty; however, the very fact that they may have a chance of successfully contesting the case gives them a powerful means of persuading the prosecutor to be flexible. Should they fail to win the case, prosecutors will find their shortcomings splashed across the front pages of the national press, will have wasted an enormous amount of time and have lost face within the prosecution service – not a good thing for a career civil servant. Both sides therefore have much to lose by letting a case go to court. In these cases, negotiations about the amount of the transaction sum, about the payment of illegal assets, about the charge (with the defendants agreeing not to contest a lesser charge if others are dropped, or agreeing to part transaction, part minor charge) are not at all unusual. Just how often such deals occur is unknown, for transaction is not subject to any public judicial scrutiny and takes place behind closed doors (in that sense, although it closely resembles plea and sentence bargaining in the US, it is not the same, the other major difference being that not the court, but the prosecutor imposes the ‘penalty’). That they occur, however, is public knowledge, and has been the remit of many an investigative journalist.\(^{46}\)

\(^{45}\) See Baauw 1999.

\(^{46}\) This was already the case in the 1980’s: see Brants, 1988, and Brants & Brants 1991, ch. IX.
4.3. **New Legislation**

Negative publicity about 'backroom-deals' with powerful suspects and corporations formed the backdrop to public and political dissatisfaction with this practice and led to a prosecutorial directive that instructs the prosecutor to make any such major transactions public afterwards.47 Meanwhile, the very concept of prosecutorial discretion to keep any cases, not only the corporate offences, out of court through imposing conditional waivers has been questioned. This has finally led to legislative proposals due to come into force in 2006 that do not in anyway take away discretionary power from the prosecutor, but greatly enhance it by allowing him to impose prosecutorial penal orders.48 The fundamental reason for what amounts to a huge change in policy and indeed in the very system of criminal procedure, is the change in penal climate that has gradually taken place in the Netherlands over the years.

Until well into the 1980’s, the Dutch enjoyed the reputation of having one of the mildest penal climates and lowest rates of incarceration in the world. This state of affairs stands in direct relation to the way in which prosecutorial discretion was used to ensure a pragmatic criminal policy of regulation through non-prosecution.49 Indeed, thirty years ago it was the stated policy of the prosecution service to increase the number of criminal cases in which no action was taken at all: prosecutors were encouraged to drop cases if at all possible, and to reserve the weight and social cost of any criminal sanction for the most serious only. The public interest in prosecution was then seen as easily outweighed by other factors, among other things that prosecution and punishment were unlikely to lead to rehabilitation and that a tolerant society should be measured by the way in which it managed to avoid what was regarded as the conflictual and socially and individually damaging solution of criminal law.50

When the possibility of transaction for felonies was introduced in 1986 (before then they were allowed for misdemeanours only, except in cases of social-economic crime), it was still very much with this idea in mind. However, the tide was already turning, with prosecutors being urged to use transaction (rather than unconditional waivers) in order to streamline criminal process but not let crime go unpunished, and an increasing number of prosecutorial directives setting out rules about which cases were eligible and what the transaction sum should be. Efficiency arguments were beginning to take precedence over traditional ideological notions that criminal law should be used as a last resort only – an *ultimum remedium*. Moreover, the development of a coherent policy of what has been called

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48 Wet OM-afoening, Kamerstukken II 2002/03, 28 600.
regulated tolerance through the use of non-prosecution and transaction put the emphasis less on tolerance than on regulation, although not necessarily through using the full weight of the criminal law. By the middle of the 1990's, however, public and political debate on crime and criminal law had become dominated by the perceived need for not only less tolerance, but also greater punitive regulation.

The Netherlands have not escaped the general trend in Western Europe towards tougher crime control and harsher sentencing, in the wake of growing (and media-fuelled) feelings of insecurity in society and/or rising levels of crime (any causal relationship is not necessarily present; nevertheless public and politicians normally simply assume it). An insecure public makes for lack of confidence in criminal justice, but visible crime control through criminal trials and punishment has become less and less the norm. Although the prosecution service has stepped up the number of prosecutions and sentencing has become harsher in the courts, this has resulted primarily in overburdening the courts and the prison system. However, the traditional means of relieving that burden – transaction and other conditional waivers – are no longer considered a real option; indeed, they are seen one of the causes of declining public confidence in criminal justice, because they are invisible and give neither offenders nor society the feeling that ‘real’ punishment has been meted out. For some time, politicians had been pushing for other solutions that would provide a coherent security policy, reinforce waning confidence in the criminal justice system and at the same time reduce the overload of cases facing the courts. One such solution was put forward in a parliamentary motion that called for the introduction of plea-bargaining and abbreviated procedures after guilty pleas in order to increase the capacity of the courts and nevertheless provide the spectacle of public sentencing.

The minister of justice commissioned research into plea-bargaining, and on the basis of the results informed parliament that little was to be expected from the introduction of such a corpus alienum into Dutch procedure. Not only did it not fit a procedural tradition of active judicial truth finding, capacity gains would be negligible; neither would plea-bargaining put an end to the ‘undesirable’ practice of negotiation between the prosecution and (powerful) defendants. Instead of plea-bargaining the minister proposed to introduce a system whereby the public prosecutor would be able to impose fines in the form of penal orders. This would be catching a number of birds with one stone: the courts would be unburdened and yet there would be ‘real’ punishment. Moreover, the problem of those who agree to transaction and yet do not pay (approximately 25%) would be

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51 Brants 1998.
52 See for an overview of this ideological change: Pakes 2004.
53 Kamerstukken II 2002/03, 28 600 VI, nr. 127.
solved: because transaction, although substantively a fine, is formally an agreement under civil law, non-compliance can only be solved through either prosecution or through somewhat tortuous civil enforcement mechanisms. Under the new system, the imposition of a prosecutorial fine is an act of prosecution, and the fine itself formally a criminal sanction; that means that the prosecutor can enforce it directly.\(^{55}\)

### 4.4. Penal Orders

Under the new law, the code of criminal procedure will be amended and a new chapter IVA added: ‘Prosecution through penal orders’ (Arts. 257a-h Sv) will come into force in 2006. Article 12 Sv will be amended to allow an aggrieved party to complain to the court of appeal and request that the case be brought before a court. Conditional waivers and transaction will disappear. Instead of coming to an ‘agreement’, the prosecutor will send the suspect a penal order, describing the offence and setting out the proposed fine. Before doing so, he must ‘establish the guilt’ of the suspect, although again no admission of guilt is necessary. Fines of more than € 2,000,- and the imposition of community service orders require the prosecutor to hear the suspect, if he so wishes in the presence of a lawyer. The suspect can block the penal order by a complaint against the decision to the district court, which will then hear the case in full; if he fails to complain within two weeks, the order can be enforced immediately. Penal orders can be issued for the same range of offences now subject to transaction and the penalties and conditions are practically the same as the conditions that can now be imposed through transaction. The prosecutor has one new measure at his disposal, namely confiscation of the suspect’s driving license for a maximum of 6 months. The police will also be able to issue penal orders to a maximum of € 225,- (Art. 257b).

According to the government, the enforcement of penal orders will greatly simplify the problem of those who, at present, do not pay the agreed transaction sum. Whether or not this sanction will be a more visible form of punishment than transaction remains to be seen, for it is the suspect who must force a public hearing by complaining to the court. The government estimates that between 4% and 25% of suspects will actually do so (a guess based on the one hand on those who take administrative traffic offences to court and, on the other, the number of people who fail to pay transactions). Some authors have questioned this, pointing to the fact that penal orders for felonies are by no means comparable to administrative traffic fines. The argument has also been put forward that the number of persons who feel they have been treated unjustly by the prosecutor, may well rise considerably, now that all consensual aspects have been removed from this

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sanction. In that case, the expected gains in court capacity could prove illusory. At the same time, of course, many will still be keen to avoid the public stigma of a court appearance. For that reason, and in order to enhance the potential visibility, the prosecution service will produce public lists of penal orders served, while details of individual orders can be provided to anyone on request, unless this would unduly contravene the rights of the suspect or a third party.

Although some have welcomed it, often on the grounds of efficiency, there has also been much criticism of this legislation. Its proponents point to the fact that what was already the case in practice – a substantial role for the executive (i.e. the prosecution service) in dealing with criminal cases – has been given a sound basis in law. For others however, this is precisely the main stumbling block: penal orders by the prosecution change the constitutional order of the Netherlands, which is based, inter alia, on the principle that only a court can punish an offender. The Dutch organisation for the judiciary is the most positive, considering this new law a ‘fortunate development’ that will bring the legal order into line with standard practice. They do, however, warn that the prosecution service will need ‘to have its house in order’ and that prosecutors are now obliged, more than ever, to take an impartial and judicial stance in this new task.

Others, who have welcomed the legal basis of the prosecutor’s new powers, are dubious about their scope. There is a risk that penal orders will become the dominant form of criminal sanction, while the only limit appears to be that the prosecutor cannot impose a prison sentence. This has led to fears that a culture of punishment may grow within the prosecution service, in which the courts are seen as necessary only for sending offenders to prison. These authors have called for reticence in this respect. The new law, however, does not appear to promote a reticent attitude, the only ways to call the prosecutor’s decision into question being a complaint to the court by the suspect (which is not expected to be very frequent and, indeed, is not the intention), or an Article 12 procedure initiated by the aggrieved party.

All the other comments about prosecutorial penal orders and the new law have been extremely negative. The Dutch Bar Association has stated that a more principled debate should have taken place before initiating such a far-reaching breach of the principle of trias politica and has asked what the prosecution service has done to deserve the power to establish guilt and pass sentence, given that they have already shown a lack of ‘judicial attitude’ in dealing with transactions under the current system. The new powers will exacerbate this, without the necessary guarantees of legal protection, so that ‘essential elements of fair trial are lacking’. And unless a suspect complains to the court, there is no judicial control of the way in which a decision to

56 Crijns 2004, p. 234.
57 Nederlandse Vereniging voor Rechtspraak 2003.
impose a penal order is taken. On the point of principled debate, some authors have called this new legislation a ‘revolutionary development’ now that the new prosecutorial powers imply that the prosecutor will ‘judge’ cases, a task reserved for the judiciary under the Dutch Constitution. They also doubt whether this new law will pass muster with the European Court of Human rights, given that access to the courts is dependent on the suspect’s initiative, while the prosecutor may not only impose financial sanctions but others that infringe on the suspect’s freedom rights, such as community service orders and confiscation of a driving license.

Two other points of criticism have been raised, that concern the increased power of the prosecutor as such, and the question of whether this will, as the government assumes, mean the end of ‘undesirable bargaining practices’. While penal orders certainly fit the inquisitorial nature of Dutch penal procedure and the large degree of confidence it places in impartial prosecution, in essence they are also a step back to long gone inquisitorial times when prosecution, judgement and sentencing were concentrated in one figure. While no external (judicial) controls govern the situation in which the penal order is imposed, it is unclear to what rules the prosecutor is bound when establishing guilt. In any event, no admission of guilt is required, and the presumption seems to be that only a guilty suspect will accept the order. However, acceptance in itself does not necessarily imply guilt.

Although the right to have a lawyer assigned and present if the penal order is to exceed € 2,000,- is an improvement in comparison with transaction, there is still a problem of informed consent to a waiver of trial if the suspect accepts the order without a lawyer, and in cases under € 2,000,-, for the prosecutor is by far the most powerful party. He is also not obliged by law to inform the suspect of the consequences of accepting a penal order (a criminal record, for example). Neither is there any reason to suppose that no negotiation will ever precede the issuing of a penal order, for the same category of powerful criminals with their specialised lawyers will no doubt take advantage of the situation in exactly the same way as they now negotiate transactions. The same inducements to avoid a public trial apply, while the same evidential problems will beset the prosecutor who is now obliged to establish guilt himself.

5. (VI) Procedures for Victim-Offender Reconciliation

Although, as in other countries, the position of the victim of a criminal offence has been the subject of much and heated debate, criminal procedure as such does not offer much scope for reconciliation procedures. There is a deal of enthusiasm among academics for the notions of mediation and

60 Crijns 2004 and De Graaf 2003.
restorative justice, even to the point of there being an academic journal on the subject that has been in existence now for five years.62 However, the government has always resisted incorporating such ideas formally into criminal procedure. In its latest round of legislative proposals aimed at improving the position of the victim – proposals that were prompted not only by pressure from victim interest groups or politicians but also, perhaps mainly, by a European Union Framework Decision that requires such legislation – the minister of justice is quite clear on the position of the victim in Dutch criminal process: criminal procedure is not geared primarily towards ‘solving a (social) conflict between victim and offender’, but towards ‘the state’s reacting to the defendant’s behaviour (punishing the offender)’.63

With this in mind, measures to improve the position of the victim aim primarily at ensuring that victims are informed of any decision in the case in which they are involved and of ways of obtaining compensation, and at allowing them to inform the judge as to the trauma that the crime has caused (victim-impact statement), all currently the subject of prosecutorial directives. An improved procedure for compensation in the context of a criminal trial has been in place since 1993.64 This procedure was introduced experimentally in two districts first, and then in the whole of the country in 1995. The law allows the victim to approach the prosecutor before joining the trial as an aggrieved party with a claim to compensation, and to attempt, with the help of prosecutorial staff at the court, to come to an agreement with the offender about compensation. The principle of opportunity then allows the prosecutor to base his decision on whether or not to prosecute on the outcome. While this could be called negotiation, there is no evidence that any bargaining takes place; but as settlements reached in this way are not open to public judicial scrutiny if the offender is not prosecuted, there is no way of knowing for certain. An offender’s willingness to agree to compensate the victim is a factor in the prosecutor’s decision on (non) prosecution and could be part of a conditional waiver. It will also play a role in sentencing if the prosecutor decides to prosecute after all.

Meanwhile, there are any number of restorative justice experiments (especially with regard to juvenile offenders), all of which are ‘tolerated’ under the opportunity principle but not particularly encouraged by the procurators general, and most of which depend on the enthusiasm of individuals or victim organisations, and on the cooperation of individual prosecutors. While these organisations no doubt keep track of their own cases and successes (or lack thereof) there are no publicly available statistics. The minister of justice has made it known that he will not formally incorporate such procedures into criminal procedure. However, given that Article 10 of the EU-directive requires reconciliation procedures for victims,

62 *Tijdschrift voor Herstelrecht*, published by Boom Juridische uitgevers.
63 *Kamerstukken II* 2004/05, 30 143, nr. 3, p. 9.
he ‘may, at some point in the future’ issue a ministerial decree on the subject. In the meantime, standard policy will continue emphasise mediation and reconciliation in administrative and civil procedures and not in the field of criminal law.65

6. (VII/VIII/IX) Guilty Pleas / Admissions of Guilt; Confession and Sentence Bargaining

As we have seen, inquisitorial truth finding in Dutch criminal procedure and the attendant rules of evidence mean that an admission of guilt or a confession by the defendant has no influence on evidence taking, let alone on the type of procedure. There are therefore no separate procedures if the defendant pleads guilty, no means of abbreviating the procedure as such, and no formal means of arriving at a lesser sentence in exchange for a guilty plea. Previous attempts to introduce separate procedures for defendants who confess66 provoked lively debate in the Netherlands, with those in favour very much in the minority. The argument that this would introduce an alien element into Dutch criminal procedure and would undermine the very principles on which it is based, easily won the day.67 The prosecutor is always bound to present sufficient legal evidence to prove the offence, and the court is bound to examine that evidence and then use it to come to a verdict – but a guilty verdict only if it has been convinced.

A statement by the defendant admitting guilt is simply one piece of evidence and in itself not sufficient to convict. In theory, therefore, the court may ignore a confession it finds implausible, although in practice (and certainly if the defendant has had legal representation from an early stage) that would be unlikely. It is also true that, while there must be other legal evidence to arrive at a sufficiency, a confession may carry a great deal of weight if believed by the court; again in practice it often takes very little to find a sufficiency of evidence (a statement by a witness testifying to finding a body, for example) so that a defendant may well be essentially convicted on the basis of his own confession.

Sentence must be pronounced according to the law (Art. 359 Sv), which means that the court must take into account the circumstances of the offence and the offender, and the shock and distress that the crime has caused to the victim and to society at large (to which end it may make use of the victim-impact statement outlined in the previous paragraph). There is no mention of confessions or of discounts. Dutch judges have a wide discretion in sentencing (anything between the general minimum of 1 day imprisonment or € 2 to the special maximum set by law on each offence – Arts. 10 and 23 Sr)

and are not bound by the sentence the prosecutor asks for; in practice they will take it into account but are usually more lenient. Although the prosecutor represents the interests of due process in the widest sense, he is nevertheless more inclined to err on the side of the victim and society in requesting sentence: it is the judge who will pay most attention to the interests and circumstances of the offender.

For that reason, an admission of guilt will be reflected in the sentence, for to admit guilt is to show remorse and that is certainly a circumstance that will be taken into account. If a defendant has apologised to a victim, or agreed to compensation, this will also work in his favour. But these are informal conditions that the court will take into account along with other circumstances, and there are no legal or traditional sentence discounts. There is also no bargaining, although many defendants do confess in the hope and expectation that the court will show leniency and in that sense we may say that these are situations known in the US as implicit bargaining. Probably the mechanism works the other way round and defendants, often instructed by their lawyers, are aware that to persevere with a denial of guilt when there is evidently sufficient evidence against them would be to invite a harsher sentence.

As there is no special or abbreviated procedure, there is also no question of the defendant giving up fundamental trial rights if he has pleaded guilty, with one exception: the right to a reasoned decision. A recent innovation, based on efficiency considerations, has been to allow the court to give an unreasoned decision if the defendant has admitted guilt (and has not retracted the admission at any stage), therefore a decision that does not set out the legal evidence on which it is based in full, or address the reasons for coming to a guilty verdict. This applies to the verdict only and in any event the court must always give the reasons that have led to a specific sentence. Appeal is always possible.

A final legislative innovation, due to come into effect, has introduced the only situation in which sentence bargaining may take place in the Netherlands, although it is not called that – it is indicative of the Dutch aversion to the idea of bargaining that every attempt is made to avoid using even the term, Rather, it is a reward system for defendants who agree to testify against co-defendants (so-called crown witnesses). After much debate, this idea finally resulted some years ago in draft legislation.\(^{68}\) Before that, the Supreme Court had approved it, although with a clear hint in its decision that such fundamental changes to the system of criminal procedure were a matter for the legislature.\(^{69}\)

\(^{68}\) Toezegging aan getuigen in strafzaken, Kamerstukken II 1998/99, 26 294 and Kamerstukken II 2001/02, 28 017.

Until now, a prosecutorial directive that anticipates the new law governs the use of crown witnesses. In cases of serious, organised crime that carry a penalty of 4 years or more and in cases of all crimes punishable by more than 8 years, the prosecutor may come to an agreement with a defendant that the latter will testify during a judicial pre-trial investigation against a co-defendant, in exchange for which the prosecutor will request of the court a reduction in sentence; he may not offer immunity from prosecution. The prosecutor may also tell a person already convicted that the prosecution service will advise favourably on a request for a pardon amounting to a reduction in sentence of one third, in exchange for that person’s testimony. This agreement must be in writing. The judge of instruction then hears the crown witness as to the nature of the agreement and the reliability of the witness, but also as to whether it is strictly necessary to resort to this measure given the circumstances of the case. If his decision is positive on all counts, he then hears the witness on oath.

There has been much debate on the ethical and legal ramifications of using crown witnesses. Some commentators accept the government’s argument that this is the only way to penetrate to the leading figures of organised crime, but others are sceptical. On the one hand there is the problem that, although the prosecution enters into the agreement, it is a judge who takes the final decision so that the witness cannot be sure that it will be honoured. Moreover, crown witnesses may not testify anonymously, although the prosecutor may offer protective measures and the existence and identity of the witness need not be made known until the pre-trial investigation has been closed. For these reasons some have questioned the efficacy of the measure. On the other hand, some commentators abhor the very idea of such ‘satanic deals with criminals’: why, they ask, should the criminal profit from helping convict a co-defendant and where are the guarantees that his testimony will be reliable given the promised reward? The argument has also been put forward that this may well lead not to the criminal authorities’ getting a grip on organised crime but to organised crime getting a hold on the authorities, while some lawyers have questioned the ramifications of the crown witness for the co-defendant’s right to a fair trial.

7. Conclusion

All of the above points clearly in one direction: the increasingly powerful position of the prosecution more or less precludes consent and bargaining in Dutch criminal procedure. Suspects and defendants are still very much

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71 If he comes to a negative decision, there is an avenue of appeal to the district court in camera, but not to the Supreme Court.
objects of inquisitorial investigation, despite the (adversarial) elements of fair trial that the European Convention on Human Rights requires. That bargaining and consensual procedures exist at all, is due, on the one hand, to circumstances in which any prosecutor would find himself at a disadvantage (namely in dealing with corporate and organised crime), and on the other to pragmatic considerations (shifting an increasing caseload in order to avoid overburdening the courts). Any consensual moments that are built into the procedure occur pre trial, even if the court, as in taking other offences into consideration (voeging ad informandum) or sentencing crown-witnesses, has the last word.

For such pre-trial arrangements, the opportunity and monopoly principles provide ample scope, although we should be careful to distinguish between consent and bargaining. Consent is formally required in a number of situations, although these will decrease substantially after penal orders come into effect. But consent does not imply negotiation. Even now, conditional waivers of prosecution, ad informandum procedure and victim compensation procedures are regarded as take-it-or-leave-it situations. That may or may not be the case and is not public knowledge, given the lack of public scrutiny. It is, however, certainly true that in most cases a suspect or defendant has by far the most to lose by not agreeing to a prosecutor’s proposal. In any event, the only indication that negotiations take place and that the prosecutor may not always be entirely in control of the situation, concerns powerful organised and corporate criminals, which has led to much political and public disapproval. There is, and has always been, a strong aversion to allowing a suspect or defendant to control events himself. Reluctantly, and only in the face of sustained pressure by politicians and the European Union, have victims been given a certain standing in criminal process, but not to the extent that they can formally force a prosecutor or a court to act in a certain way.

The underlying ideological reason for this state of affairs is the immense trust in the authority of the non-partisan prosecutor and the courts, and in hierarchical organisational controls, that the system reflects. It would be going too far to elaborate on this. Suffice it to say that in the Netherlands this inquisitorial feature of criminal procedure is taken to extremes. There are indications that the public are increasingly unwilling to trust the prosecution service, although the authority of the courts remains more or less intact. As yet, however, the political answer has been to shore up the position of the prosecution service, while paying not much more than lip service to demands that whatever goes on in the prosecutor’s office, should be subject to public scrutiny.
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THE STATUS OF eGOVERNMENT IN THE NETHERLANDS

S. van der Hof

1. Introduction

eGovernment has been high on the policy agenda since the mid 90s. Since then, the Dutch central government launched several programmes and issued a number of policy documents in the area of or related to eGovernment. This paper, first, provides a chronological overview of the most important government policy initiatives on eGovernment. 1 Subsequently, the paper addresses issues with legal implications or issues touching on legal matters, which have been addressed in these policy documents. Then, eGovernment practice in the Netherlands will briefly be described to show the impact of the policy initiatives, and eGovernment projects and programmes, so far. Finally, the paper addresses the regulatory framework for eGovernment, the remaining legal challenges and ends with a short conclusion.

2. Policy Initiatives

2.1. 1998 Electronic Government Action Programme

With the ‘1994 National Action Programme on Electronic Highways: From Metaphor to Action’ the Dutch government launched its first ICT policy initiative. This action programme aimed at stimulating the development of ‘electronic highways’, but did not as yet address the provision of online public services. After an evaluation of the results achieved under the ‘1994 National Action Programme’ in 1997, the Ministry of the Interior and Kingdom Relations launched the ‘1998 Electronic Government Action Programme’. This programme envisaged a more active role of the government by developing a more efficient and effective government through the use of ICTs. The programme revolved around three overall themes:

1. Good electronic access to government – The starting point here was that government information, which is fundamental in a democratic constitutional state, such as legislation, court decisions, parliamentary information, should be online accessible to citizens. As a result of this objective, for instance, the government portal www.overheid.nl and the project Government-Citizen Communications (e.g. resulting in PC’s with internet connections in public libraries) were established.

2. Better service to the public – One of the actions here included the continuation of the Programme OL2000, which was launched in 1996. This project aimed at the development of an electronic counter (‘one-stop shop’) for the provision of public services to citizens, in addition to existing traditional means of communication (multi-channel delivery). Also the use of chip cards for public services was studied.

3. Improving the back-office of national government – This action line purported an improved data exchange within the government with a view to use data already available with the government, one-time data provision by citizens and business, and a reduction in administrative burdens and cost efficiency for companies.

2.2. 1998 Legislation for the Electronic Highway

In 1998, the Ministry of Justice also launched the policy document ‘Legislation for the electronic highway’. Although it is not specifically focused at eGovernment as such, it deals with the influence of the dematerialization tendency on administrative law as well as the confidentiality (PETs, anonymous biometrics) and reliability (e-identification, digital signatures, TTPs) of electronic communications and, thus, affects eGovernment developments.

2.3. 1999 Dutch Digital Delta

In 1999, the policy document ‘The Dutch Digital Delta’ (D3) saw the light of day and introduced five pillars, amongst which the regulation and use of ICT in the public sector, which were considered essential for the ‘the future position of the Netherlands as a world leader in ICT’. D3 further builds upon earlier policy documents and, therefore, to a great extent overlaps with issues already mentioned before.

2.4. 2000 Contract with the Future

D3 was shortly thereafter followed by another policy document, titled ‘Contract With The Future’, in 2000. This document envisaged a new and more balanced relationship between citizens and government through ICTs and recognised that in order to achieve that goal government had to become more approachable to citizens, amongst others, by improving accessibility
and citizen participation and by providing citizens with more choices on how to structure their informational relationship with the government. Several pilot projects, studies and surveys were initiated accordingly, which intended to complement the activities already started under the '1998 Action Programme Electronic Government' and take them a step further.

2.5. 2003 Modernising Government

After a change of government, the 'Better Government For Citizens And Business Action Plan' was launched in 2002, but did not serve a long life. A year later already, the '2003 Action Plan Modernising Government' replaced the 2002 Action Plan due to, again, a change of government. 'Modernising Government' aims at a more reserved government with respect to regulation and concentration on tasks that are vital for a constitutional state as well as more responsibility for society at large. One of the lines of action includes the improvement of public service, including eServices. 'Modernising Government' has been further elaborated in the '2004 National ICT Agenda ‘Better Performance With ICT’ and the ‘2005 Follow-Up on National ICT Agenda ‘Better Performance With ICT’.

3. Legal and Regulatory Issues in eGovernment Policy

The policy documents of the previous paragraph address several persistent key issues that have legal implications or touch upon legal matters in Dutch eGovernment policy. The most important of which are: privacy, dematerialization of government communications, confidentiality and reliability of eGovernment communications, efficient eGovernment communications and service provision, interoperability of eGovernment data exchange, and access to and re-use of public sector information. This paragraph will further elaborate on these issues by addressing relevant developments in each category.

3.1. Privacy

Most policy documents clearly recognize that the privacy of citizens should be adequately guaranteed. Personal data of citizens must be kept confidential and the collection of such data must be transparent. Citizens should, e.g., be protected against datamining and the use of their personal data by third parties. More concrete plans mentioned are an opt-out system through self-regulation and the use of privacy-enhancing technologies (PETs)

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2 Kanerstukken II 2002/03, 28 755, nr. 1.
3 A policy document on personal information is expected soon, see: <http://www.minbzk.nl/ict_en_de_overheid/ict_en_de_overheid/blindgangers/ict_binnen_de/documenten_en_links_0#PrivacyEnhancingTechnologies>.
and anonymous biometrics. The latter will, however, be necessarily restricted by higher interests, such as state security and criminal investigations. Moreover, the ‘2000 Contract With The Future’ policy document initiates a study on control over and transparency of personal data. The study led to research projects, such as on legal and technical aspects of controlling own personal data and periodic reports to citizens on recorded own personal data. Results of the first project were published in 2001. In the same year, a special commission recommended the introduction of a voluntary digital safe (\textit{digitale kluis}), which provides citizens with access to their personal data and allows them to manage and supply personal data. The proposal was strongly criticized mostly for privacy and security reasons by the Dutch Data Protection Authority and several politicians. The proposal seems to have been abandoned since then. In 2003, the outcome of the second project is that a periodic survey of personal data of citizens should only be provided at their request. The establishment of a central register is unnecessary, but the government must provide sufficient help for citizens to be able to find out about registered personal data. Presently, the Ministry of the Interior works out whether such a service can be integrated with the Citizen Service Number (see further section 5.1.4).

Privacy is a thread in many of the other issues mentioned hereafter as well, most notably with respect to confidentiality, reliability, efficiency of eGovernment communication and service provision.

3.2. \textit{Dematerialization of eGovernment Communications}

The ‘1998 Legislation for the electronic highway’ policy document recognizes that administrative communication and decision-making processes, at that time, contained writing requirements, which needed to be adapted to electronic communications by changing of the General Administrative Law Act. The policy document, initially, advises the introduction of an experimental provision in this Act, which gives electronic decisions an equal status to written ones. This idea of an experimental provision was, however, soon abandoned again and in 2004 the General Administrative Law Act was permanently changed to accommodate electronic communications with(in) the government (see further section 5.1.1). Furthermore, the ‘1999 D3’ policy document addresses electronic tax declarations, which over the years have been successfully introduced for businesses and private persons, as well as electronic procurement as relevant eGovernment issues.

\begin{itemize}
\item[4] See also (in Dutch): <http://www.minbzk.nl/ict_en_de_overheid/ict_en_de_overheid/blindgangers/ict_binnen_de_0/beveiliging_en#Regieentransparantiepersoonsgegevens>.
\end{itemize}
3.3. **Confidentiality and Reliability of eGovernment Communications, Service Provision and Procedures**

The ‘1998 Electronic Government Action Programme’ first mentions the importance of reliable and confidential eGovernment communications, including issues such as identification and authentication. The policy document points at the relevance of information security and specific technologies, such as TTPs, digital signatures and chip cards. It also mentions explicit goals, such as ensuring sustainability with respect to digital government records. A project on digital longevity (<http://www.digitale duurzaamheid.nl>) had started already in 1996. Within this programme, knowledge and experiences of government organisations on digital information management and quality control have been made available over the years (so-called digital toolbox). Moreover, research experiments with respect to long-term digital preservation were performed. Recommendations on technical and preservation strategies are being made available on the programme’s web site.

The ‘1998 Legislation for the electronic highway’ policy document, moreover, points out that government legislation is necessary with respect to the use of biometrics, electronic identification, digital signatures, and TTPs. In the latter case, the document also anticipates self-regulation, which led to a trustmark for Certification Service Providers (i.e., TTPs that issue digital certificates for digital signing and encrypting purposes) (TTP.NL). With respect to electronic signing, the Electronic Signature Act 2003 was issued to implement Directive 93/9/EC (see section 5.1.1). In order to allow the use of biometrics in passports, legislation amending the Passport Act (Paspoortwet) is pending in the second chamber of parliament.7

Moreover, a government PKI (PKIoverheid, <http://www.pkioverheid.nl>) has been established and several private companies were admitted as certified Certification Service Providers (i.e., TTPs that issue digital certificates for digital signing and encrypting purposes) under the TTP.NL scheme.8 In 2004, the Dutch government embraced the newly established national authentication service (DigiD, <http://www.digid.nl>), which overrules the many authentication initiatives which existed in the Netherlands at the time. DigiD means a step forward in the field of e-identification and a more efficient eGovernment. The authentication scheme provides three security levels dependent on the service concerned: basic (user name and password), middle (Internet-banking mechanisms, software certificates), and high (PKIoverheid and electronic national identity card, expected to be introduced in 2006).

Finally, several quite recent incidents, such as a denial-of-service attack at the <http://www.overheid.nl> website, have shown that information

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7 *Kamerstukken II 2001/02, 28 342, nr. 1-5.*

8 An evaluation of government TTP policy was carried out in 2004: Zouridis *et al.* 2004.
security within the government is, however, still worrying. In 2002, the
Ministry of the Interior and Kingdom Relations started Govercert.nl
(<http://www.govercert.nl>), the Dutch government’s computer emergency
response team, and ‘waarschuwingsdienst.nl’ (<http://www.waarschu-
wingdienst.nl>) (a computer security alert service for citizens and SMEs) to
increase information security.

3.4. Efficient eGovernment Communications and Service Provision

The policy documents address several recurring topics on the efficiency of
eGovernment communications and services. First of all, the idea of the
reduction in the administrative burden led to the ‘streamlining of key data’
project (<http://www.stroomlijningbasisgegevens.nl>). A system of initially
6 key registers (i.e., registers on natural persons, companies, plots, addresses,
buildings, and geographic maps) is being established, in which key data need
to be provided only once and can, subsequently, be used by the public sector
as a whole. For the future, an expansion of the systems with further registers
is intended (probably including key registers for income and wealth, vehicle
registrations, non-residents, social-security records and the large-scale basic
map of the Netherlands). Within the project a study addressing, among other
things, privacy, liability, intellectual property rights, and archiving has been
performed to map and clarify the legal issues involved.9 Meanwhile,
legislation is pending or drafted to regulate the different registers (see further
section 5.1.5).

Another project, which aims at a reduction of the administrative burden
for government and businesses, is the Government Transaction Gate
(Overheidstransactiepoort (OTP), <http://www.ictal.nl>). OTP is a digital post
office which supports and facilitates standardized electronic communication
between government and companies. In 2004, a study into the legal aspects
of OTP, such as liability, evidence and security, was performed to map the
legal environment in which such a service operates.10

Second, the ‘2003 Modernising Government’ action plan announces the
introduction of a Citizen Service Number, expected in January 2006, to
improve service provision and enforcement (e.g., of fraud) by the
government (<http://www.programmabsn.nl>). The Citizen Service
Number is a unique identification number used in relationships with the
Dutch government and to some, as yet uncertain, extent in relationships with
non-governmental bodies, and will correspond with and replace the National
Insurance Number. Legislation regulating this personal number is currently
pending in Parliament. The Citizen Service Number is criticized from several
sides (amongst others, the Dutch Data Protection Authority and the Council
of State) for a number of reasons. First, worries exist with respect to the

9 Schreuders & Prins 2002.
10 Van der Hof et al. 2004.
integrity and security of the system. Currently, the quality of data available in the government back offices leaves much to be desired and an improvement as a result of the introduction of a Citizen Service Number is doubted. Second, better public service provision to citizens is an important argument for the introduction of the Citizen Service Number. However, the citizen is addressed rather as an object than as a customer and the actual interested parties seem to be the users of the system. Another important argument for a Citizen Service Number is the fight against identity fraud. Yet, some feel that an extended use of this number will rather reinforce identity fraud risks. So far, the Dutch government has neglected to address the risks of identity fraud. Finally, a special facility, a so-called roadmap, is intended to provide more transparency to citizens concerning the uses of the Citizen Service Number amongst public bodies and the legal basis for such uses. However, non-public bodies using the number are not included in the map. Moreover, an unsettled issue is the responsibility with respect to the quality of the information on the website concerned. In addition, the roadmap may provide more transparency so as to provide the government with more ideas and opportunities to exchange personal data.

Third, pro-active service provision is a persistent issue in Dutch eGovernment policy and research into legal and other barriers to pro-active service provision was felt to be necessary. In 2001, the government issued a practical guide on the development and implementation of pro-active service provision for the public sector. This handbook addresses the legal implications of using citizen information, more specifically personal-data protection. In pilot projects, pro-active services are further being developed. In a 2002 Research report on Electronic government and privacy, the Dutch Data Protection Authority also addresses the data-protection rules applicable to pro-service provision and stresses that personal data should be sufficiently up-to-date and appropriate for linking purposes to prevent problems with linking of files.

Finally, the ‘2003 Modernising Government’ document addresses the problem of adequate and timely replies to e-mails addressed to the government. Research of the National Ombudsman had shown that the central government lacked considerably in this respect. The policy document states that the government organization must be adjusted such that statutory deadlines can be met. Moreover, uncomplicated correspondence should have priority and in the case of delays and complex correspondence the procedure and final deadline must be announced to the sender. In 2000, a code of conduct on dealing with e-mail messages was issued for the Dutch ministries. In October 2005, ‘Burger@overheid’, a forum that stimulates

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11 See also Prins 2003, p. 2-3.
12 Prins 2006.
eGovernment from a citizen perspective (<http://www.burger.overheid.nl>), concludes on the basis of a study into government communication, however, that many municipalities still do not respond at all or late to e-mails, especially in the case of difficult questions and irrespective of an acknowledgement of receipt, some of which contained promises about further procedures and deadlines. This forum issued a code of conduct, based on the 2000 Code of Conduct for ministries, which has now been adopted by a small number of municipalities. In addition, the forum operates a complaints service on this issue.

3.5. Interoperability of eGovernment Data Exchange

The ‘2003 Modernising Government’ policy document briefly mentions the use of (open) standards for electronic data exchange with and between public bodies. In order to encourage the use of open standards and of open-source software, the OSOSS programme (<http://www.ososs.nl>) was started in 2003. Meanwhile, a national standardization council has been established to stimulate interoperability between governments and between government and citizens/business. Moreover, a knowledge centre for open-source software has been set up to meet the needs for expertise and support in this area.15

3.6. Access to and Re-use of Public-sector Information

The ‘1998 eGovernment Action Programme’ states that fundamental information of a constitutional state, such as legislation, court decisions and parliamentary information, as well as other government information must be made widely accessible through the Internet. Such information is currently available at different websites (e.g., <http://www.overheid.nl>, <http://www.rechtspraak.nl>, <http://www.eerstekamer.nl>, <http://www.tweedekamer.nl>). In 2000, the Advisory Commission on ‘Fundamental Rights in the Digital Era’, which was established by the Dutch government, recommended the introduction of a constitutional right of access to public-sector information as well as an obligation for the government with respect to the accessibility of fundamental information of a constitutional state. Although the government initially made a proposal mainly in lines with the recommendations of this commission, it was finally decided to leave any decision-making with respect to this particular constitutional right until after an evaluation of the Government Information (Public Access) Act 1991 (Wet openbaarheid van bestuur 1991) had taken place. This evaluation was carried out in 200416 and again recommended the introduction of a constitutional right of access to public-sector information as

15 Kamerstukken II 2003/04, 26 643-29 800XIII, nr. 67.
16 Van der Hof et al. 2004a.
well as a general law on access to, accessibility and use of public-sector information, which would replace the Government Information (Public Access) Act 1991. Furthermore, the evaluation report recommends making active dissemination of information the rule and access at request the exception. In line with this, the ‘2000 Contract With The Future’ policy document stresses that all government information should be actively made available to the public. In 2003, the ‘Modernising Government’ policy document announces a project to commence with active dissemination of all information on merely three urgent topics in 2006. In 2005, 8 ministries have, however, established a site with public-sector information that has been made public upon a recent request on the basis of the Government Information (Public Access) Act 1991. According to the evaluation report, the active dissemination rule should, furthermore, be complemented with legal obligations to guarantee actual and intellectual accessibility of public-sector information. In addition, back and front offices of public bodies should be better geared to each other and ICTs (including the Internet) should be used more and more effectively to achieve public-sector transparency. So far, however, statements by the government concerning the evaluation report, and the legal future of public access to public-sector information remain forthcoming.

In relation to the re-use of digital government information by companies, the ‘1998 Government Action Programme’ mentions the importance of clear conditions on non-discriminatory access to such information. This topic is, subsequently, addressed in other policy documents as well. Presently, legislation regulating the re-use of public-sector information is pending in parliament (see further section 5.2.2).

4. eGovernment in Practice

The previous sections show an impressive list of policy initiatives. This section will address the Dutch eGovernment situation to establish whether these policy initiatives have led to a productive eGovernment practice. Both the situation of eGovernment in the Netherlands as well as the Dutch situation compared to that in other countries are discussed.

4.1. eGovernment in the Netherlands

The status of eGovernment in practice differs at the national and local level as well as between small and large municipalities. The national level shows important developments, such as in the field of tax and customs administration, car registration, the student loan system and information exchange between social welfare agencies.17 The local level is not doing as

well as the national level, although some distinctions are necessary. Some cities took part in the OL2000 project (see section 2.1) and especially three of them, which were in later on indicated as SuperPilots (i.e., The Hague, Enschede, and Eindhoven/Helmond), show promising results. Moreover, outside the OL2000 project, large cities are doing better than smaller municipalities, because they own the resources to invest in eGovernment and there is a critical mass to use e-services. All in all, the progress at the local level has been rather slow. Not until the end of 2003 did all of the municipalities have a website, and the maturity of e-service delivery on these websites is rather low. To give an example, transactional services are still very few. Again with the smaller municipalities lagging behind the bigger ones. Furthermore, citizens rate off-line services higher than on-line services.18

More generally with respect to the implementation of ICTs in the public sector, the ‘1999 D3’ policy document observes that lack of central steering and co-operation between public organisations in this respect is felt as a problem.19 Good examples are the ample e-authentication initiatives in the public sector, which only after years have eventually been covered and replaced by one central facility, called DigiD. Joining such a central initiative makes it easier and financially more worthwhile for municipalities to implement e-authentication mechanisms in their eGovernment services than having to develop their own mechanisms. More and better co-operative action in other areas of developing eGovernment services may prove fruitful as well.

4.2. The Netherlands compared to other Countries

Until 2004, international benchmarks showed that the Netherlands have over the years dropped in rankings on eGovernment services and is no longer at the top. In relation to other EU countries, the number of online public services is low and the progress of getting such services online is slow.20 A recent international benchmark by Accenture measures a combination of service maturity and customers services maturity, which results in an overall maturity score. Service maturity consists of service breadth, the number of national services available online, and service depth, the level of completeness at which the service is offered (publish-, interact- or transact-level service). Customers services maturity is the extent to which government agencies manage interactions with their customers (citizens and businesses). On the 2005 overall maturity index, the Netherlands finds itself in the middle group, scoring only slightly higher than the average of 48% (50%), and being indicated as a follower. Trend-setters and challengers

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18 See all Leenes 2004, p. 8-11.
19 See also Leenes 2004, p. 12-15.
20 Leenes 2004, p. 11-12.
according to this benchmark are: Canada and the United States respectively Denmark, Singapore, Australia, France, Japan, Norway, and Finland.²¹

5. Regulatory Framework for eGovernment

An overall regulatory framework for eGovernment, i.e. an eGovernment Law, does not exist in the Netherlands. However, some laws address issues related to eGovernment and other laws that do not specifically address eGovernment may nevertheless be applicable to this area. This section will first deal with the most relevant legislation in both categories respectively and wind up with concluding remarks concerning the regulatory framework for eGovernment.

5.1. eGovernment-related Laws

5.1.1. Electronic Government Communications

On 1 July 2004, the Act on Electronic Government Communications (Wet elektronisch bestuurlijk verkeer), which amends the General Administrative Law Act (Algemene Wet Bestuursrecht), was enacted. The law regulates electronic communications between government bodies on the one hand and between government and citizens/businesses on the other hand. Parties involved must have given express notice of their electronic contactability. The sole availability of an e-mail address does not amount to such contactability. Government bodies can give notice with respect to specific forms of e-communication in different ways, i.e. through a general regulation, an individual e-mail message, on websites, the local paper, etc. Moreover, the law takes a functional approach, i.e. electronic messages should be sufficiently reliable and confidential as regards the nature and the content of the message as well as its purpose. In other words, the security of electronic communications should be as reliable and confidential as conventional communications, and some instances require more security measures (e.g. granting a license) than others (e.g. providing general information). Both the criteria of reliability and confidentiality depend upon the state of the art and may be further defined by technical rules for specific situations. Furthermore, with respect to e-signatures this law refers to the section in the Civil Code (Electronic Signature Act 2003), which implements Directive 99/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures,²² and is also based on the functional approach as well as on the distinction between


advanced and normal e-signatures as laid down in the Directive. These provisions are applicable to government e-communications, unless the nature of the message concerned opposes such an application. Also, law can impose additional requirements for the use of e-signatures in e-communications with (in) the government. In view of complying with deadlines, this law finally determines the times of dispatch and receipt of e-messages sent to government bodies.

5.1.2. eProcurement

On 1 December 2005, the Regulation on procurement rules for public contracts (Besluit aanbestedingsregels voor overheidsopdrachten), which implements Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contract, entered into force. Among other things, the Regulation regulates the possibility of eProcurement. The objectives are to allow for more efficient and timesaving public procurement procedures and to introduce new ways of public procurement, i.e. electronic auctions and dynamic purchasing systems. Electronic auctions function as an automated evaluation method, ranking tenders anonymously depending on new prices revised downwards and other new values concerning certain elements of the tenders. A dynamic purchasing system is a fully electronic system intended for common purchases with characteristics generally available in the market. Before sellers or service providers can subscribe to specific procurement offers, they have to submit an indicative tender to be admitted to the system.

Following the Act on Electronic Government Communications, ‘writing’ in this Regulation includes electronic documents and is defined in line with the Directive, which states that (in) writing is ‘any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means’.

5.1.3. Electronic Tax Returns and Invoices

Since January 1996, tax legislation allows tax declaration forms to be filed with the Tax Department electronically. Since January 2005, companies are legally obliged to electronically file tax declaration forms with respect to, among other things, income, corporation and turnover taxes. With the implementation of Directive 2001/115/EC of 20 December 2001 amending

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24 Wet van 6 december 1995 tot wijziging van de Algemene wet inzake rijksbelastingen en van enige andere wetten in verband met de invoering van de mogelijkheid tot het doen van aangifte op elektronische wijze, Staatsblad 1995, 606.
Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax, electronic invoicing has been introduced into Dutch law. Electronic invoices will be accepted by the tax inspector when the authenticity of the source and the integrity of the contents of the invoice are sufficiently guaranteed, which is, for example, the case when an advanced electronic signature in the sense of Directive 99/93/EC on electronic signatures is used. Under certain conditions, electronic invoicing through EDI and other methods are allowed as well.

5.1.4. Citizen Service Number

Presently, a proposal for a Citizen Service Number Act is pending before parliament, regulating the Citizen Service Number already elaborated upon in section 3.4. The proposed law addresses the attribution, use and management of these personal numbers, and more specifically the protection of personal data.

5.1.5. Streamlining of Key Data

Under the ‘streamlining of key data’ project (see section 3.4) legislation is planned for the beginning of 2007 addressing each of the key registries. These laws will address the terms and definitions used in the registries, management of the registries, the conditions for data exchange, and the obligatory use of registries by public bodies (to actually stimulate more efficient uses of data and one-time data provision). The project also instigates amendment of the Personal Data Protection Act and the General Administrative Law Act. Future legislation is expected with the introduction of additional key registries.

5.1.6. Electronic Crime Reports

In 2005, the Code of Criminal Procedure has been amended to accommodate electronic crime reports and records. Further regulations may be issued to set the requirements for such reports and records.

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25 Wet van 18 december 2003, houdende wijziging van de Wet op de omzetbelasting met het oog op de vereenvoudiging, modernisering en harmonisering van de ter zake van de facturering geldende voorwaarden op het gebied van de belasting over de toegevoegde waarde, Staatsblad 2003, 530.

26 Kamerstukken II 2005/06, 30 312, nrs. 1-4.

5.2. General Legislation Relevant to eGovernment

5.2.1. Personal Data Protection

The Personal Data Protection Act 2000 (Wet bescherming persoonsgegevens 2000) implements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. When eGovernment activities encompass the ‘processing of personal data’, a notion that includes many different activities with respect to data (capable of) identifying an individual, and the processing of such data is not already covered by a more specific Act (e.g., the Municipal Database (Personal Records) Act), this Act applies to such activities. eGovernment services using citizen information are likely to be subject to the Personal Data Protection Act 2000.

5.2.2. Access to and Re-use of Public Sector Information

The Dutch Constitution holds an obligation for both government and the judiciary to observe openness (openbaarheid) in the course of their duties. Access to public-sector information has been predominantly regulated in the Government Information (Public Access) Act 1991. According to this Act, any person (including legal persons and public bodies) can request information, which is related to an administrative matter and contained in documents, held by a public body or organisation working on behalf of a public body. Access can be restricted on grounds of unity of the Crown, state security, company secrets, Dutch relations with other states and international organisations, state economic and financial interests, criminal investigations, personal-data protection, etc. In addition, public bodies must provide information relevant to a proper and democratic government of their own accord.

In 1998, access to environmental information has been included in the Government Information (Public Access) Act 1991 (implementation of Directive 90/313/EC of 7 June 1990 on the freedom of access to information on the environment). In 2004, the Aarhus Treaty was directly implemented into Dutch law. In 2005, two further directives, which were

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29 OJ L 158, 23.06.1990.
31 Wet uitvoering Verdrag van Aarhus, Staatsblad 2004, 519.
issued as a result of the Aarhus Treaty, were implemented in, amongst others, the Government Information (Public Access) Act 1991.\textsuperscript{33} Presently, proposed legislation, which implements Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, is pending in the second chamber of parliament.\textsuperscript{34} This law will, amongst others, add a chapter on re-use to the Government Information (Public Access) Act 1991.

5.2.3. Preservation of Government Information

The 1995 Archives Act (\textit{Archiefwet 1995})\textsuperscript{35} and 1995 Archives Decree (\textit{Archiefbesluit 1995})\textsuperscript{36} regulate the filing, storage and destruction of public-sector records. The purpose of the 1995 Archives Act is to guarantee the public nature and preservation of public-sector archives. This law does not contain any form requirements with respect to records and is, therefore, also applicable to electronic records and archives. The 2002 Regulation on the Arrangement and Accessibility of Records (\textit{Regeling geordende en toegankelijke staat archiefbescheiden 2002}) does, however, contain complementary requirements for digital records, such as with respect to metadata on content, form and structure, and technical data on conversion, migration and storage.

5.3. Concluding Remarks

The regulatory framework for eGovernment is, on the one hand, made up of eGovernment-related legislation, which amends existing legislation relevant to government communications, services and procedures in order to accommodate electronic equivalents, and, on the other hand, general legislation that applies to these government communications, services and procedures regardless of their electronic nature. In the first case, it is interesting to determine whether the adage ‘online = offline’, which was introduced by the ‘1998 Legislation for the electronic highway’ policy document, was followed by the Dutch legislator. This adage essentially means that the same norms should apply online as are applied offline.\textsuperscript{37} eGovernment-related legislation, particularly, addresses the dematerialization, reliability and confidentiality, and efficiency of government services and communications. With respect to dematerialization, and reliability and confidentiality, legislation is aimed at providing electronic

\begin{itemize}
\item \textsuperscript{33} Implementatiwet EG-richtlijnen eerste en tweede pijler Verdrag van Aarhus, \textit{Staatsblad} 2005, 341.
\item \textsuperscript{34} Kamerstukken II 2005/06, 30 188, nrs. 1-6.
\item \textsuperscript{35} \textit{Staatsblad} 1995, 277.
\item \textsuperscript{36} \textit{Staatsblad} 1995, 671.
\item \textsuperscript{37} Schellekens 2006.
\end{itemize}
equivalents to paper and oral services and communications. The idea of functional equivalence, which is adhered to in that respect, clearly shows the intention to endorse the off-line situation. Because of an inherent unreliability of electronic communications, this often leads to supplementary requirements that guarantee authenticity and integrity of such communications, but such requirements do not detract from the essence of this adage. Ultimately, new legislation has in this area merely been introduced to extend legislation to electronic communications. With respect to a more efficient government, the situation is somewhat different, because in that case new systems (e.g., the key register and Citizen Service Number), which as yet do not exist in the off-line world either, are introduced to achieve the goals set by the government. Both systems will, however, impact the offline as well as the online world, although the effect may be more substantial with respect to the latter. Finally, it is worth recalling that recent eProcurement legislation introduces new possibilities (electronic auctions and dynamic purchasing systems) exclusively for the on-line world.

Moreover, it is notable that European law to a great extent influences the regulatory framework, i.e. EU directives, which over the years have been implemented into Dutch legislation, although this is obviously the case more generally and not as such specific to eGovernment issues. The ‘1998 Legislation for the electronic highway’ policy document expresses a preference for international regulatory action with respect to issues concerning the electronic highway, however, so far eGovernment is, regardless the European influence, predominantly still a national issue. Yet, this may change in the future, because a need to attune national eGovernment services and procedures at the European level clearly starts to surface and leads to, e.g., interoperability and standardization issues.

Finally, this section has shown that the regulatory framework for eGovernment consists of government legislation. In the Netherlands, self-regulation, for instance, is not a common means used for regulating eGovernment, although the ‘1998 Legislation for the electronic highway’ shows a preference for self-regulation in the short term to get ICT developments going successfully. Self-regulation is, however, not considered suitable where fundamental values and norms of the constitutional state are at stake, which explains to a large extent why this kind of regulation is omitted in the eGovernment area. Moreover, the interest of the government clearly outweighs the interests of companies and citizens in this respect, making eGovernment predominantly a government issue and not an issue in which the market and more generally non-government stakeholders are expected to take (a part of the) regulatory responsibility. Nevertheless, examples exist where self-regulatory instruments have an impact upon eGovernment. First, the TTP.NL scheme, which holds criteria for CSPs providing qualified certificates to the private sector (see section 3.3). This scheme is also applicable to those CSPs that wish to join the government PKI (PKoverheid). A second example is the codes of conduct for ministries and municipalities on dealing with e-mail communications (see section 3.4).
6. Remaining Challenges

In view of the actual status of eGovernment in the Netherlands and the position of this country internationally, obviously the further development and sophistication of eGovernment services as such remains a challenge for the near future. More specifically, the persistent key issues that have legal implications or touch upon legal matters in Dutch eGovernment policy elaborated upon in section 3 (i.e. privacy, dematerialization of government communications, confidentiality and reliability of eGovernment communications, efficient eGovernment communications and service provision, interoperability of eGovernment data exchange, and access to and re-use of public sector information) deserve further attention while eGovernment progresses. This section will address the most pertinent remaining challenges for eGovernment for each of the key issues identified earlier.

6.1. Privacy

Data protection remains an important challenge with respect to most of the key issues, since most eGovernment services include the processing of personal data. In order to avoid problems, such as time and money-consuming technical, organizational and policy adjustments, at a later stage, data protection rules must be taken into account and implemented in eGovernment services right from the start. Such timely and correct implementation is not merely relevant in view of complying with data-protection rules, but is also likely to stimulate trust of citizens in eGovernment services.38

Another important issue is progress in the creation of a digital identity infrastructure (including, e.g., the introduction of the Citizen Service Number), in which a digital identity (e.g., electronic signature, biometric passport) is linked to the physical identity of an individual. Such an infrastructure affects the protection of personal data and, more generally, the privacy of citizens, because in time their actions are at risk to become, dependent on fundamental (future) choices to be made, completely transparent within and perhaps outside the government information infrastructure.39 Therefore, the Dutch Data Protection Authority advocates what is called privacy by design: government needs a proper identity infrastructure to be sure of a citizen’s identity, however, not in every instance do citizens have to be identifiable within this system. Non-identifiability can in such cases be made part of the design of the identity infrastructure by, e.g., implementing privacy-enhancing technologies (PETs).40 The increasing

importance of issues such as identity and identity management, including the protection of privacy in that respect, is also evident from substantial European research projects, such as PRIME (Privacy and Identity Management for Europe, <http://www.prime-project.eu.org>) and FIDIS (Future of Identity in the Information Society, <http://www.fidis.net>). In Dutch government policy, these issues so far, however, remain highly underexposed.

Finally, a remaining challenge is citizen control with respect to own personal data. The Dutch Data Authority states that transparency is an important prerequisite for citizen trust in the government and one of the issues (among other issues such as access to public-sector information) in that respect is transparency of personal-data use by the government. The finality principle, i.e. personal data should solely be collected for clearly defined and specific purposes, used as a design principle for the information infrastructure plays a crucial role in stimulating trust.41 In this respect further monitoring of the development and adequacy of government initiatives, such as the possible integration of a service to provide transparency of personal-data uses with the Citizen Service Number (see section 3.4 on the roadmap to be introduced in draft legislation on this number), is important.

6.2. Dematerialization of Government Communications

The regulatory framework addressing the legal status of electronic communications must be kept up-to-date while technology progresses. Most laws mentioned in section 5.1 currently seem to be formulated sufficiently technology-neutral and, thus, capable of dealing with new technologies. However, technical rules that elaborate on these laws and go into further details on the technical specifics have to be monitored periodically in order to keep up with, for instance, new and updated standards. Also, the strong focus on advanced electronic signatures – and thus the specific technology of digital signatures - in electronic-signature legislation may need revision, when future technologies provide new forms of reliable and authenticated electronic communication. Moreover, while the dematerialization tendency proceeds, some legislation may still need adapting in order to encompass electronic communications and services.

6.3. Confidentiality and Reliability of eGovernment Communications

Besides persistent issues already mentioned in section 6.1, information security will continue to be a crucial point of attention in eGovernment processes because of the inherent vulnerability of ICTs. A recent incident, for instance, where security experts gained access to medical data of 1.2 million individuals in two hospitals as a result of inadequate security arrangements,

has alerted the government again to ICT vulnerability and, thus, to the urgency of sufficiently adequate information security mechanisms. The introduction of electronic patient files in January 2006 has now been postponed with at least a year. Moreover, the government announced legislation on such files, which will address security and reliability issues.42

6.4. Efficient eGovernment Communications and Service Provision

The Citizen Service Number to be introduced nationally in 2006 will in view of the criticism of the Dutch Data Protection Authority and the Council of State (see section 3.4) persist as an issue of further attention. The same is true for the way in which the government deals or, rather, does not deal (timely) with e-mail communications by citizens (see section 3.4). Efficiency can be effective only if the government practices what it preaches.

6.5. Interoperability of eGovernment Data Exchange

As was mentioned in section 5.3, interoperability gets more and more important in the European context, as is shown by the IDABC programme (Interoperable Delivery of European eGovernment Services to Public Administrations, Businesses and Citizens, <http://www.europa.eu.int/idabc>). This programme aims at improving efficiency and collaboration between European public administrations by establishing pan-European eGovernment services.43 Moreover, at the national level the interoperability of eGovernment services and processes and co-operation within the public sector remain relevant in view of the furtherance of eGovernment.

6.6. Access to and Re-use of Public Sector Information

The debate on the modernization of the Government Information (Public Access) Act 1991 as a consequence of, amongst others, ICT developments, and the introduction of a constitutional right of access to public-sector information as well as an accompanying obligation concerning accessibility of fundamental public-sector information as addressed in section 3.6 is still unsettled.

7. Conclusion

This status report shows a remarkable list of eGovernment policy initiatives. However, a lot of work still has to be done to bring eGovernment practice to

42 Kamerstukken II 2004/05, 27529, nr. 18.
a full and a more sophisticated momentum. To a large extent the regulatory framework is in place; yet some laws are presently still pending in parliament or being drafted by the legislator. Several key issues that have legal implications or touch upon legal matters in Dutch eGovernment policy can be identified, i.e. privacy, dematerialization of government communications, confidentiality and reliability of eGovernment communications, efficient eGovernment communications and service provision, interoperability of eGovernment data exchange, and access to and re-use of public sector information. These issues remain challenges for the future of Dutch eGovernment.

Because this paper has primarily addressed issues from a legal angle, some facets of eGovernment that effect society at large have remained underexposed. To conclude, these aspects will briefly be mentioned here. First, the advance of electronic communications and services increasingly seems to result in an elimination of traditional communication mechanisms (i.e., paper and oral communications). Although the Act on Electronic Government Communications still optimistically propagates the optional use of e-communications, obligatory electronic tax declarations for business are a fact already. The legitimate question is how soon elimination will penetrate other public-sector areas and services? Second and related to the tendency of elimination, exclusion of citizens may occur as far as access to electronic information and services is concerned. Although a large majority of citizens is online nowadays, part of the population may – in spite of public computers in, e.g., libraries and other projects to win people over – for whatever reasons remain deprived of electronic access. Moreover, eGovernment seems to result in a shift in initiative from citizen to government. Obviously, active service provision will contribute to such a shift, yet also plans by the Tax Authority to automatically fill in tax declarations for citizens. Some feel, however, that such a development will diminish the individual freedom of citizens to be known to the government as a certain person. Finally, an area where challenges and issues mentioned in this conclusion and earlier in the paper come together is personalization of public service provision, i.e. the use of ICTs to tailor services and information to the individual needs and desires of citizens. Like identity management and identity fraud, this is an increasingly relevant issue not yet addressed (substantially enough) in eGovernment policy.

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