

THE DUTCH SUPREME COURT AND PARLIAMENT: POLITICAL DECISIONMAKING VERSUS NONPOLITICAL APPOINTMENTS

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The Hoge Raad der Nederlanden (Dutch Supreme Court), founded in 1838, has grown from an insignificant body to a politically important institution in Dutch society. Partisan politics, however, does not influence appointments of justices, although the formal procedure of appointments gives the lower house of Parliament ample opportunity to exercise such influence. This nonpolitical appointment to a highly politically active highest court is unique among highest courts in Western democracies. In this article, I examine the history of both the decisionmaking of the Court and the appointments of justices and suggest explanations for the disparity between the political role of the Court and the nonpolitical appointments. I also compare the Dutch exception to the practice of highest courts in other Western democracies, concluding that there is evidence that partisan political interference in appointments to the Dutch Supreme Court will grow in the future.

I. INTRODUCTION

In 1919 the *Hoge Raad der Nederlanden* (the Dutch Supreme Court) rendered a decision in *Lindenbaum v. Cohen* (1919) that meant the start of a new era, both for the Supreme Court and for its political role in Dutch government. Lindenbaum was an Amsterdam printer. A competitor, Cohen, had given money to an employee of Lindenbaum to gain access to information at Lindenbaum's office, including, for instance, copies of contracts with customers. Lindenbaum sued Cohen in tort and won at the trial court but lost at the court of appeal. The case continued up to the Supreme Court.

Until then the Supreme Court had held that one is liable in tort only if a statutory provision has been violated. Cohen had not

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committed such a violation. In the decision in *Lindenbaum v. Cohen*, however, the Court changed its course dramatically, and decided that the relevant article in the Civil Code (art. 1401), which states that one is liable for violation of an *statutory rule*, should be read as “an act or omission which infringes another’s right, or conflicts with the defendant’s statutory duty, or *is contrary either to good morals or to the carefulness which is due in society with regard to another’s person or property*” (translation by Fokkema, 1978: 137–38; emphasis added).

With *Lindenbaum v. Cohen* the Supreme Court departed from its strict adherence to the literal interpretation of statutes and for the first time took an expansive view of law.¹ During the following decades the Court extended this broad interpretation of codes and statutes, growing from an insignificant nonpolitical body to a politically powerful institution in Dutch society.

While the Dutch Supreme Court grew to a politically influential body, partisan influences in appointments to the court did not develop. In this article I will discuss the relation between changes in the appointments to the Court and its political (and nonpolitical) role in Dutch society from the Court’s founding in 1838 to the present. I will show the tremendous contrast between the political role of the Court and the present practice of appointments of justices, comparing the Dutch Supreme Court to highest courts abroad.

The basic theoretical question I address is how judicial independence, especially judicial policymaking, can be reconciled with democracy. In most Western democracies, as judicial policymaking expands, partisan political involvement in the appointment process of justices increases in one way or another. The highest courts in Western democracies rarely have substantial political power without a political or partisan system of appointments.

In general, two models of appointments to the highest courts prevail. In one model, most justices are appointed from the judiciary and appointment to the highest court forms a natural final position in a lawyer’s career. In these cases appointment to the highest court is often, but not always, restricted to career judges, and partisan political influence is indirect or absent (see Table 1). Examples are appointments to the cour de cassation in France,² to Law Lord in the United Kingdom, and to the corte di cassazione in Italy. The second model is political appointment of justices, usually by partisan affiliation. In these appointments, the parliament or a parliamentary committee plays an important role. Examples are appointments to the U.S. Supreme Court, to the Bundes-

¹ Recently Van Maanen (1986: 129) pointed at a few earlier incidental decisions, in which the Court did not strictly adhere to the literal text of a statute either.

² I restrict the discussion to ordinary court systems. In most so-called civil law centuries, there is also an administrative court system.

Table 1. Constitutional Review of Statutes and the Appointment Process in High Courts in Western Democracies and Japan

| Country & Court | Judicial Activism | Appointments | Sources |
|--|--|--|---|
| United Kingdom House of Lords | No constitution, no const. review | Career appointments | Paterson, 1982; Waltman, 1988: 114 ff. |
| Switzerland Bundesgericht | Const. review explicitly prohibited | Political appointments, apportioned among parties. 6-year term | Dölle & Engels, 1989: 33-34; Schubert, 1985: 16 |
| Belgium Hof van Cassatie | Prohibition of const. review | Career appointments with nonovert political influence | Craenen, 1988: 17; Koopmans, 1988 |
| Arbitragehof | Since 1980 review of acts to certain const. articles | Political appointments; 6 jurists, 6 politicians | |
| Luxembourg Cour Supérieure de Justice | Prohibition of const. review | Career appointments | Thill, 1988: 431 |
| Sweden Högsta Domstolen | Since 1979 const. review, but rarely employed | Career appointments | Board, 1988: 186-87 |
| Denmark Højesteret | Since 1921 const. review, but rarely employed | Career appointments | Dölle & Engels, 1989: 28-29 |
| Norway Høyesterett | Since 1918 const. review, but rarely employed | Career appointments | Dölle & Engels, 1989: 27-28 |

Table 1 (Continued)

| Country & Court | Judicial Activism | Appointments | Sources |
|-----------------------------|--------------------------|---|---|
| The Netherlands | | | |
| Hoge Raad der Nederlanden | see text | see text | |
| Israel | | | |
| Beit Hamischpat Haelion | Cautious judicial review | Career appointments by partly political nominating committee | Edelman, 1987 |
| Spain | | | |
| Tribunal Supremo | No const. review | Career appointments by semi-political Censejo General del Poder Judicial | Dölle & Engels, 1989: 36; Prakka, 1988: 655-56; Brewer-Carías, 1989: 225 ff. |
| Tribunal Constitucional | Since 1979 const. review | King appoints 12 members on recommendation of parliament, senate, and government. Jurists | |
| Portugal | | | |
| Supremo Tribunal de Justica | No const. review | Career appointments by semipolitical Conselho Superior da Magistratura | Dölle & Engels, 1989: 37; Lunshof, 1988: 583 ff; Brewer-Carías, 1989: 265 ff. |
| Tribunal Constitucional | Since 1976 const. review | Political appointments: 13 members, 10 app. by parliament, 3 by cooptation. 6-year term | |

Table 1 (Continued)

| Country & Court | Judicial Activism | Appointments | Sources |
|--|--|--|---|
| France Cour de Cassation Conseil Constitutionnel | No const. review Since 1958 const. review, both before and after act comes into force | Career appointments Political appointments: 9 members, 3 each by president, Assemblée Nationale, Sénat. 9-year term | Rademaker, 1988 |
| Italy Corte di Cassazione Corte Costituzionale | No const. review Since 1948 const. review | Career appointments Political appointments; 15 members, 5 each by president, united meeting of parliament, other high courts. 9-year term | Di Federico & Guarnieri, 1988 |
| German Federal Republic Bundesgerichtshof, Bundesarbeitsgericht, Bundessozialgericht Bunderversfassungsgericht | No const. review Since 1948 const. review | Political appointments by committee from Bundestag and Länder Political appointments; half by Bundestag, half by Bundesrat. 12-year term. Members include former politicians | Blankenburg, 1988; Holland, 1988: 91-93; Hondius, 1988: 247-48; Kommers, 1976 |

Table 1 (Continued)

| Country & Court | Judicial Activism | Appointments | Sources |
|--------------------------------|---|---|--|
| Austria Oberste Gerichtshof | No const. review | Political appointments, apportioned among parties | Dölle & Engels, 1989: 32-33 |
| Verfassungsgerichtshof | Since 1920 const. review (present form from 1945) | Political appointments, apportioned among parties. Jurists | |
| Japan Saiko Saibansho | Since 1947 const. review | Political appointments by cabinet | Itoh, 1988 |
| Ireland Chúirt Uachtarach | Since 1937 const. review | Political appointments by cabinet | Koekkoek, 1988: 338 ff; Morgan, 1985: 47 ff. |
| Canada Supreme Court | Const. review | Political appointments from judiciary | Baar, 1988 |
| United States Supreme Court | Const. review | Political appointments by president, subject to Senate approval | Abraham, 1985; Solomon, 1984 |

NOTE: By and large, countries are ranked from least to most activist court, even though such ranking must at times be arbitrary.

verfassungsgericht in West Germany, to the corte costituzionale in Italy, to the Supreme Court of Canada, and to the conseil constitutionnel in France.³

The highest courts in Western democracies also vary in the extent to which they play an active political role in their country. Politically inactive courts tend to adhere to precedents or the literal text of statutes,⁴ as, for instance, the cour de cassation or the House of Lords. Moderately political active courts take an expansive view of precedents and statutes, as is done by the Dutch Hoge Raad der Nederlanden. The most political active courts exercise judicial review of statutes to achieve conformity with the constitution. That power, either based on statute or adopted by the court itself, attracts partisan political involvement in the appointments to the court (see Table 1).⁵ The most striking example is the U.S. Supreme Court, although the magnitude of its power is unique among Western democracies, or even compared to other common law countries.⁶ Outside the common law countries, constitutional review was introduced only recently, after the Second World War. In these countries the power of constitutional review was not given to the then highest court but to a specially created constitutional court (see Table 1).⁷

Models of appointment and political activity appear to be related. The second model of appointments—active partisan influence by parliament—is applied to highest courts that have a polit-

³ Partisan political influence could also be exercised through *removal* of justices. In the courts under discussion, the justices are appointed either for a specific term (for instance, nine years in the constitutional courts of France and Italy, or twelve years in the constitutional court of West Germany), with or without the possibility of another term, or they are appointed for life. The latter can mean until death (as in the U.S. Supreme Court) or until a preset age (usually seventy, as in the Dutch Supreme Court). In all countries, however, justices are protected from political or government influence during their tenure, either because no removal procedure exists or because the removal procedure is very cumbersome.

An indication of partisan political influence on appointments may also be found in the composition of the highest courts. Holland (1988: 92–93) states that the political role of the German constitutional court is emphasized by the fact that the justices are recruited not only from the judiciary but also from among civil servants, law professors, and politicians who have passed the state law examination. Although recurring appointment of politicians may support his contention, there is no reason to evaluate the appointment of former law professors and former civil servants as an indication of the political role of a court.

⁴ Depending on whether the court operates in a common or civil law country, respectively.

⁵ Table 1 deals only with the most far-reaching form of judicial activism, constitutional review.

⁶ Although the Supreme Court of Canada can exercise constitutional review, Baar (1988: 55) stresses that this court took a much more restrained approach during the 1970s than did the U.S. Supreme Court.

⁷ Brewer-Carías (1989: 185 ff.) refers to a system in which a special court is created for constitutional review—the concentrated system, as opposed to the diffuse system in, for instance, the United States.

ical active role and the first model of appointments to politically inactive courts. In other words, the more politically active a highest court is, the more political partisan influence on the appointments to the court.

The Dutch Supreme Court casts some light on how democracies can manage this process, because it presents a seeming paradox: as the Supreme Court became more involved in policymaking during the last century and a half, parliamentary involvement in the appointment process declined.

In the following, I will try to develop some explanations for this phenomenon, based on the developments of both the decision-making by the Court and the appointments to the Court during the last century and a half. In order to give some background to the discussion, I begin with a brief outline of the Dutch legal culture and the Dutch court system.

II. THE LEGAL CULTURE

Prior to the French occupation of The Netherlands—the occupation lasted from 1795 to 1813—the country was a federal republic that consisted of rather autonomous provinces and consequently had a judicial system that resembled a hotchpotch. Although Roman-Germanic law provided a generally accepted legal framework, much of legal decisionmaking was governed by customary law. The French not only brought the system of codification to The Netherlands but also left the country with a uniform, hierarchical structure of courts.

In 1814 the country became a constitutional monarchy. The constitution prescribed codification of the law which resulted in the Civil Code of 1838 and the Criminal Code of 1881. These codes, as revised, are still in force today.⁸ The basic idea of extensive codification in The Netherlands—as, for instance, in Germany (Holland, 1988)—was that every conceivably subject could be incorporated in a code, and thus the judge's role was no more than to apply a rule of law to a specific case (*"le bouche de la loi,"* after Montesquieu, 1871 [1748]). The body of legislative rules was paramount, and any development of the law through precedents was out of the question. This view of the division of power was paramount in nineteenth-century legal thinking, especially in the civil law countries (see Cliteur, 1989; Cummins, 1986; Kommers, 1976).

According to the traditional civil law model of judicial decisionmaking, once the facts of the case are subsumed under the applicable legal rule, the decision should almost automatically

⁸ Shortly after the Second World War, a fundamental recodification of the Civil Code was undertaken. The *Nieuw Burgerlijk Wetboek* (New Civil Code) came into force only in part and will come into force completely in 1992.

emerge. Because dissenting opinions suggest that the codes might be unclear, they are strictly prohibited.⁹

The Dutch codes were, and are, not subject to judicial review or amendment. An article in the constitution itself declares statutes untouchable.¹⁰ Judicial review of the constitutionality of statutes, then, is impossible. Treaties, however, supersede legislation, and through review of statutes for conformity with treaties, as, for instance, the Treaty of Rome, a limited form of "constitutional" review is possible.

Legal procedure in The Netherlands, like that in most civil law countries, accords with an *inquisitorial* model: the judge controls proceedings, the calling and questioning of witnesses, and the like. The judge's active role in court has no parallel outside the court. Members of both the sitting and standing magistracy tend to keep a low profile. To take the justices of the Supreme Court as an example, only a few Dutchmen could name one or more members of the Supreme Court and most law students cannot name the president of the Court. Justices are reluctant to express their individual opinions publicly. Until a decade ago, for instance, contributions of Supreme Court justices to debates at meetings of the Dutch Law Association (Nederlandse Juristenvereniging) were left out of the printed proceedings. There has been a tendency over time toward more openness for the judiciary, but explicit political involvement is still subject to strong criticism.¹¹

The basic model of Dutch civil and criminal law has not changed since the beginning of the nineteenth century, but dramatic changes have occurred within that basic framework, changes in which the Dutch Supreme Court played a major role. Before discussing these changes, I will give a brief outline of the Dutch court system.

III. THE STRUCTURE OF THE COURTS

As in most other civil law countries, the administration of justice in The Netherlands is divided among administrative and ordinary courts. I restrict my discussion to the ordinary courts. The judicial organization is based on the Judicial Organization Act (Wet op de Rechterlijke Organisatie) of 1827. This act, accomplished after twelve years of discussion, changed the enormously

⁹ For instance, violation of the secrecy of judges' deliberations prior to their decision ("the secrecy of the courts chambers") is not allowed.

¹⁰ The relevant article in the constitution, now art. 120 Grw. Ned., used to read, "the acts of parliament are untouchable," but with the constitutional revision of 1983 has been rephrased to "the judge will not enter into judgment of the constitutionality of acts of parliament." However, it is generally assumed that the meaning is still the same (see, e.g., Van Buuren, 1987: 54 ff.; Polak, 1987: 122).

¹¹ For instance, the vice president of the Amsterdam trial court, Cnoop Koopmans, was much criticized for becoming a member of the Amsterdam city council.

diverse court system that existed in every Dutch province prior to the French occupation into a nationally uniform hierarchical structure. The secession of the Southern Netherlands (now Belgium) necessitated some changes in the 1827 act, and thus the act did not come into force until 1 October 1838. On that date, all courts entered upon their duties. The act—as revised—has survived the past one and a half centuries.

The Dutch court system is organized in four layers (see Fig. 1). The lowest level, the cantonal court (*kantongerecht*) hears

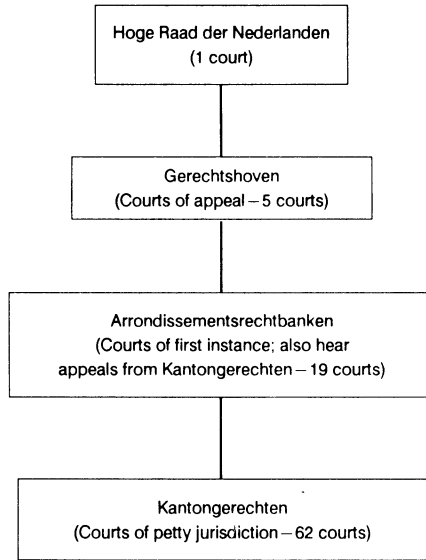


Figure 1. Structure of ordinary courts in The Netherlands

petty offenses and small claims. In addition, the cantonal court has original jurisdiction for some specific civil cases, regardless of amount of controversy, among which the cases involving tenancy and labor. The trial court (*arrondissementsrechtbank*) hears all other criminal and civil cases. The trial court hears also appeals from decisions of the cantonal courts in its district.¹² Decisions of the trial court sitting as a court of first instance are appealable to the court of appeal (*gerechtshof*). In ordinary appeals, the cases are dealt with *de novo*. The sixty-two cantonal courts, the nineteen trial courts, and the five courts of appeal are structured hierarchically.

As a rule, two stages of appeal are possible in each procedure: after the decision in first instance, appeal to the next higher court

¹² In the first half of 1989, it was proposed to merge the cantonal courts, the trial courts, and various administrative courts. In the mid-1990s the ordinary court system will probably consist of three layers: *arrondissementsrechtbanken*, *gerechtshoven*, and the *Hoge Raad*. Appeals from decisions by the *arrondissementsrechtbanken* in administrative cases, however, probably will follow another track.

is possible, and the second decision is subject to appeal in cassation to the Supreme Court. As in the first appeal, leave to appeal in cassation to the Supreme Court is not required. In such an appeal, however, the facts as determined by the lower courts are not reviewable; the Supreme Court can only decide on issues of law.

Both criminal and civil cases are tried by professional judges; a jury is unknown in The Netherlands. The law requires judges to have graduated from a Dutch law faculty, and candidate judges cannot be appointed unless they have completed six years of judges' training or have had more than six years of experience in a legal profession.¹³

Cantonal court judges sit alone, and as a rule they try both criminal and civil cases. In the trial courts and the courts of appeal, there are specialized divisions in which three judges sit *en banc*. Due to the heavy caseload, however, the exception of an *unus index* (a single judge) in the trial courts has recently come to be the rule.

IV. THE SUPREME COURT

As does any Dutch court, the Supreme Court announces all its decisions as unanimous and judges are obliged to maintain secrecy on their deliberations. And as is true of most other countries, no leave to appeal is necessary and the Supreme Court has no control over its docket.¹⁴ Public prosecution at the Court is represented by one procurator-general and seven assistant procurators-general. Both justices and procurators-general are appointed for life (i.e., until the age of seventy) and are fully independent of the government. The independence of procurators-general is justified on the grounds that they may have to prosecute members of parliament and cabinet members before the court. Such a prosecution, however, has never been initiated.

The procurators-general play a role in both criminal and civil cases, in all civil cases and many criminal cases rendering an opinion before the Court itself starts deliberations. These opinions are published together with the decision of the Court. Thus, the opinions of the procurators-general in which they disagree with the

¹³ Most of these latter appointees are attorneys of members of the standing magistracy, but former company attorneys and law professors are also appointed as judges.

¹⁴ That does not mean that control is entirely absent. A strong filter is provided by the members of the The Hague bar, the only attorneys allowed to represent clients before the Supreme Court (Sillevis Smitt, 1978). Most cassation cases are handled by five law firms that have specialized in cassation cases. But even they do not always succeed in keeping their clients from pursuing pointless appeals (Van Koppen, 1990; Van Schellen, 1979). Of course, the costs of an appeal in cassation also reduce the number of appeals. In 1986, 3,285 cases were brought before the Supreme Court—454 cases before the civil division, 2,010 before the criminal division, and 821 before the so-called third division (Von Schmidt auf Altenstadt, 1989).

later decision of the Court (about 30 percent of the cases) are the closest the Dutch come to dissenting opinions.

The Supreme Court is divided into three divisions: the civil division, the criminal division, and the so-called third division. The latter, established in 1919, has jurisdiction in tax cases and expropriation cases. Unlike the civil and criminal divisions, the third division has two fixed panels, which divide cases depending on the statute involved. The third division as a whole, however, meets weekly at lunch to ensure unity of decisionmaking. Unlike, for example, the German Bundesgerichtshof or the French cour de cassation, the full court rarely meets.¹⁵

Since the Supreme Court cannot consider the facts of the case, the Court refers cases to a lower court after reversal, if the facts need further consideration. These cases may be referred to the court which gave the decision that was appealed or to another court on the same level.

V. DEVELOPMENT OF DECISIONMAKING

The possibility of appeals in cassation has been based entirely on the French system, where the institution of cassation goes back to the fourteenth century (Buys, 1884: 220; Veegens, 1989: 1–29). The 1814 constitution stipulated that the highest court in the country could reverse decisions that were openly in conflict with statutory provisions and could not judge the facts. The primary function of the Court, then, was to maintain a unified *application* of statutes, not a unified *interpretation* of statutes, since interpretation was thought to be unnecessary. The Supreme Court can only review questions of law, not questions of fact.

Of course, in many cases the distinction between law and facts is arbitrary (Scholten, 1974), and nowadays serves among other things to limit the number of appeals to the Supreme Court (Hondius, 1978: 20). In the nineteenth century that distinction was firmly accepted by the Supreme Court. Originally, the legislature saw only two roles for the Supreme Court: to maintain unified application of statutes and to supervise the quality of the administration of justice. During the last century and a half, many have come to believe that the institute of cassation should also serve the development of the law, but only very recently has development of the law been named the most important function of the Supreme Court (Koopmans, 1985; Snijders, 1988). This function of the Supreme Court has grown to such an extent, that the Court sometimes is called deputy legislator (Verburgh, 1977).

In that development—from applier of statutes to developer of law—the Supreme Court itself played a major role. The strict ad-

¹⁵ The full court meets, for instance, when a vacancy occurs and a list of recommendation must be sent to the Second Chamber of Parliament (see below).

herence to the application of statutes actually made the Court an unimportant institution in the nineteenth century (Algra, 1973). Also, because of its strict adherence to the words of statutes, the court often gave decisions that were unjust. A fine example is the *Zutphen Waterpipe* (1910). In a warehouse packed with leather items, the waterpipe broke due to the extreme cold. The main valve was located in an apartment above the warehouse. The occupant of the apartment, Miss De Vries, refused to close the valve and refused entry for anyone to do so, saying that she did not want to be disturbed in the middle of the night. Only after the owner of the warehouse returned with the police did she give in, and after twenty minutes the valve was closed. Miss de Vries was sued in tort, but the Supreme Court decided that Miss de Vries had no legal or contractual obligation to close the valve on request and thus she was not liable for the damage.

In this and many other cases, the Supreme Court slavishly followed the literal text of the law. Therefore, during the nineteenth century many lawyers felt that such administration of justice could as easily be carried out without a body as costly as the Supreme Court.

Another phenomenon also weakened the position of the Court during the nineteenth century. After 1838 the country was left not only with one Supreme Court but also with eleven courts of appeal, one in every province, far too many to handle the relatively meager caseload. In 1854, for instance, the eleven courts of appeal together rendered 163 final decisions and 143 intermediate decisions, an average of 28 decisions per court (*Een advocaat bij dat collegie*, 1855). But provincial chauvinism preserved all the courts of appeal. Influential lawyers at the 1870 meeting of the Dutch Law Association proposed abolishing appeals in cassation. Proposals were made to discontinue all courts of appeal and turn the Supreme Court into the only court of appeal. But after Parliament defeated eight bills to so change the Supreme Court, only minor changes in procedure were introduced (Pieterman, 1990).

In 1919 the Dutch Law Association again discussed abolishing appeals in cassation, but now a small majority voted against abolition. The majority of the association believed that any reform requiring the Supreme Court to hear full appeals would threaten the unification function of the Court, because then too many divisions of the Court would be necessary.

The decision in *Lindenbaum v. Cohen* in 1919, discussed above, was the turning point in the history of the court. After that decision, the influence of the Supreme Court grew significantly. With the introduction of the concept of *carefulness* as a criterion for liability in tort, the Supreme Court bridged the gap between the law and an ever changing society more rapidly and often better than the Dutch legislature could do. A study by Hirsch Ballin (1988) in which he compared decisions of the Supreme Court in

1951–52 with decisions in 1970 showed that even in that twenty-year period the change from application of statutes to interpretation of statutes continued to evolve. Fockema Andreæ (1904, 1938) demonstrated the same tendency for the nineteenth and early twentieth century.

In fact, legislators often refrain from enacting regulations on certain issues, and leave their regulation to the judiciary. For instance, most of the development of civil law has been left to the Supreme Court.¹⁶ But also in criminal law, the Supreme Court has given rulings on subjects like abortion, euthanasia, and the law of evidence without any legislative intervention.

Especially in the last two decades the legislature has left more and more subjects to decision by the courts. Indeed statutes often include vague norms that must be fully defined by judicial decisions (e.g., contracts must be executed in “good faith”; behavior of the government must accord to “principles of decent administration”; see Schoordijk, 1988). Partly, these vague concepts are used in statutes because the legislators today realize that it is impossible to make a specific rule for everything.

A typical Dutch phenomenon also contributed to the many vague norms in statutes. The seats in the lower house of the Dutch Parliament are usually divided among ten to fifteen political parties, none of which has ever had and probably will ever have an absolute majority. Dutch cabinets therefore are always based on coalitions. This makes the process of legislating quite tedious and stimulates compromise, if not ambiguity, in most statutes. The need to compromise fragmented political interests also produces complicated and detailed statutes in The Netherlands.¹⁷

The present political role of the Supreme Court is widely supported, both within and outside the legal profession.¹⁸ Labor unions, for instance, have long struggled without success to get legislation granting the right to strike. Yet, recently the president of the largest labor union remarked that the Supreme Court took care of the right to strike quite well and he feared that any legislation on this matter would turn back the clock.

A logical next step after the gradual process from the judge as *bouche de la loi* to the present state of affairs would be an extended form of judicial statutory review. A further development in this direction might warrant the introduction of a special constitutional court, which would mean a tremendous change in the

¹⁶ Recodification of the Civil Code is now mainly done by incorporating Supreme Court rulings into the new code.

¹⁷ Atiyah and Summers (1987) argue that the sharp political division in Britain between the two parties and the prevailing strong party discipline make such compromises unnecessary, resulting in shorter and clearer statutes.

¹⁸ It is felt that most lawyers agree on the importance of the Supreme Court (Snijders, 1988). However, there are no quantitative data to support this contention.

Dutch legal system. The idea that a cassation court like the Supreme Court is less fit to function as a court with the power of judicial review is supported by the situation in other civil law countries. In Germany, Austria, Italy, France, and, more recently, Spain and Portugal, a special constitutional court reviews statutes (see Table 1).¹⁹ Even in Belgium a limited form of constitutional review is exercised by the *Arbitragehof*, a court established in response to the change to a federal state. Dölle and Engels (1989) suggest that the introduction of constitutional review in these countries is related to the federal structure of the countries, which requires protection for parts of the country against the federal state (in, e.g., West Germany, Austria, Spain, or Belgium). They also suggest that introduction of constitutional review followed a period of dramatic changes in the structure of the state (in, e.g., West Germany, Austria, France, Italy, Spain, Portugal, and Belgium) and that the constitution or the revision of the constitution that made constitutional review possible in these countries was not written in the nineteenth century when legal doctrine prescribed a role of the judge as *bouche de la loi*.

The factors Dölle and Engels suggest indeed do not apply to The Netherlands. That does not mean that judicial review of statutes is completely absent. As stated above, statutes are reviewed for conformity with treaties (based on arts. 93 and 94 of the Dutch constitution, introduced in 1953). Until 1980 the Dutch Supreme Court was reluctant to review statutes by referring directly to treaties. If possible, the court gave a wider interpretation to statutes, rather than applying a treaty expressly (Alkema, 1980: 136). After 1980 the Supreme Court took another course. Van Dijk (1988: 184 ff.) showed that in the period 1980–86 in 522 Supreme Court cases at least one human right treaty—among others the European Convention on Human Rights (ECHR)—played a role. The number of cases, however, grew from 51 (2 percent of all Supreme Court cases) in 1980 to 141 (4 percent of all cases) in 1986. The Supreme Court decided that a statute violated a treaty in 37 cases in that period, the number growing from 1 (2 percent of cases in which a party invoked a treaty) to 12 (9 percent). Thus, although the number of cases in which statutes are reviewed for conformity with treaties is growing, such judicial review is still limited in The Netherlands.

A recent decision of the Supreme Court, in the *Harmonization case* (1989) illustrates how far the Supreme Court has come, but also shows where the Supreme Court currently stops in the development toward constitutional review. In The Netherlands, all students receive financial aid from the government, with the

¹⁹ Brewer-Carías (1986: 186) stresses that the so-called concentrated system of constitutional review (see note 7) is not typical only of civil law countries, pointing to Papua New Guinea and Uganda, which have both a common law system and the concentrated form of judicial review.

amount received depending partly on the income of a student's parents. In the past decade, a maximum was set on the number of years during which an allowance could be received. By a recent act of Parliament the right was restricted again, this time for students who took up a second university study after completing a first one. A student union and a few individual students sued the state in summary proceedings to obtain an injunction that would forbid the government to implement the act. They argued that the years they spent at the university from 1980 onward—before the act was even under discussion in Parliament—should not be taken into account for determining the period for which an allowance would be granted. That, they said, violated the legitimate expectation that they could finish their studies without financial problems, and therefore the implementation of the act would mean an infringement of both unwritten principles of law and article 43 of the Charter of the Kingdom of The Netherlands (*Het Statuut voor het Koninkrijk der Nederlanden*).

The Charter, a statute of the kingdom,²⁰ is in fact a treaty between the various parts of the kingdom—The Netherlands, The Netherlands Antilles, and Aruba²¹—and is a statute that supersedes the constitution. No formal statutory provision bans judicial review of statutes to the Charter, as a provision does for review of statutes for conformity with the constitution. The president of the The Hague court granted the injunction based on the violation of article 43 of the Charter, but in a leapfrog appeal in cassation, the Supreme Court reversed. The Supreme Court denied review of statutes both to unwritten principles of law and to the Charter. The Court denied review to the Charter solely because “there is a *tradition* not to review” (emphasis added). The review to unwritten principles of law was denied because during the recent debate in Parliament on the changes in the constitution in 1983 such review was expressly rejected.

The Court refused to exercise review reluctantly; it wrote that it adhered to this line of reasoning, even though “the so-called Harmonization Act . . . violates legitimate expectations of the students concerned and thus violates the principle of certainty of law.” More interestingly, the Court also argued that the need for judicial review of statutes has increased because “several developments—among which the development of our parliamentary system towards monism²² and the accompanying increase of domi-

²⁰ As opposed to a statute of the state, i.e., the part of the kingdom in Europe.

²¹ The Charter initially, in 1954, formed part of the decolonization process of the then colonies Surinam (independent in 1975) and The Netherlands Antilles (the secession of Aruba took place in 1985).

²² The Court refers to the recent Dutch custom of building coalition cabinets on a detailed written agreement (the *Regeeraccord*; the Government Agreement) between the coalition parties. Dutch legislative culture is based on a dualistic relation between parliament and cabinet. A written agreement

nance of the executive power in the realization of statutes—remove the assumption justifying the ban on judicial review, to wit, that parliamentary procedure guarantees a legal sound content of each statute” (my translation). Although the decision of the Court does not bear indications of prospective overruling of the ban on judicial review of statutes, the wording of the decision indicates that the Court would have loved to do it. The decision in the *Harmonization* case also shows that the Supreme Court is cautious in interfering with the business of the legislature.

Following the decision of the Court in the *Harmonization* case, the introduction of constitutional review has come under discussion again (Cliteur, 1989, 1990; Dölle & Engels, 1989; Goedhart, 1990; Van Houten, 1990). The most important argument used for constitutional review is the same one the Supreme Court used in its decision: the legislature is no longer able, because of the growing monism, to guarantee the constitutionality of statutes.

In conclusion, the Dutch Supreme Court gradually developed, during the last century, from a nonpolitical insignificant body to a politically highly active body.²³ Although the Supreme Court declined to introduce constitutional review, many parts of Dutch law are now governed by Supreme Court rulings. In private law, the

between the coalition parties considerably limits the possibilities to judge each separate bill for all the allies of the cabinet in Parliament, without infringing upon the Government Agreement. This leads to a monistic instead of a dualistic relation between the cabinet and the parliamentary majority, in which the coalition members of Parliament are fully tied to decisions of the cabinet. Such results in legislative procedures in which bills are run through Parliament on political force, without much deliberation and amendment, as in the case of the *Harmonization Act*.

An example of how the Government Agreement prevented legislation is the law of abortion. Abortion is formally forbidden in The Netherlands, but during the seventies a liberal practice evolved. A parliamentary majority—the Socialist party (PvdA), the Conservative party (VVD), and the Liberal party (D66)—favored a more liberal ruling. The Christian Democratic party (CDA) opposed such a statute. Since the latter party always takes part in coalitions, it was able to prevent enactment of a more liberal statute through the Government Agreement. Today, the Dutch practice of abortion is ruled by Supreme Court decisions.

²³ In fact, only one severe interruption occurred in that process, namely, through the Supreme Court's role during the German occupation from May 1940 until May 1945. In 1941 the Jewish president of the Court, Visser, was removed by Reichskommissar für die besetzten niederländischen Gebiete Seys-Inquart (Visser died shortly afterwards). The other justices did not resign and hardly protested, even after Justice Donner was imprisoned twice. After the occupation, the Court was severely criticized for failing to oppose the Germans, who violated both peacetime and wartime law. The court was criticized most for its decision in the so-called *Assay case* (1942), which dealt with the legislative power of the occupying authorities on issues that were irrelevant to the occupation. The Supreme Court upheld the Germans' decision to bring economic criminal cases before special tribunals, and thus gave the Germans the power to issue such rules (see also the discussion between Justice Van den Dries, 1945, and De Boer *et al.*, 1945).

The Court's behavior during the occupation (an overview is given by Mazel, 1984) severely damaged the Court. It took some time to regain confidence and establish its role in Dutch society.

Supreme Court, for instance, independently developed contract law and set norms for the behavior of the government toward citizens and for the relation between divorced parents and their children (Schoordijk, 1988). In criminal law the Supreme Court stretched the law to such an extent that Schaffmeister characterized the Supreme Court's rulings as having "hardly any resemblance to the legal system" (1988: 71; my translation). The Supreme Court, for instance, without a specific statutory provision, accepted anonymous witnesses and allowed police officers to infiltrate. Also, Supreme Court rulings govern such fields as the law on euthanasia and abortion.

Before completing the discussion of the present role of the Court, I will describe the way in which the justices in the Supreme Court are selected.

VI. JUSTICES

Presently, the court has thirty-one members—one president, four vice-presidents, and twenty-six justices. Each case brought before the Court is decided by five justices, but as a rule all justices in the division take part in discussing the case in chambers. In each division, cases are assigned to the justices that serve that year in that division, in the order the cases are docketed. Usually, justices rotate among the divisions the first years after their appointment, but in later years they usually remain in the division they prefer.

A. *Formal Procedure*

The only formal requirement for justices at the Supreme Court is graduation from a Dutch law faculty. No minimum age or previous experience is formally required. The average age at appointment is and has been fifty-three. Initially, no retirement age was set for members of the Supreme Court, but later the retirement age was set at seventy-five, and today justices, as other judges, must retire at seventy.²⁴

The procedure for filling a vacancy on the Court is based on the 1814 constitution and the 1827 Judicial Organization Act and continued virtually unchanged.²⁵ The Supreme Court initiates the procedure itself by notifying the Second Chamber of Parliament

²⁴ During the German occupation to give the occupier the opportunity to remove unwanted judges more easily, the retirement age was set at sixty-five for all judges and justices.

²⁵ Between 1848 and 1887 the Second Chamber of Parliament drew up a list of five nominees instead of three. The change in 1848 was made because the government doubted the quality of the nominees and apparently thought that a longer list might give a higher chance of appointing at least one nominee of good quality (Heemskerk, 1881: 63–64). In 1887 a list of three nominees was reintroduced, because the Crown always appointed the first candidate on the list anyway.

(Tweede Kamer der Staten-Generaal, the lower house) of a vacancy and providing a ranked list of six candidates (“the long list”). The Second Chamber then votes to draw up a ranked list of three nominees (“the short list”), from which the Crown²⁶ appoints a new justice. The Second Chamber is not at all bound by the long list of the Supreme Court, but the Crown must choose from the three nominees on the short list.

At face value this procedure is quite open to political influence by the Second Chamber, because it can nominate anyone it likes. Following the growing political role of the Supreme Court, one would expect that Parliament would interfere more and more with the appointment procedure, as is common in, for example, West Germany or Italy. In fact, the contrary has happened.²⁷

B. *History of Appointments*

The data in Table 2²⁸ show that the Second Chamber interfered with many of the appointments in the nineteenth century. In the first half of this century such interference diminished and is virtually absent after the Second World War. The last time the Second Chamber did not use the first three names on the long list to make up the short list was in 1975 when Miss A. C. van den Blink was “promoted” from fifth place on the long list to second place on the short list. This promotion did not affect the appoint-

²⁶ The constitution speaks of King (now Queen Beatrix), which in fact means the cabinet of ministers. In the nineteenth century, especially before 1848, the king was more powerful, but the present queen only formally signs the appointment. The last instance of sovereign influence on the appointments to the Supreme Court was immediately after the Second World War. Although the justices who were appointed by the Germans had been dismissed, Queen Wilhelmina refused to sign new appointments because the justices who were appointed before the occupation and served under the Germans stayed on after the war. In the end she gave up her resistance when Justice Donner, the only justice in the Court who had resisted the Germans, was nominated as president (Mazel, 1984).

²⁷ The (assistant) procurators-general are appointed directed by the Crown. Some of the developments I will discuss below apply to these appointments also, but I refrain from discussing them here (see Van Koppen & Ten Kate, 1987).

²⁸ All data on the justices and the appointment procedure are drawn from Van Koppen and Ten Kate (1987), where also a short biography of each justice can be found.

For presentation purposes, the last century and a half is divided into seven periods. In Period 1 (1838) the sixteen members of the original court were appointed. These appointments were done by the king, without influence from the Second Chamber. Period 2 (1839–87) runs until a year in which an important change in the constitution went into effect. Period 3 (1887–1917) runs until the institution of universal suffrage and precedes the decision in the important *Lindenbaum v. Cohen* (1919) case. Period 4 (1918–40) is the period between the two world wars. In Period 5 (1940–45) the justices were appointed by the occupying German authorities. Period 6 (1945–67) precedes the appointment of the first woman at the Court. Period 7 (1968–87) spans the remaining years.

Table 2: Correspondence Between Lists of Recommendation by Supreme Court (Long Lists), Lists of Nominees by the Second Chamber of Parliament (Short Lists), and Appointments by the Crown (entries are frequencies)

| Period | 1 1838 | 2 1838-1887 | 3 1887-1917 | 4 1917-1940 | 5 1940-1945 | 6 1945-1967 | 7 1968-1987 |
|--|-----------------|-----------------|-----------------|----------------|----------------|----------------|----------------|
| No. of justices appointed | 16 ^a | 48 ^b | 27 ^c | 24 | 7 ^d | 31 | 45 |
| Crown appoints first on short list | | 43 | 27 | 24 | | 30 | 45 |
| First on short list the same as first on long list | | 24 | 18 | 21 | | 29 | 45 |
| Short list in accord with long list | | 1 | 13 | 18 | | 29 | 44 |

^a Appointed by the king, without recommendation or nomination.

^b There were 51 long lists in that period.

^c There were 28 short lists in that period.

^d Appointed by the Reichskommissar für die besetzten niederländischen Gebiete, the Austrain A. Seys-Inquart.

ment, but was only done as a signal to the Supreme Court to recommend more women.²⁹

In only 7 of 198 instances did the Crown not appoint the first on the short list.³⁰ Thus, the influence of the Second Chamber on the appointments was considerable before 1920: in 60 percent of the appointments the Second Chamber nominated someone the Supreme Court had not recommended.

After 1948, all appointed justices at the Supreme Court were first both on the long and the short list. In fact, the Second Chamber never again interfered with the appointments. The lack of interference has resulted in a system of cooptation: the first candidate of the Supreme Court is always appointed. The numbers 2 through 6 on the long list consist of lawyers who will reach the first place on the list at a future vacancy, depending on the expertise the Court requires at that time. Only occasionally are lawyers put on the long list merely to give them a kind of recognition.

The Second Chamber's lack of interference does not seem due to prior consultation in the construction of the long list, as is evident from its apparent lack of knowledge of the candidates. Interference by the Second Chamber disappeared to such an extent that in 1979 the chamber for the first times since the Second World War debated an appointment. The subject of the debate was not the proposed candidate but the lack of knowledge about the candidates the Supreme Court recommended. One participant in that debate told me that each time a Supreme Court nomination was on the agenda of the Second Chamber, the legal specialists of the political parties had to phone in haste to the Supreme Court to receive at least some basic information on the candidates. In 1979, after consultation with the president of the Supreme Court, it was agreed that in future the Court would supply a short (about half a page of text) biography for each recommended lawyer.

The developments in the appointment process show a decrease in political influence on the appointments to the Dutch Supreme Court. These developments are peculiar if they are put next to the remarkable *increase* in political influence of the Court. The decrease in the Second Chamber's influence on appointments seems to relate to differences in the structure of the Dutch political and

²⁹ At that time the only appointed woman justice—and in fact the only recommended woman until then—had been Miss A. A. L. Minkenhof, appointed in 1967. Four women serve or have served on the Supreme Court.

³⁰ That happened in 1840, at the occasion of the first vacancy in the Court, when the Crown passed over the nominated DeKeth in favor of Lightenvelt, who was well known at the royal court. Again in 1947, the Crown passed over a nominee, Melort, in favor of A. Z. Hanlo.

Twice the Crown passed over a nominee for political reasons: in both cases the kind did not appoint the nominee, the Leyden attorney Olivier, because he was a friend and ally of the liberal—too liberal to the king's taste—minister of domestic affairs Thorbecke. At the three other instances, the lawyers who were nominated first asked the crown for personal reasons not to be appointed.

administrative elite in the nineteenth and twentieth centuries and to the typical coalition structure of Dutch politics. I shall discuss both in turn.

Until the introduction of the universal suffrage in 1917, the composition of the Dutch Parliament was rather one-sided: about 80 percent of the members were lawyers and most of them were either noble or patrician (Van den Berg, 1983).³¹

The members of the Supreme Court between 1838 and 1917 also were either noble (17 percent) or patrician (53 percent; see Table 3). Becoming a lawyer was a traditional occupational choice for men in many of these families.³² Since most of the members of Parliament, most cabinet ministers, and, of course, all members of the judiciary were lawyers and were recruited from a small social stratum, many of these functionaries were recruited from the few upper-class families that traditionally included many lawyers. As a consequence, the political and judicial elite was relatively small. Thus, many members of Parliament were kin to the few lawyers who were eligible to an appointment to the Supreme Court.³³ Also, many justices had political careers before their appointment (about 25 percent between 1838 and 1917).

At present less than 20 percent of the Second Chamber are lawyers; noblemen and patricians have become rare, both in Parliament and in the Supreme Court.³⁴ It seems that the Second Chamber's interference in the appointment process during the nineteenth century more often resulted from interest in having

³¹ Nobility is defined as being member of the aristocracy because one's family has been raised or affirmed as such by the Crown. Noble families are enumerated in the so-called *Red Booklets* (*Nederland's Adelboek*, yearly from 1903; the *Who's Who* of Dutch nobility). Patricians are member of important but not noble families. For these families a comparable *Who's Who* exists: the *Blue Booklets* (*Nederland's Patriciaat*, yearly from 1910), but it should be noted that, contrary to the *Red Booklet*, one has to pay to be included into the *Blue Booklets*. I took the *Red* and *Blue Booklets* as criteria for deciding whether an individual was or is noble or patrician.

³² Before 1920, 52 percent of the appointed justices in the Supreme Court had a father who was also a lawyer; after 1920 (excluding the appointments by the German occupier), 34 percent had a father who was lawyer.

³³ These relations are too manifold to reproduce here. Many justices, for instance, were relatives of ministers of justice. Minister of Justice D. Donker Curtius was a brother of the president of the Supreme Court W. B. Donker Curtius van Tienhoven. A later minister of justice, Boot, was a nephew of this president. Minister of Justice Godefroi was a brother-in-law of Justice Asser; Minister of Justice De Jong van Campens Nieuwland, an uncle of justice De Jonge; Minister of Justice W. Wintgens, a son of justice W. C. B. Wintgens and son-in-law of Justice Op den Hoof; Minister of Justice Th. Heemskerk van, a son of Justice A. Heemskerk; and Minister of Justice J. A. Loeff, the father of Justice L. P. M. Loeff.

These family connections have become less common but have not vanished completely. A recently appointed justice, E. Korthals Altes, for instance, is a nephew of former Justice E. J. Korthals Altes, who in turn is father of Minister of Justice F. Korthals Altes, who left office in 1989.

³⁴ In fact the only nobleman on the Court is the present Chief Clerk of the Court, *Jonkheer* (Squire) Van Nispen tot Sevanaer.

Table 3: Number of Justices Who Appear in the Red and Blue Booklets^a

| Period | Percentage of Justices Appointed | | | | | | |
|---------------------------|----------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| | 1 1838 | 2 1838-1887 | 3 1887-1917 | 4 1917-1940 | 5 1940-1945 | 6 1945-1967 | 7 1968-1987 |
| <i>Justices in</i> | | | | | | | |
| Red Booklet (nobility) | 25 | 10 | 22 | 4 | | | |
| Blue Booklet (patricians) | 50 | 56 | 48 | 42 | | | |
| Neither | 25 | 34 | 30 | 54 | | | |
| No. of justices appointed | 16 | 48 | 27 | 24 | 7 | 31 | 45 |

^a These booklets contain description of noble and patrician families (*Nederlands Adelboek* (yearly) and *Nederland's Patriciaat* (yearly), respectively).

relatives and friends named to the long list than from political motives.³⁵ More generally, because most members of the Second Chamber were lawyers, they were interested in appointments to a judicial body. Most members of Parliament knew the candidates and therefore neither debates of appointments nor hearings—as is common in the United States (Freund, 1988)—were necessary. The Second Chamber's present lack of interference can be seen in part as a continuation of that tradition.

Today it is evident that Supreme Court justices are recruited from the top lawyers in the country and that appointments are based primarily on merit.³⁶ Of the seventy-six appointments since the Second World War, 50 percent of the appointees came from the sitting magistracy, 8 percent from the standing magistracy, 17 percent from the bar, and 24 percent from a university position. Political affiliation does not play a role in appointments: the political affiliation of only a few justices is known, and none has been politically active. This is in dramatic contrast to other countries, where political affiliation is an important factor influencing appointments to the highest court; consequently, many justices had held political offices prior to their appointment.³⁷

In summary, during the interbellum the tradition developed that the Second Chamber of Parliament no longer interferes with appointments to the Supreme Court. That tradition strengthened after 1945 to such an extent that the Second Chamber votes on nominations often without even knowing the individuals who are recommended.

VII. EXPLANATION

The Dutch Supreme Court as I have described it above seems to be an exception among highest courts in Western democracies. The Supreme Court is a politically very active court—though not to the extent that it exercises constitutional review—while partisan political influence on appointments to the Court is completely absent. The Second Chamber traditionally does not influence appointments. Although that tradition stems from the practice during the interbellum, other mechanisms are needed to explain the perpetuation of such a tradition. I will try to explain this situation

³⁵ See note 30.

³⁶ Van Koppen and Ten Kate (1987) showed that other influences play also a role in the appointment process. Candidates who knew one or more justices in office when they were students at the university have a higher chance to be appointed, as have candidates who come from the western provinces (together known as Holland). Among the appointees, relatively many lawyers worked to the government center 's-Gravenhage (The Hague), either as judge or attorney. Former Justice Drion (1988: 41–42) does not agree with the latter, arguing that also relatively many lawyers from Amsterdam are appointed.

³⁷ It should be noted that in other countries, as in the American states, public prosecutors and judges from lower courts are elected, often along partisan lines (see Kagan, Infelise, and Detlefsen, 1984).

with the following characteristics of Dutch politics: (1) the coalition structure of Dutch government, (2) the ideology of the division of power, and (3) the manner in which government is legitimized. Each characteristic, I admit, can only explain part of the present contrast between the Court's decisionmaking and nonpolitical appointments. The contrast, however, may be a transition toward more political involvement in appointments on the one hand and more judicial activism on the other. I will discuss possible future developments in the concluding section.

The Second Chamber's political caution seems to be related to the coalition structure of Dutch government. As said, the Dutch government system is built on coalitions between various parties.³⁸ Especially during the first half of the twentieth century, Dutch society was strongly divided in so-called *zuilen*, parts of society that are divided according to religious and political denominations.³⁹ To ensure a stable society, the government system was built on negotiation and compromise among the denominations, rather than antagonism between the *zuilen*. This form of "pacifatory democracy" (Kossmann, 1978: 569) requires, among other things, that a cabinet appoint both political allies and allies of the opposition to important offices. If a cabinet did not, it would likewise expect the present opposition to fill all important vacancies with their own allies when the opposition comes into power. But, more important, appointment of allies of the opposition is an essential part of the compromising structure that ensures a stable government, even with incompatible political and religious *zuilen*. This produces a tendency to "depoliticize" political questions (Lijphart, 1975).⁴⁰ The custom of appointing allies of the opposi-

³⁸ Cabinets are always based on coalitions between the Christian parties (recently unified into the Christian Democratic party (CDA)) and either the Socialist party (PvdA) or the Conservative party (VVD). Sometimes other, smaller, parties take part. Until the fall of 1989, a coalition of VVD and CDA was in power; since then a coalition of CDA and PvdA supports the cabinet.

³⁹ The most important *zuilen* in Dutch society were Catholics, Protestants, Socialists, and Humanists. An extensive discussion is given by Kossmann (1978: 567-74).

⁴⁰ How this works is nicely illustrated by Minister of Traffic and Water Hanja Maij-Weggen, who came into office in the fall of 1989. She adopted a very fierce style of debating with Parliament, often called the English style. Her appearances in Parliament caused general uproar, both in and outside Parliament. Hazeu analyzed the problems of Ms. Maij-Weggen (1990: 15; my translation):

The technique of the Dutch elections creates a multiple-party system, rather than a two-party or three-party system. Always, coalitions are necessary, sometimes center-left, sometimes center-right. To govern, the parties need each other. That leads to a culture of cooperation, "consensus engineering," or simple put: to making friends. . . . To reach something, the government needs very wide political support. That is not done by trying to score all the time, but now and then one needs to feed an ally, a coalition partner, or the opposition a good shot. Indeed, even the opposition, because they may be in the future partners. . . . Therefore, the political behavior of Ms. Maij-Weggen creates much uproar, but she accomplishes nothing. It is dysfunc-

tion is thus firmly established in The Netherlands in appointments as, for instance, mayors, commissioners of the queen (*commissarissen der Koningin*, the governors in each province), or members of the Raad van State (State Council, comparable to the French Conseil d'Etat).

An example of how that mechanism has operated are the so-called Catholic seats on the Supreme Court. Since the nineteenth century, about 35 percent to the Dutch population has been Catholic. The government was predominantly Protestant, and the Catholics were in the minority in all government positions throughout the nineteenth century. In the period between 1848 and 1901, for instance, only 13 percent of the cabinet ministers were Catholic (Dogan and Scheffer-van der Veen, 1957–58). The pacificatory democracy, however, required that the Catholics participate in government offices to a certain extent. On the first Supreme Court, in 1838, only one Catholic justice was appointed. That number gradually increased to four in 1913. Until 1968 a firm policy was maintained that, if a vacancy arose because a Catholic stepped down or died, he was replaced by a Catholic. Other seats on the court were reserved for Protestants, although occasionally a Jewish justice was appointed.

This system of reserving seats for specific religions or individuals with specific political affiliations is still widely practiced in The Netherlands. At the Supreme Court, however, the custom has died out: there are no longer any Catholic seats, and there has never been a division of seats according to political affiliation.

In other countries with multiple political parties pacificatory democracy is maintained by appointing justices with different political affiliation proportionately to the power of the respective parties. In Austria and to some extent in Belgium (Koopmans, 1988: 368) such a system is followed. In countries with a two-party system, usually the party in power appoints almost exclusively political allies to the highest court. The United States and France fall into that category. Until recently, for instance, the French conseil constitutionnel has been made up exclusively of Gaulist politicians (Rademaker, 1988: 140). An intermediate position is taken by the highest West German courts (Bundesgerichtshof, Bundesarbeitsgericht, Bundessozialgericht, Bundesverwaltungsgericht, but not the Bundesverfassungsgericht). An incident in 1986 (see Hondius, 1988: 247–48) may illustrate the West German case. According to the Richterwahlgesetz of 1950 the justices in these courts are elected by a committee of twenty-two members, eleven chosen by the Bundestag and eleven by the Länder (the German

tional. . . . Let me end with a prediction. Let us give Ms. Maij-Wegen another half-year, because she seems stubborn. I think that after half a year she will either comply to the Dutch political game, or will not be minister any more.

states). On 30 January 1986 the Social Democrat members⁴¹ of the committee left the meeting after eleven of twelve vacancies in the courts were filled with Christian Democrats. The Social Democrats were rebuked in the newspapers, because their spokesman Gunther, in his role as minister of justice in the state of Hessen, has exclusively appointed Social Democrats as judges.

It could be argued that leaving the appointments of justices solely to the Supreme Court is a Dutch version of pacificatory democracy, which the presence of many political parties apparently demands: the peace is kept, not by divisions of seats on the Court along partisan lines, but by abstaining from any partisan influence in the appointments. This explanation, however, seems only partial, because in other areas of Dutch government, proportional political appointments do take place.

A second partial explanation can be found in the way in which the ideology of the division of power (Montesquieu, 1871 [1748]) is adopted in Dutch legal culture. According to Montesquieu's *Trias Politica* judicial power should be independent of both executive and legislative power. That independence is generally reached in Western democracies and elsewhere by a norm of independence by justices during their tenure at the Court, although either or both of the other two powers play a role in appointments. The Dutch practice of refraining from influencing appointments may be a version of the independence of the judiciary that is just extended somewhat further than in other democracies.⁴² Cliteur (1989: 1371–72) argues that the Dutch adopted the French version of the *trias politica* ideology. In the American version (see, e.g., Hamilton in Kramnick, 1987), the division of powers has led to a system of checks and balances; in the French version the division of power has led to a *separation* of powers. The latter ideology may lead to a tendency to leave judicial appointments as much as possible to the judiciary. McWhinney (1986: 45 ff.) showed that the manner in which judges are appointed is related to the presence or absence of what he calls the basic legal myth “that the judicial role is a purely mechanical one and that judges do not make law in their decisions.” Where that myth persists, the highest judges are appointed the same way as are all other judges. Such applies, for instance, to the French cour de cassation and lower courts, or to the Italian corti di cassazione and lower courts. Formally, also

⁴¹ Apart from the recently founded neofascist Republikaner party, West Germany is governed by the Christian Democrats (CDU/CSU), the Social Democrats (SPD), the Liberal party (FDP) and the (least powerful) Green party.

⁴² Donner (in Van der Pot, 1972: 324–25) discusses propositions in parliament in the beginning of this century to rescind the nomination by the Second Chamber for that reason. The propositions did not lead to a change in the constitution. Donner assumes that the subject has never been brought up again because the practice of noninterference discouraged it.

Belgium falls into that category, although nonovert partisan political influences on appointments seem to exist.

The Dutch version of the division of power as an explanation of the present relation between the Second Chamber and the Supreme Court appears to be contradicted by the manifold nineteenth-century interventions by the Second Chamber in appointments to the Supreme Court. However, as I showed above, these interventions were more social than political.

Developments in Supreme Court decisionmaking, discussed above, indicate that Dutch legal culture is moving from a separation of powers ideology to a system of checks and balances. The present appointment practice, therefore, may stem from a continuation of nineteenth-century legal ideology, or, in McWhinney's words, a perpetuation of the basic legal myth. Thus, this explanation does not resolve the incompatibility of the practice of nonpolitical appointments of justices and political decisionmaking of the Supreme Court but points to a transition. I return to that subject in the concluding section.

A third partial explanation may be the legitimacy of the Court itself and, through that, the legitimacy of the government as a whole (Watson, 1978). An independent judiciary, and especially an independent highest court, may restrict government power but at the same time may legitimize that power. The more independent the judiciary is, the more the legitimacy of the other branches of government is enhanced. A very independent judiciary is especially alluring to the other two branches, and to political parties, if the judiciary refrains from poking into their executive and legislative business.⁴³ Under these conditions, Parliament can adopt a cautious strategy in appointments as long as the judiciary does the same in decisionmaking. The *Harmonization* case (1989) discussed above is a good example of the latter. The Court rebukes the Parliament for producing a bad statute but maintains its hands-off strategy. As long as the Dutch Supreme Court does that, there is no reason whatsoever for the Second Chamber to interfere in appointments to the Court. In this regard, the Scandinavian highest courts are comparable. Although constitutional review formally is possible in these countries, it is rarely employed. In Sweden, for example, no court has ever declared a statute unconstitutional (Board, 1988: 185). Judicial restraint apparently leaves room for career instead of political appointments.

An independent judiciary can legitimize government also in another manner. With closely balanced coalitions in power, the legislature is often unable to generate statutes on controversial topics, which nevertheless need to be regulated. Leaving such is-

⁴³ Crombag (1983: 115-16) argues that the introduction of constitutional review of statutes by the Dutch Supreme Court would enhance the legitimacy of the other two branches of government.

sues to an independent judiciary enables the political parties to maintain fragile coalitions and still have these issues resolved. The case of Israel, more than The Netherlands, shows under what circumstances increasing such judicial activism is possible *without* political interference with appointments. Edelman (1987: 107) described the role of the Israeli *Beit Hamischpat Haelion*:

In the highly politicized democracy that is Israel, authority has flowed towards its premier nonpartisan institution—the Supreme Court built upon a tradition of respect for the “rule of law.” The justices began by insisting upon their role as interpreters—not creators—of law. Gradually the justices began to use principles of natural justice to help them interpret the meaning of the legislature. By carefully using that indirect form of judicial review only when abiding, consensual values were present, the justices were not accused of abusing their discretion. They were not seen as using their positions to advance a special cause; they were perceived as the protectors of fundamental values. When at least . . . the justices openly exercised judicial review, it became the occasion to confirm, rather than deny, their place in the political system.

In Israel, justices are appointed by a nominating committee that consists of two ministers, the president, and two justices of the High Court of Justice, two members of the Parliament (Knesset), and two attorneys. The committee has an overriding desire to avoid any taint of partisanship. That desire can be qualified as a deliberate choice in a policy where virtually everything else is allotted on the basis of party affiliation (*ibid.*, p. 96). Apparently, the fear of losing an institution that protects the rule of law in an otherwise politically sharply divided country preserves nonpartisan appointments to the High Court of Justice in Israel and simultaneously leaves the Court free to exercise judicial review.

The Israeli form of pacificatory democracy, however, only partly applies to The Netherlands, because ideological differences between Dutch political parties are immensely less great. But, still, the Dutch Supreme Court has ruled on such controversial topics as abortion, euthanasia, or criminal defendants’ rights, which the legislature was unable to resolve. Thus an independent Supreme Court without political appointments in The Netherlands is maintained because it legitimizes government in two ways: it continues a hands-off strategy but at the same time rules on subjects the legislature was unable to resolve.

In summary, the present cooptation system in appointments to the Dutch Supreme Court seems to be possible under the following conditions. The coalition structure of Dutch government makes it impossible for any single party to have a major influence on Supreme Court appointments. One alternative, then, is to appoint both government and opposition affiliates apportioned among political parties, as is done for the Dutch State Council. It

seems that in The Netherlands the other alternative, abstinence from political influence on appointments, is maintained under the influence of the ideology of the separation of powers. It is enhanced by the Supreme Court itself, because it maintains the tradition of not interfering too much with the business of the executive and the legislature.

VIII. CONCLUSIONS

During the last century and a half, the Dutch Supreme Court has grown from an insignificant body to an institution with considerable political influence. The court gradually evolved from one that strictly adhered to the text of statutes to one that interprets statutes. During the past two decades, the court has even started to function as a substitute legislature in many areas. Recently, in its decision in the *Harmonization* case (1989), the Court halted on the brink of engaging in a more extended form of political involvement, the kind of judicial review of statutes known in most other Western democracies.

The present form of recruitment of justices to the Supreme Court is in great contrast with the Court's political influence. The candidates for justices go through a formal process in Parliament, but in fact the Court selects its own members. This discrepancy grew in a period in which the Court's influence was not as extensive as it is now. But the Second Chamber of Parliament's tradition of not interfering with appointments to the Court persisted, even after the Supreme Court continued to gain influence in Dutch society.

I tried to explain the persistence of this tradition as being based on the coalition structure of Dutch government, the ideology of the state, and the structure of government legitimacy. A fourth explanation can be based on the decisionmaking of the Supreme Court itself: maybe as yet the Court has not gone far enough on the path from nonpolitical decisionmaking to induce the Second Chamber to interfere more with the appointments.

The Second Chamber retains the formal power to interfere. The question of why the Second Chamber has not interfered with Supreme Court appointments can be turned around: What could the Second Chamber gain by doing so? Surely, there is no direct need to interfere; with little exception, Supreme Court decisionmaking is not controversial among Dutch legal elites or in Dutch society as a whole. With a noncontroversial and revered institution such as the Supreme Court, politicians have more to lose than to gain by politicizing appointments.

There are, however, some signs that the present practice is merely a transition practice and that the attitude of the Second Chamber may soon change. The individual justices are now less

resistant to public attention and sometimes even seek publicity.⁴⁴ The decisions of the Court are more often discussed outside legal circles and occasionally meet public criticism.⁴⁵ The greater public attention means that political parties may develop more of an interest in who is appointed to the Court.

Solomon (1984) has described that process for the U.S. federal courts of appeals. These courts were largely invisible to the general public in the first half of this century. The increasing number of federal regulatory and agency cases coming before those courts increased their potential as centers of policy making. He concludes (1984: 342):

The major point is that because reform and social change were linked to the creation of regulatory agencies and challenges to those agencies took place in the lower federal courts, it was quite likely that presidents would come to recognize the policy importance of those courts, but the specific historical context determined the timing and manner in which the president reacted.

Following Solomon, the most fundamental reason for future interference by the Second Chamber in appointments to the Court can be found in the decisions of the Court itself. Assistant procurator-general Mok asserted in his conclusion in the *Harmonization* case (1989): “a change of the system [toward more judicial review of statutes] would warrant a infrastructure that fits,” pointing to other courts⁴⁶ whose composition is based on their political tasks. Mok further expressed his opinion that such a change should be carried out by legislative or constitutional means, rather than by judicial decisions.

Mok’s remarks and the following upsurge in the discussion on constitutional review may mean that constitutional review by the Supreme Court is no longer far away. Dölle and Engels (1989) showed that constitutional review in civil law countries was introduced in federal states and grew out of dramatic changes in state structure that warranted a new constitution or a major revision, which was not influenced by nineteenth-century legal doctrine. Neither of these factors applies nor probably will apply in the near future to The Netherlands.

It is obvious that both the legal forum and the political parties are quite content with the functioning of the Supreme Court and its members. The Court usually receives little criticism even for decisions in politically highly relevant cases, even when the government is not supported by the Court. The manner in which the Court develops law along gradual lines, rather than through

⁴⁴ E.g., on the occasion of the 150th anniversary of the Court in 1988.

⁴⁵ Note, for example, the reactions to a decision of the Court in which a rapist was acquitted (see Van Maarseveen, 1988).

⁴⁶ The Bundesverfassungsgericht, the corte costituzionale, and the U.S. Supreme Court.

sweeping decisions, of course contributes to its independence, both in appointments and the extent to which it is free to develop law further. It can be expected, however, that an autonomous development of the political role of the Supreme Court—whether it will or will not further develop judicial review of statutes—would force the Second Chamber to interfere with the appointments.

Engels expects a continuing development toward constitutional review based on the present monism in legislation: “The process of legislation is slow and shows signs of paralyzing. As far as statutes are accomplished, they create problems for the judiciary because they are too complicated and too detailed. The low quality of legislation is enhanced by diminishing safeguards in legislative procedure” (Engels in Dölle & Engels, 1989: 75 ff.; my translation). That, he argues, is caused by monism, which in turn stems from the coalition structure of Dutch government. Thus, it may turn out that the coalition structure of Dutch government, which partly caused the Parliament’s noninterference with the Supreme Court, in the end may evoke constitutional review, which in turn will cause Parliament to interfere with appointments to the Dutch Supreme Court.

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