

## **The Three Most Important Things About My Country's Legal System That Others Should Know: The Netherlands**

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### **1. Introduction**

The Netherlands is the largest of the three countries within the Kingdom of the Netherlands (the other two are Aruba and the Dutch Antilles). The country (16 million inhabitants on 39.000 sq km; language: Dutch; head of state: Queen Beatrix) is bordered by the North Sea, Belgium and Germany. Its legal system can be qualified as a civil law system: it has codified its major parts of private law and criminal law in comprehensive codes and meets all other requirements usually attributed to civil law jurisdictions. In most literature, Dutch law is located somewhere in between the French and the German legal family, although in practice it seems to approach the German legal family somewhat more. This is for example apparent from the new Dutch Civil Code of 1992, which has a general part and a (rather abstract) way of drafting that reminds the reader much more of the German than of the French code.

In the following, I will discuss three characteristic aspects of Dutch law. It should however be clear from the outset that if anyone else would have written this note, he or she would probably have picked out three other aspects or would in any event have presented them in a radically different way. One could for example also have stressed that Dutch law is now to a large extent a multilevel jurisdiction because of the influence of European law or is characterised by a large degree of de-formalisation. My focus is on codification (2), protection of weaker parties (3) and the pragmatic and transparent approach towards controversial issues (4).

### **2. Codification, Re-codification and Judicial Discretion**

The first aspect of Dutch law that needs attention is the emphasis it puts on codification: generally speaking, the Dutch find it important to lay down the law in statutes and to regularly revise these statutes by incorporating new case law and the insights of legal doctrine. This explains why, in the last sixty years or so, the Dutch legislator embarked upon several large codification projects, replacing large parts of the existing legislation in the fields of private law, constitutional law and administrative law.

Perhaps the best-known (re-) codification project is the drafting of a new Dutch Civil Code (*Burgerlijk Wetboek*), which already started in 1947 and is still ongoing. Most of the provisions of the old Dutch Code of 1838 were translations of the French *Code Napoléon*; when these provisions no longer expressed the existing private law because they had been set aside or interpreted by the Dutch Supreme Court, the general feeling was that a new civil code had to be put in place. Re-codification started in 1947, when law professor E.M. Meijers was entrusted with this project. In 1970, the first book of the new code (on family law) was enacted, followed

by a second book on company law in 1976. In 1991 Book 8 on transport law was put into force. The core of private law was adopted in 1992, when the Books 3 (General Part), Book 5 (Property Law), Book 6 (Law of Obligations) and parts of Book 7 (Specific Contracts) were enacted. In 2003, Book 4 on the law of succession was adopted. Some parts of Book 7 are still to follow: the contracts envisaged by it are now still governed by the old civil code.

The same desire to put the law into comprehensive codifications led the Dutch to fundamentally revise the old Constitution of 1815 in 1983 and to adopt a single General Administrative Law Act (1994) that applies to both the making of administrative decisions and their judicial review.

It should be stressed that this emphasis on codification does not mean that the courts lack the freedom to broadly interpret or even evade the statutory provisions. To the contrary: the new Dutch Civil Code in particular contains many open-ended norms (such as ‘fairness and reasonableness’) that allow the courts considerable freedom in deciding concrete cases. Even in case of very specific statutory rules, Dutch courts are allowed (and sometimes willing) to deviate from these if they feel that justice requires so. Generally speaking, the Dutch judiciary (that consists completely of professionally trained judges; trial by jury does not exist) enjoys a large discretionary power. This makes case law at least as important as statutory law.

I still point at one particular aspect of codification in the Netherlands. It is that the new codes are often based upon extensive comparative research: it was tried to offer ‘the best solutions’ from various jurisdictions, also with a view to *exporting* the code to other countries. Indeed, the Dutch have been rather active in law reform in Central and Eastern Europe and in other parts of the world, true to the view of E.M. Meijers that it is in drafting codes of high quality that a small country can show its greatness. The Dutch ambition to play an important role as ‘legal capital of the world’ (hosting e.g. the International Court of Justice and the International Criminal Court) must probably also be seen in this perspective.

### **3. Protection of Weaker Parties**

The second thing that springs into mind if one discusses Dutch law is the high value that it puts on protection of weaker parties. Like many other Western-European countries, the Netherlands is a welfare state with a high level of social security, consumer protection and protection of weaker parties generally. Looked at from an economic (cost-benefit) perspective, protection through open-ended norms like unconscionability and good faith is also part of Dutch legal culture in which welfare is usually regarded as being promoted most by State intervention (sometimes including intervention by the judiciary), no matter what economic or empirical evidence there may be against this view.

In the context of this paper, it is impossible to go in any detail into the many different ways in which weaker parties are protected. But there is one aspect that deserves some attention because here it seems that Dutch law is distinctively different from other European jurisdictions. It is concerned with the discretionary power that the court grants itself when it feels that the simple application of an existing statute

would lead to an unjust result. One example is where the court found that a statutory rule on prescription had to be set aside on basis of fairness and reasonableness, even though the legislator had considered only a few years before that this should not happen in the type of case at hand. In this personal injury case, decided by the Dutch Supreme Court in 2000, a Mr. Van Hese had worked as a painter with the *Schelde Groep BV* between 1959 and 1963. In 1996, he was diagnosed with asbestos cancer. As a result of its long incubation time, it was not known to the victim he contracted this disease. Mr. Van Hese filed a claim for compensation against his former employer who referred him to art. 3:310 of the Dutch Civil Code, which contains a long-stop of 20 years. Nevertheless, the court reasoned that although the prescription period is absolute in principle for reasons of legal certainty, the long-stop can be set aside in exceptional circumstances like here ‘if it is uncertain whether the victim has in fact contracted a certain disease and the results of this disease only become manifest after the passing of the prescription period.’

The above does of course not mean that the Dutch court has unlimited powers. In the field of constitutional law, it even lacks one important instrument that exists in many other jurisdictions: Dutch law does not allow constitutional review of statutes. Art. 120 of the Constitution states explicitly that the courts are not allowed to review the constitutionality of statutes and treaties. On the other hand, courts are obliged not to apply statute law in so far as it is contrary to international treaties accepted in the Netherlands (including the European Convention on Human Rights). Currently, there is a debate whether constitutional review should not be accepted after all; if it would come to this, this competence will probably be entrusted to the ordinary courts, not to a separate constitutional court.

#### **4. A Pragmatic and Transparent Approach Towards Controversial Issues**

A final characteristic of Dutch law is well known abroad and relates to the liberal policy of the Netherlands towards controversial issues such as prostitution, euthanasia and the use of soft drugs. Although the law in these areas has a very firm basis in Dutch society and is accepted by a great majority of the Dutch population, it is often criticised abroad. It is clear that this criticism can only be justified if it is based upon proper knowledge of Dutch law. But it also seems that the criticism is incited by the Dutch willingness to discuss openly problems that exist everywhere and to deal with them in a pragmatic way: Dutch policymakers believe that if a problem cannot be solved, it is better to try to ‘decriminalise’ and control it.

One case in which this policy becomes very clear is the Dutch law on prostitution. In line with Dutch public opinion that prostitution is a job like any other job, prostitution (including window prostitution) is seen as a profession by the law, which implies that prostitutes pay income tax, may join unions and have access to social security and health services. Legalising prostitution also implies that age limits (both for prostitutes and clients) can be set, that prostitutes must be able to show a EU passport before being able to rent a window, and that brothels only get a license if they meet certain requirements. This regulation of prostitution allows the government to deny licences to brothels that do not meet requirements as to hygiene, salaries, hiring policies, etc.

Another example of this pragmatic policy concerns euthanasia or assisted suicide. In 2002, the Dutch practice of allowing voluntary euthanasia under very strict conditions (a practice that had at that time already existed for decades and still exists in other countries) was formally legalised in a statute. Conditions are that a patient of 16 years or older faces a future of unbearable and lasting suffering, that the patient makes a voluntary and well-considered request to die, that both doctor and patient are convinced that there is no other solution, that a second medical opinion is obtained and that life is ended in a medically appropriate way. There is a government agency to which the euthanasia must be reported. It is thus far from it that a patient has a *right* to demand termination of life or that a doctor is *obliged* to cooperate. Before the statute was put into place, doctors could be prosecuted for murder: they had to prove that termination of life was justified. With the new statute, the burden on proof is shifted to the prosecutor, who is to show that the voluntary euthanasia did not meet the requirements of due care. Again, it was the Dutch willingness to discuss difficult moral issues openly (in fact, discussion took more than 30 years) that could lead to this statute.

A final example is the pragmatic Dutch policy on soft drugs. In many countries, drugs are seen as detrimental to society and are therefore outlawed, even if evidence shows that criminalising drugs does not help to reduce the amount of people taking these drugs. In Dutch law, the general assumption is that it is not illegal to hurt yourself (one of the reasons why also the use of alcohol or cigarettes is allowed) and that the problems usually associated with the use of drugs are not caused by the people using these drugs, but by persons selling them on an illegal market for high prices. By making the use of soft drugs legal, this market no longer exists and criminal behaviour surrounding drug use (like stealing money to be able to pay for drugs) comes to a halt. This is why Dutch law allows users to possess a small quantity of soft drugs for personal use and why so-called coffee shops are allowed to sell these small quantities to individual customers older than 18. Wholesale suppliers are still prosecuted, as are traffickers of both soft and hard drugs. Thus turning the use of soft drugs into an issue of public health and not of criminal law, problems of public order or criminal behaviour surrounding the use of soft drugs have virtually disappeared.

**Further reading:**

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- J.M.J. Chorus et al (eds) (1999), *Introduction to Dutch law*, 3<sup>rd</sup> ed., Deventer: Kluwer
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## New Zealand

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New Zealand was populated by Maori, migrating from the Pacific, beginning about 1000 years ago. It was discovered by Europeans in 1642 and again in 1769 by Captain Cook. In the late 18<sup>th</sup> and early 19<sup>th</sup> century it was increasingly visited by sealers and whalers. In 1840 the Treaty of Waitangi was signed by a representative of the British Crown with some but not all Maori tribes and thereafter England asserted sovereignty over New Zealand and English settlers began migrating in numbers. Institutions of government on the English model were established, with representative democracy since 1852 and responsible (Cabinet) government since around the late 19<sup>th</sup> century. Independence from the UK was gradually attained and certainly was fully in place by the 1930s, and substantially in place for quite some time before that.

New Zealand is a unitary state. It is a Westminster-style parliamentary democracy with a single House of Representatives, a mixed-member proportional representation system<sup>136</sup>, and an independent judiciary.

Broadly speaking, its constitution mirrors that of the United Kingdom, the old colonial parent. The Queen of Great Britain and Northern Ireland is also the Queen of New Zealand, where she is represented by a Governor-General who exercises a formal role in parliamentary law making (by giving the “Royal assent” to bills passed in Parliament, and which, by convention may not be withheld). Like the United Kingdom’s, the New Zealand constitution is unwritten, contains no formal constitutional rights, and permits almost unquestioned Parliamentary supremacy. New Zealand courts have no power to review the validity of Parliament’s laws, nor declare them invalid for unreasonably abridging human rights.

New Zealand does, however, have a Bill of Rights which affirms a range of rights and freedoms derived from the International Covenant on Civil and Political Rights. Though the New Zealand Bill of Rights Act (passed in 1990 as ordinary legislation) confirms the supremacy of Parliament, the practice of regular elections, a wide franchise, and public scrutiny of political debate ensures a degree of rights protection that is comparable to other liberal democracies in the world today.

The provisions of the Bill of Rights Act are crafted to provide a political-democratic protection against unreasonable limitation of the rights and freedoms of citizens. The guaranteed rights limit the power of the executive branch and all public actors. As to the legislative branch, the Bill of Rights Act requires the Attorney-General to draw to members’ attention any potentially rights-infringing provision that is contained in legislation introduced to the House of Representatives. Coupled with a statutory expression of the principle that legislative abridgment of fundamental human rights must

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<sup>136</sup> Parliament comprises 120 members, of whom 60 hold “electorate” seats, and 60 are “list MPs”. Citizens have two votes: one for their electorate candidate and the other for a party. The 60 list MPs are appointed to Parliament from lists registered in advance by political parties, in such numbers as to ensure that the make-up of Parliament reflects the proportion of votes received by each political party contesting the election. It follows that, of the two votes, it is really the party vote that determines the result.

be clear and express and that courts must read ambiguities in a rights-favouring way, the Bill of Rights Act ensures that Parliament will only be taken to have unreasonably limited the various rights and freedoms where that result is clearly intended and is supported by sufficiently clear statutory language. Further, moves to abridge rights are politically contentious, and New Zealand's small size means they will rarely escape considerable attention. As a result, New Zealand can boast few deliberate abridgments of fundamental rights since the Act was introduced 17 years ago.

Rights litigation is heavily influenced by international and comparative law, in the sense that the views of international tribunals and the judgments of foreign courts are often cited and considered in judgments. In particular, recourse is often had to jurisprudence emanating from Canada, the USA, the United Kingdom, the European Court of Human Rights, the Human Rights Committee under the International Covenant on Civil and Political Rights and, on occasion, the Constitutional Court of South Africa.

The Treaty of Waitangi, signed in 1840 by Maori chiefs and a representative of Queen Victoria, is New Zealand's founding constitutional document, though not itself a source of law. Under the Treaty the Maori tribes of New Zealand ceded their sovereignty – or at least a power to govern – to the English Crown, and in return Maori indigenous rights were affirmed. Because of its brevity, but also because of textual discrepancies between the respective Maori and English translations of the Treaty (the Maori text arguably reserves considerable power to Maori which the course of history has not respected) it is usual now to speak of the “principles” of the Treaty. These principles are generally taken to denote an ethos of partnership between executive government and Maori in matters concerning governance and economic development. In practice this entails a duty to consult and give effect, so far as politically possible, to Maori aspirations. In the educational sphere, particular emphasis is placed on the preservation of the Maori language and culture. State schools are required to facilitate this, and there is also provision for schools in which Maori language is the language of instruction.

Legal education in New Zealand is characterised by being outward looking and strongly influenced by international law and developments. As a small country at some distance from the rest of the world, but relatively prosperous, it has a considerable amount of interaction with other nations through international trade. Many New Zealanders travel widely and law graduates are commonly employed in major international cities such as London, New York, Paris, Singapore and Dubai, as well as serving in international tribunals and organisations.

New Zealand has a four tier court system: (1) District Courts hearing most criminal cases and civil cases up to \$200,000; (2) a High Court of New Zealand hearing serious criminal cases and with unlimited civil jurisdiction; (3) the New Zealand Court of Appeal to which appeals are mostly possible as of right save in cases beginning in the District Court where leave is often required; and (4) the Supreme Court of New Zealand to which appeals are possible only by leave.

Until 2004 the highest court in the structure had been the Judicial Committee of the Privy Council in London. The New Zealand Supreme Court was established and began sitting in 2004 in consequence of the abolition of the right to appeal to the Privy Council. The last Privy Council appeal (of a residual case in the system already) was heard in early 2007.