

Three Things Every Lawyer Should Know about the Dutch Legal System

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1. The Basics

The Netherlands is a relatively small, densely populated country located in the North-Western part of Europe. It has a population of about 16,4 million. It is called the Netherlands (in Dutch: *Nederland*), because a large part of the country is below sea level.

The Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) was founded in 1813. It was part of France from 1795 until 1813, before 1795 the greater part of the current territory was governed by a confederation of sovereign provinces (The Dutch Republic, or *Republiek der Verenigde Nederlanden*).

The Netherlands is a constitutional monarchy with a parliamentary system. Since 1814 there has been a hereditary monarchy occupied in turn by Kings William I, William II and William III, followed by the Princess Regent Emma and Queens Wilhelmina, Juliana and Beatrix.

A basic principle of the constitutional system is that 'The King is immune', which means that The King has or enjoys immunity and the ministers are politically and legally responsible. In practice only the political responsibility of ministers has any real meaning. Legally speaking the King forms part of the government but actually it is the responsible ministers who make policy.

Some former colonies are still part of the Kingdom: the Caribbean islands of Aruba, Curaçao, Bonaire, St. Maarten, St. Eustatius and Saba. They form a federation with the parts of the Kingdom in Europe. The Charter for the Kingdom of the Netherlands forms its constitution, which has a meaning superior to the written Dutch Constitution.

The territory in Europe could be characterized as a decentralized unitary State. Legislative and administrative powers are exercised by central, regional (12 provinces) as well as local bodies (such as cities and municipalities). There are also other bodies and agencies that have legislative and administrative powers.

Just as the other legal systems of continental Europe, the Dutch legal system belongs to the tradition of civil law. This means that it is characterized by abstract reasoning and an emphasis on statutory law, in contrast to the Anglo-Saxon common law systems, which are characterized by case-by-case reasoning, typical institutions such as the trust, and an emphasis on judge-made law. Within the civil law tradition, the Dutch legal system belongs to the Romanistic family. The most important reason for this classification is that the Netherlands were briefly occupied by France, a period in which the French legal codes were introduced in the Netherlands. The later Dutch codes were modelled on the French originals, and this has given the Dutch system a number of typically Romanistic institutions. For instance, the existence of cassation as the highest instance of court proceedings has a French origin. More recently, however, changes in Dutch law have not been exclusively modelled on the French system. Law reform in the Netherlands draws on different legal systems and therefore Dutch law can no longer be classified as clearly Romanistic. Also typically Dutch elements are being developed, such as in the new Civil code in which the major developments in Dutch case law

throughout the 20th century are codified.

The most important form of legislation is the legislation made by the central government in cooperation with the Parliament (*Staten-Generaal*, consisting of two chambers). Lower forms of legislation are rules made by other agencies that belong to central government, by the representative organs of provinces, municipalities and the typically Dutch water management boards, by agencies or other public bodies.

The Dutch judicial system can roughly be divided into two subsystems: the general system and the administrative law system. The Supreme Court in the general system is the *Hoge Raad*, it deals with matters of criminal law, tax law as well as private law. The lower courts are the *kantongerechten* (courts for petty offences and matters of relatively small importance), the *rechtbanken* (general courts of first instance) and the *gerechtshoven* (general courts of second instance).

The administrative law system has a few supreme courts: the Council of State (*Raad van State*), mainly dealing with planning law as well as environmental law, the *Centrale Raad van Beroep*, mainly dealing with social security and civil servants matters, and the *College van beroep voor het bedrijfsleven*, dealing with matters of trade and economic administrative law).

Source:

Oswald Jansen and George Middeldorp, *Researching Dutch Law*, June 2005,
<http://www.nyulawglobal.org/globalex/Netherlands.htm>

Further Reading:

Constantijn Kortmann and Paul Bovend' Eert, *The Kingdom of the Netherlands. An introduction to Dutch Constitutional law*, Kluwer Law and Taxation Publishers, Deventer, Boston 1993.

Eric Janse de Jonge, The Netherlands, in: *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, Bristol 1998, pp. 365-378.

2. The influence of European legislation on Dutch law

The Netherlands have always been an enthusiastic supporter of European cooperation. It was one of the six countries that formed the first European community, the European Coal and Steel Community in 1951. Since then, the Netherlands have been party to all the treaties establishing closer ties between the countries of Europe. The pro-European attitude of the Netherlands has had profound influence on the law: most fields of law are affected by rules and regulations from Brussels. In some fields, for instance environmental law and consumer law, the majority of the rules are either European or national rules adopted to conform to European law. European community law takes precedence over national law. In the famous *Costa-Enel* case (6/64) the Court of Justice of the European Community has ruled that European law is an integral part of the national legal system of the EC member countries and takes precedence over national law. Therefore one cannot fully ascertain the applicable law without researching the relevant European law.

Because European rules are made by supra-national bodies, the European Council,

Commission and Parliament, national sovereignty, the power of the national government and Parliament to legislate and execute legal rules as they see fit, has seriously diminished. Now that the European Union is expanding, the influence of the Dutch government on European issues diminishes even further. Although not everyone is completely happy about this, many people acknowledge that a small country such as the Netherlands cannot achieve much, economically or politically, on its own.

In addition to the law stemming from the European Communities, and now the European Union, there is a pervasive influence of the European Convention on Human Rights in Dutch law. The Netherlands ratified the European Convention in 1954. As a consequence, Dutch citizens can take their complaints about the violation of the Convention to the European Court of Human Rights, after they have exhausted national remedies. Although the general opinion in the Netherlands is that Dutch human rights protection is very good, the European Court has on a number of occasions ruled that the Dutch state violated a provision of the European Convention. One of the articles for which the Netherlands were at fault in the past is article 6: the right to a fair trial.

As to the effect of general public international law in the Dutch legal order, one has to look at articles 93 and 94 of the Constitution. These articles provide for the direct effect (self-execution) of provisions of treaties and of resolutions of international organizations if they are binding on all persons by virtue of their contents. When the Dutch judge rules that such a provision has direct effect, a citizen can invoke the provision in his case and the provision will then prevail over conflicting Dutch law.

Source:

Sanne Taekema (ed.), *Understanding Dutch Law*, Boom Juridische uitgevers, Den Haag, 2004.

Further reading:

Ian Ward, *A Critical Introduction to European Law*, Cambridge University Press, 2004.

3. A pragmatic legal culture

The Dutch legal culture is characterized by a pragmatic attitude in which compromises are valued as favourable to strict legal doctrine. Usually, two historical explanations are given.

After eighty years of civil war, the mainly protestant provinces of the Dutch Republic gained independence from the Catholic Spanish empire. The Dutch Republic became a state in which (Calvinist) Protestantism was state religion, but it practiced religious tolerance, i.e. everybody was permitted to practice his faith no matter if it was conform with the state religion or not, as long as he did not break the country's laws. For many centuries, the Netherlands were a place of refuge for people with religious beliefs that were outlawed in other countries. Because of this hospitality to other religions and because of the free press, the country had a reputation for tolerance. With the rise of socialism in the nineteenth century, Dutch civil society became more and more organized along four religious-political lines: Catholics, orthodox Protestants, socialists and a general liberal group: the so called pillarization (*verzuiling*). Since none of the political parties of the four blocks ever commanded a majority of the Electorate, a politics of accommodation was developed.

Another historical explanation is derived from the fact that for centuries the inhabitants of the Netherlands ('the low countries') had to work together to impolder land and maintain dikes in order to keep the water out, otherwise all would drown. This would have shaped Dutch civil society. Issues are resolved by negotiation and settlement rather than by conflict. In the nineteen nineties this Dutch form of public governance was officially labelled the *poldermodel*. It represented the organised cooperation between the Dutch government, employers, labor unions and other parts of civil society, aimed at reaching agreements rather than conflict.

These two developments in Dutch society reinforced the need to compromise and settle for pragmatic solutions. Sometimes, this meant accepting that a more principled solution was not feasible. The attitude of (temporarily) accepting a solution that may not be very elegant or principled is one that is shared by politicians and jurists alike.

Although the Dutch legal system is notorious for its practice of regulated tolerance, or *gedogen*, in criminal matters such as drugs, prostitution and euthanasia, there is not a widespread condoning of this practice. It is best seen as a phase in a dynamic process of coping with changing circumstances and opinions in society. Regulated tolerance is a reaction that stems from the realistic attitude that the problematic phenomenon will not simply go away. Once the view takes hold that the criminal law cannot solve a social problem, the pragmatic attitude demands that other tactics be pursued. Regulated tolerance means following a clear policy of not prosecuting certain offences; in the Dutch context, it is usually a combination of administrative policies by the local government and criminal policies by the public prosecution office. Similarly to the case of euthanasia, regulated tolerance with regard to prostitution was a step on the way to legalization: in 2000, prostitution was made legal by a change in the Criminal Code.

The practice of regulated tolerance is one of the indications that the Dutch legal culture is pragmatic, i.e. the focus is on finding a good solution instead of following the rules for their own sake. It is important to note, however, that this is a characteristic of the internal legal culture, being the attitudes and values of the people working in the legal profession. It should not be confused with the attitudes about law in society, the external legal culture. The general public is less lenient about following the rules and their expectations about what can be achieved by legislation are higher.

The stark rise of crime figures in the Netherlands since the nineteen eighties and the general fear of crime as a result of this, led to a strong need felt in society for 'law and order', a stricter enforcement of the rules to achieve a more orderly society. This tendency can be most clearly witnessed in the debates about issues of public safety. Dutch public opinion, which is in favour of individual freedom in matters of sexual orientation and private opinion, has become stricter when the value of freedom has to be balanced against safety and public order: restrictions on civil rights in the interest of safety, to prevent crime or terrorism, are more easily accepted now than they used to be.

Source:

Sanne Taekema (ed.), *Understanding Dutch Law*, Boom Juridische uitgevers, Den Haag, 2004.

Further reading:

Chrisje Brants, 'The Fine Art of Regulated Tolerance: Prostitution in Amsterdam', *Journal of Law and Society* (25) 1998, p. 621-635.

Freek Bruinsma, *Dutch Law in Action*, Ars Aequi Libri 2000.