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The Netherlands

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1. Introduction

In this contribution the findings of a research project into access to justice in environmental matters in the Netherlands have been laid down. Following the structure of all national reports, first, the various proceedings (administrative, criminal and civil law) have been described (section 2). Then, the empirical data that have been collected in 2003 are summarized. This section (section 3) shows the total number of environmental and planning cases that are brought before courts, as well as the nature of the applicants, and their success ratio. In section 4 one remarkable case has been described and analysed.

2. Description of proceedings in the Netherlands

2.1 Characteristics of the country

One of the main sources of Dutch law is statutory law. This does not only include formal legislation (legislation by government and parliament), but also regulation by decentralized bodies (provinces, municipalities) and delegated legislation at the level of the central government (ministerial ordinances). The law is largely influenced by EC law. Apart from this statutory law, self-regulation has become more important over the last decade. This means that instruments like covenants have become rather important as 'sources of law', while operations have gained more freedom and responsibility in obeying environmental rules when voluntary environmental management systems are in place. A great deal of environmental matters fall within the scope of administrative law, for which the General Administrative Law Act gives procedural rules. However, NGOs and citizens also have the possibility to initiate court proceedings under civil law and under criminal law.

The General Administrative Law Act (GALA) distinguished three 'preparation procedures', i.e. procedures that have to be applied when drafting a decision, such as an environmental permit. The three procedures are: the normal preparation procedure (Title 4.1), the public preparation procedure (Section 3.4) and the extensive public preparation procedure (Section 3.5). The relevant procedure determines who can participate in the decision-making process and who can address the courts. The extensive preparation procedure applied to most environmental decisions and was most liberal as far as public participation and standing are concerned. As a consequence of a strong call for deregulation, in 2002, the public preparation procedure and the extensive public preparation procedure have been integrated (into a new

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Section 3.4),[1] thus limiting the number of people who can address the courts. In Parliament the Minister of Housing, Spatial Planning and the Environment had promised to adapt the environmental legislation to the new procedure in order to not reduce the number of people that have access to justice in environmental matters.[2]

Meanwhile, the newly installed Cabinet in the spring of 2003 called for further deregulation by abolishing the so called 'actio popularis' in environmental law. The new procedure has not yet entered into force; a proposal for the necessary changes into specific environmental legislation has only been sent to Parliament in February 2004. This proposal, contrary to the earlier promises, does limit the number of people who can address the courts in environmental matters. Below, the current discussions will be further elaborated.

There are administrative sectors within the District Courts, with the possibility of appeal to the Administrative Law Division of the Council of State. However, in almost all environmental cases, legislation provides for immediate appeal with the Administrative Law Division of the Council of State (i.e., appeal in one instance). Civil and criminal law cases can be addressed in three instances. Decisions of the District Courts (civil sector, criminal sector) can be reviewed by Courts of Appeal. The Supreme Court can be addressed for a cassation procedure (only in civil law and criminal law cases).

2.2 Procedures before administrative courts

In this section procedures before administrative courts are discussed. I make a distinction between procedures with regard to environmental permits and procedures regarding other decisions, such as ordinances, plans etc. This distinction is necessary as a consequence of differences in the preparation procedure.

Until 2004, environmental permits, i.e., the integrated permit on the basis of the Environmental Management Act (EMA), as well as other permits, such as the permit on the basis of the Pollution of Surface Waters Act (PSWA), are granted applying the extensive public preparation procedure (Section 3.5 of GALA). Other decisions are usually taken applying the public preparation procedure (Section 3.4 GALA). Since the new procedure has not yet entered into force, I will first deal with the current situation (current as of April 2004).

2.2.1 Procedures against permits: 'anyone'

Decision-making processes on applications for all environmental licences are regulated by the extensive public preparation procedure. According to Article 8.1 of the Environmental Management Act (EMA) it is forbidden to set up, operate or change the set up or operation of an installation unless one has a permit to do so (IPPC-installations and all other installations that might have adverse impacts on the environment). A party has to apply for such a permit with the competent authority. The extensive public preparation procedure applies as well on these permits, as on several other decisions (e.g. licences to discharge waste into surface waters). After the application and the draft-decision have been published *anyone*, as well as advising bodies, such as the Inspectorate for the Environment, can bring forward written objections. Besides that, anyone can ask the administrative authority to organise an 'exchange of thoughts' (hearing) at which oral objections may be put forward. The term 'anyone' implies that all groups of citizens

[1] *Staatsblad* [Bulletin of Acts and Orders] 2002, 54.
[2] *Kamerstukken* [Parliamentary Documents] II, 1999-2000, 27 023, No. 3, p. 6 and No. 5, p. 11.

and environmental NGOs, as well as non-interested individuals have a right to participation in environmental decision-making with regard to permits. There is no need to show special interest in this procedure. The final decision has to show that the objections have been taken into consideration.

When the extensive public preparation procedure has been attended, there is no need to object to the same administrative authority, but instead one can address an appeal to the Administrative Law Division of the Council of State directly. This is called the *indirect actio popularis*. Anyone has a right to be involved in decision-making. Once a person or a group of people or NGO have entered the decision-making process, they have a right to go to court as well, as long as they object on the grounds put forward by them in the decision-making process. They are not allowed to introduce new arguments in court. Anyone who has objections against alterations of the draft decision, as well as interested parties who cannot reasonably be blamed for not having made objections against the draft decision, have a right to address the Administrative Law Division of the Council of State as well. In all of these cases there is a direct appeal to the Administrative Law Division of the Council of State.

The Council of State has very extensive powers, since it can, besides squashing a decision to grant a permit, also take a new decision if it decides the case is clear enough to do so. Otherwise it can rule that the administrative body has to take a new decision. It can also change some of the conditions attached to the licence, or draw up new ones. In some cases compensation for damages can be awarded. However, it must be noted that usually the Administrative Law Division of the Council of State only tests government decisions in a rather marginal way. Allegations by administrative bodies that administrative courts sometimes show 'legal activism' are taken seriously, both by the legislator (deregulation!) and by the courts. This means that the Administrative Law Division of the Council of State usually annihilates a decision on formal grounds, leaving the administrative authorities the possibility to adopt a new decision, but only after having gathered more or better information concerning the relevant facts and interests to be weighed.

Appeal does not suspend the decision. However, an applicant may ask for suspension in a special procedure before the president of the Administrative Law Division of the Council of State. There is no higher appeal possibility afterwards.

These procedures are characterised by low costs. Although parties can be held liable for procedural costs, they do not have to provide for financial security. The final decision, including judicial review, can take up to 1 or 1,5 years. Judicial assistance is not obligatory and there are no strict formal rules for the formulation of complaints or letters of appeal. There are government financed bureaus of legal aid, some of which are specialized in environmental matters. They especially assist local and regional environmental organisations.

There are two important additional procedures that are open for anyone. First, anyone can request the competent authority to *update or withdraw the permit*, when this is necessary to protect the environment (Art. 8.22vv EMA). Second, any person has the right to ask an administrative body to take *enforcing measures* when they feel the authority is in default of doing so (Art. 18.14 EMA). The decision upon such requests can be reviewed by the judiciary. In these cases the persons (or groups/NGOs) that ask for an update of the permit, or for enforcing measures, are seen as applicants for a decision, and therefore always considered to be interested parties.

2.2.2 Abolishing the actio popularis in the Netherlands

As already stated above, in the Netherlands, there currently is a debate on access to justice in environmental matters. A few authors and politicians claim that NGOs should not have access to justice, not even in administrative law cases, because NGOs have no direct interest in environmental matters. The decision to grant an environmental permit to an industrial plant is a matter between the competent authority and the company that applied for the permit and, possibly, one or two people living close to the plant. NGOs should only be able to interfere with the political process, for instance by urging the city council to look into the decision of the competent authority. Courts should not be able to annul a decision taken by a democratically legitimised public authority following arguments of a non-democratically legitimised NGO.[3] In general, it is often thought that court procedures by NGOs and individual citizens are time and money consuming. The national government that was installed following the May 2002 elections took this view in its 'Strategic Document': 'it has become easier to obstruct decisions than to take a decision; as a consequence, public authorities often cannot solve social problems. The Cabinet will look into proposals to (...) streamline procedures and abolish the so called actio popularis, in order to increase decisiveness of the authorities'.[4] In June 2003, it was announced that both in planning and environmental law the (indirect) actio popularis will be abolished.

The majority of authors disagree with this position. They state that legal protection applies to NGOs in environmental matters, not only as a consequence of the Aarhus Convention,[5] but also because NGOs, for long, are considered to have an interest in environmental matters under national law. Standing for environmental NGOs is often considered to be a consequence of the constitutional right to environmental protection, laid down in Article 21 of the Dutch Constitution.[6] They argue that the large number of cases that is won by NGOs in environmental cases against public authorities shows that public authorities are not always inclined to apply environmental legislation correctly.[7] Also, abolishing the right for NGOs to go to court in administrative law, will probably lead to the same number of court procedures, this time initiated by directly involved individual citizens that take up positions prepared by NGOs. From a legal point of view, the separation between a group of local citizens that have joined forces in an association and NGOs is not very sharp. Courts, in each and every case, will have to go into the matter of admissibility, which, in turn, leads to delays. Also, the number of tort procedures is expected to increase after decreasing the access to justice in administrative law.

As already stated above, by early 2004, a proposal to abandon the actio popularis had been sent to Parliament.[8] Should this proposal be accepted, then public participation will still be available for 'anyone'. However, only 'interested parties' will be allowed to go to court. In addition, only 'interested parties' will be granted the right to ask an administrative body to take enforcing measures under Art. 18.14 EMA. This will, after having existed for 25 years (since

[3] For example: J. Teunissen, annotation under ABRvS 13 November 2002, (2003) *Gemeentestem* No 7177, 29.
[4] http://www.regering.nl/regeringsbeleid/bronnen/regeerakkoord/
[5] And other arguments based on international and EC-law, J.M. Verschuuren, 'Internationaal milieurecht en de Awb', in: Lurks e.a., *De grootste gemene deler. Opstellen aangeboden aan prof.mr. Th.G. Drupsteen* (Deventer 2002), 235-244.
[6] J. Verschuuren, 'The Constitutional Right to Protection of the Environment in The Netherlands', (1994/4) *Revue Juridique de l'Environnement*, 340; more elaborately, same author, *Het grondrecht op bescherming van het leefmilieu* (Zwolle 1993), 296 and 378-380.
[7] M.P. Jongma, F.C.M.A. Michiels, 'Het beroepsrecht van milieu-organisaties moet blijven!' (2002/45-46) *Nederlands Juristenblad*, 2238-2239.
[8] *Kamerstukken* [Parliamentary Documents] II, 2003-2004, 29 421, Nos. 1-2.

1979), end the 'indirect actio popularis' in the Netherlands. According to the proposal, it is no longer justified to have a special regime for environmental matters. The Cabinet admits that the proposal will probably not reduce the number of court cases since research showed that usually only interested persons object against a decision anyway (see below). Non-interested persons do not seem very interested! Still, the Cabinet argues that in times of deregulation and decreasing administrative burdens such as these, maintaining an actio popularis would give the wrong signal to society.[9]

The proposal meets a lot of criticism. The Council of State warns for an *increase* of the administrative burden, because now competent authorities as well as courts, in each and every case will have to decide whether or not the applicant is an interested party. In my view, the line of reasoning of the Cabinet is contrary to the Aarhus Convention.[10] Although the Aarhus Convention does not explicitly necessitate an indirect actio popularis, it still is rather odd to reduce access to justice in environmental matters, where the Aarhus Convention in its preambular provisions clearly states that access to justice must be *improved*. Some even argue that, once someone has entered the participation process, he or she becomes a member of the 'public concerned' and gets 'sufficient interest' as meant in Article 9(2) of the Aarhus Convention, thus allowing this person to go to court. This line of reasoning can not only be found in literature,[11] but is in the UN/ECE 'Aarhus Implementation Guide' as well.[12] Such a line of reasoning implies that an indirect actio popularis should be instituted!

In Parliament it was even suggested to drop the presumption that environmental NGOs have an interest when the environment is at stake.[13] The latter suggestion would clearly violate both the Aarhus Convention and Directive 2003/35/EC.[14] The Dutch Minister for the Environment has therefore pointed out in Parliament that he cannot support proposals to that effect.[15] Meanwhile, the Justice Department, in its combat against 'administrative burdens' and bureaucracy,[16] is researching the possibility to further limit the number of cases before courts by introducing additional admissibility criteria. Two of these are now being studied: a) the introduction of a 'Schutznorm'-criterion (the applicant can only invoke legal provisions that have explicitly been designed to protect his specific interests), and b) the applicant can only address issues that directly influence his or her interests (at the moment, once you are in - i.e., once you are considered to be an interested party-, than you can invoke any legal rule that is applicable in the case, or address any topic that is relevant for the decision).

2.2.3 Procedures against other environmental decisions: 'interested parties'

[9] *Kamerstukken* [Parliamentary Documents] II, 2003-2004, 29 421, No. 3, p. 4.
[10] In April 2004, the ratification process of the Aarhus Convention was well under way (*Kamerstukken* [Parliamentary Documents] II, 2002-2003, 28 835, Nos. 1-2).
[11] F. de Lange, Beyond 'Greenpeace', Courtesy of the Aarhus Convention, (2003) *Yearbook of European Environmental Law* Vol. 3, 239.
[12] S. Stec, S. Casey-Lefkowitz, and J. Jendroska, *The Aarhus Convention: An Implementation Guide* (New York/Geneva: United Nations, 2000), 108.
[13] J.M.H.F. Teunissen, 'De algemeen belangorganisatie als bestuursrechtelijk (pseudo-)Openbaar Ministerie?' (2003) *Gemeentestem* No. 7179.
[14] Directive 2003/35/EC providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, [2003] OJ L156/17.
[15] *Kamerstukken* [Parliamentary Documents] II, 2002-2003, 28 600 XI, No. 95, 6.
[16] See the May 2003 Coalition Agreement 'Participation, Employment, Deregulation', published at http://www.government.nl.

The normal or the public participation procedure apply to most other decision-making processes, such as permits on the basis of nature protection law, environmental ordinances, or decisions on administrative enforcement. Sometimes there are specific processes, not included in the GALA. There are differences between the procedures leading to the various decisions, depending on which Act has to be applied, but in almost all of these cases 'interested parties' have a right to participate in the decision-making.

After an environmental decision has been taken, one has the right to lodge a notice of objection against this decision. When the *normal preparation procedure* has been followed, this applies to the applicant, if: 1. the denial is related to information on facts and interests that involve the applicant, 2. this information deviates from those that the applicant has submitted himself, and to any other interested party, if: 1. the decision is based on facts and interests that involve this party, 2. the information is forwarded by the interested party himself. When the competent authority intends to apply administrative pressure or to impose a penalty, the permit holder concerned will be informed of this intention. He must be given the opportunity to express his views if: 1. the decision is based on information or facts and interests that involve this party, 2. the concerned information hasn't been forwarded by the interested party himself. This opportunity doesn't have to be given if the party has failed to give information (although that was legally mandatory), if this would be in conflict with the urgency of the decision, if the interested party has been heard before, or if the object of the decision can only be obtained if the interested party is not aware of the content of the decision (in advance).

When the *public preparation procedure* has been followed, any interested party has a right to raise objections. That is any party whose interest is directly involved with the environmental decision. Legal personalities have an interest if they protect the interest concerned on the basis of their aims and actual activities. Art. 1:2(3) GALA states: 'As regard legal persons, their interests are deemed to include the general and collective interests which they specially represent in accordance with their objectives and as evidenced by their actual activities.' In general, case-law shows that courts are rather lenient towards NGOs when applying this clause.

The objection has to be made to the same administrative authority that took the original decision. After the notice of objection is received, the issuer of the notice and possible other parties concerned get the opportunity to be heard. The administrative authority determines whether or not the complaints are well-founded. If the administrative body agrees with the raised objections, they can overrule the original decision and take a new decision which gives (partly) in to the objections. In both *participation* and *objection* procedures, no fee may be asked by the administration. Although judicial assistance is recommended, it is not compulsory. That means that in most cases the expected costs do not stand in the way of the participation in or the start of a procedure.

An appeal against the decision on this objection must be addressed to the Administrative Law Division of the Council of State in case of decisions on the basis of the EMA and Acts mentioned in Art. 20.1 EMA.[17] Appeal against other decisions, for instance on the basis of the Nature Protection Act or the Flora and Fauna Act, must be addressed to the administrative sector of the competent District Court. In these cases, after appealing to the District Court, higher appeal -usually- is possible with the Administrative Law Division of the Council of State. The

[17] I.e., Nuclear Energy Act, Noise Abatement Act, Groundwater Act, Air Pollution Act, Pollution of Surface Waters Act, Pollution of the Sea Act, Chemical Substances Act, Soil Protection Act, Antarctic Protection Act.

administrative Courts and the Council of State can decide to annul the administrative decision and order the competent authority to take a new one. In some cases compensation for damages can be awarded. When the case is very clear, the judge can take a decision instead of referring the dispute back to the administrative body.

However, there are various decisions against which no appeal is possible. These include all forms of legislation, including orders in council, ministerial orders and also national environmental policy plans. Since in many cases environmental licences have been replaced by general rules for certain categories of installations, laid down in orders in council (75% of all installations no longer need a permit), this can be criticised from the point of view of access to justice (see further section 3.2).

In the cases where a District Court or the Council of State has no legal jurisdiction, the civil sector of the District Court can function as 'a way out'. When factual acts, juridical acts under private law or from appeal excluded decisions (such as regulations from decentralised authorities, orders in council, etc.) are legally questionable, one can go to the civil sector of the District Court if it is a matter of tort. An individual or an organization has to prove that the administrative authority has committed a wrongful act against them by the action concerned (see below).

2.3 Procedures before civil courts

Activities causing environmental harm can be unlawful under the general law of torts. Any individual who claims to be the victim of a wrongful act has access to justice in civil cases: his or her specific interest is injured. The Dutch Civil Code contains an Article that deals with group actions. The legal requirements for admissibility of organizations in civil law proceedings are being a legal person, having relevant objectives under the articles of association and whose members have similarity of interests (Art. 3:305a). Environmental NGOs explicitly fall under the scope of this article. The State has access when a private party commits a wrongful act against the State, and if the civil action against that private party doesn't violate the rules for compliance as laid down in basic public law. As mentioned above, any individual citizen as well as environmental organizations can request the competent authority to enforce environmental legislation.

The Dutch Civil Code contains two kinds of foundation for the requisition of environmental damage: personal liability on the basis of a wrongful act and qualitative liability. Whether or not there is a matter of personal liability is being determined by applying the general law of torts (Art. 6:162). The essential requirements for the successful application of the Article concerned are unlawfulness, accountability, damage and a causal connection between unlawful actions and the damage. There is unlawfulness in case of a breach of (subjective) rights, when the action or omission violates legal duties or when there is a violation of unwritten law or failure to take due care. The qualitative liabilities in the Dutch Civil Code are the liability for dangerous substances, the liability of the owner of a waste disposal site and of the operator of a drill hole (Art. 6:175/177). In cases of environmental damage it is very often hard to point out exactly who caused the damage. In those cases case law assumes the most likely responsible party to be primarily responsible party. In such a case, it is up to him to prove someone else caused the damage. When there are more responsible parties, each of them is liable for a

proportionate part of the damage and they may be held jointly and severally liable for the damage.

Individuals, NGOs and the State can ask for a judicial injunction or prohibition. This is possible in the situation of an (impending) breach of right or of law. Individuals and the State can also ask for compensation of the damage they suffered. NGOs cannot ask for (financial) compensation for damage to the environment in general, i.e. *res nullius* or *res communes omnium*. The costs made to restore or to prevent damage can be eligible for compensation if the claimant can show an interest (this may be an environmental organization as well). These are costs the claimants made themselves to restore or prevent damage to the environment (e.g., clean-up costs). This is mostly damage to persons or objects and thus 'easy' to establish. But in the situation where restoration in the old situation, or the creation of an equal situation is not possible, suchlike *pure ecological damage* won't be eligible for legal compensation, at least it has not been awarded until now. In Art. 3:305a(3) of the Civil Code this explicitly has been laid down for tort actions initiated by NGOs.

The above also applies to governmental decisions. NGO's sometimes start a tort procedure when they feel that a governmental body violates legal duties, for instance international or EC-law. A famous example in Dutch case law will be discussed in section 4.

The costs of proceeding before a civil court are rather high in the Netherlands. In civil procedures parties are obliged to get legal representation before the court: they cannot be their own attorney. These costs are usually rather high. Moreover, the party who loses the case, also risks to pay for the costs of the counter-party. This risk keeps a lot of people from proceeding in - rather insecure- environmental liability procedures, especially the not so rich environmental organizations will think twice before going to court. Besides that, a procedure can take very long as it goes before three instances. So it can take from a few months up to a few years to get a final judgement.

Apart form the costs, another practical obstacle is the fact that NGOs mostly do not have the necessary legal knowledge to start a procedure. Therefore, a special project has been set up in the Netherlands in 1992. Legal Aid Service Centres have been armed with environmental lawyers to give individual citizens and NGOs that cannot afford legal assistance legal advice. They can even represent them in court, if it should come to that.[18]

2.4 Procedures before criminal courts

The Dutch legal system is fairly familiar with dealing with environmental matters by transaction, settlement and dismissal. In exchange for renounce from penal prosecution the public prosecutor can make several conditions, the fulfilment of which can prevent penal prosecution. These so-called transactions generally result in the offender paying a certain amount of money that the prosecutor fixes. Other important transaction conditions are the taking away of the unlawful obtained benefit, the payment of the costs of the damage as caused by the criminal offence, the repair in the old situation and the publication of the environmental offence. A settlement has the objective to prevent the suspect or the convicted to become part of a legal procedure that deprives him of his unlawful obtained, or to prevent that a court ruling concerning that will be left out. A settlement does not terminate the prosecution in a possible law suit. A dismissal is an

[18] By late 2003, however, the Minister of Justice suggested to change this system. To date, it is not clear what will happen with these government subsidised lawyers.

official announcement by a legal authority to a suspect that he will no(t) (longer) be prosecuted. Once a case is dismissed prosecution is only possible if new facts occur.

The public prosecutor has the competence to decide whether to prosecute or to renounce from prosecution. There is in principle no control by any other authority whether or not this decision is right. An important legal right in this respect is given to directly interested parties. A directly interested party is defined as someone whose interest will be affected if a prosecution should be left out (Art. 12(2) of the Criminal Prosecution Act). An NGO that according to its objectives and as appears from its factual activities looks after a certain interest, and that particular interest is directly affected by the decision not to prosecute, has that same right to complain to the Court. It needs to be stressed that nature and environmental organizations are considered to be promoters of the interest of victims of environmental crimes. 'Victims' needs to be read as those that experience disadvantage of the environmental degradation, but also the environment itself.

NGOs thus have the possibility to provoke a prosecution if the public prosecutor decides to renounce from prosecution by complaining to the Court (Art. 12(1) of the Criminal Prosecution Act). If the Court considers the complaint to be reasonable, it can order the public prosecutor to start the prosecution. The Court will turn down the complaint if the Court decides that the refusal is in the interest of the common interest.

2.5 Non-judicial procedures

Anyone (including NGOs) has the right to request the Dutch *National Ombudsman* to investigate acts of national administrative authorities, as well as acts of decentralized public authorities, in so far the latter authorities explicitly have declared the National Ombudsman competent to deal with complaints against them. The National Ombudsman has the responsibility to investigate complaints that are forwarded to him concerning governmental bodies that allegedly have not acted properly towards a natural or legal person. The Ombudsman isn't entitled to act if an other way of legal protection is available, or has been available but not been used. Before going to the Ombudsman, the plaintiff must have tried to get things settled with the administrative authority that is involved. If mediation between the Ombudsman and the authority fails, an inquiry will be started which will result in a written report. This report will be made public and available to all. Although only in a few environmental cases parties turned to the Ombudsman, this procedure has an important complementary role. The influence of the Ombudsman reaches even further than particular cases because his findings may be confirmed by the Minister him/herself.

Currently, a proposal to include a chapter on complaint procedures in the GALA is being discussed in Parliament.[19] The new Chapter 9 will give citizens the right to submit complaints against all acts by any public authority. It will also introduce procedural provisions as to how these complaints have to be dealt with. Decentralized authorities can either institute their own ombudsman, or accede to the National Ombudsman.

3. Empirical data

3.1 Methodology

[19] *Kamerstukken* [Parliamentary Documents] II 2002-2003, 28 747, nos. 1-3. Proposal submitted to Parliament on 24 December 2002 (still pending April 2004).

Since almost all administrative environmental law cases are decided in first and only instance by the Administrative Law Division of the Council of State, data collection was focussed on this court. Data have been compiled from existing sources, such as annual reports of the Administrative Law Division of the Council of State 1997-2002 and a 1999 research report on the actio popularis,[20] and new sources. All important cases by Dutch district courts since 2000 have been made available through the internet (at http://www.rechtspraak.nl). Case-law by the Administrative Law Division of the Council of State has only been made available since April 2002. This database has been used to run the searches necessary to find the data on numbers of cases. Since only cases of the years 2000-2002 are published here, and since the database does not cover all decisions, additional sources were necessary. Therefore, in addition, cases published in the various traditional sources (for instance the environmental law reviews), as well as on CD-ROMs have been studied, covering the years 1997-2002. Finally, interviews with key persons within the Administrative Law Division of the Council of State and NGOs were carried out to check the data obtained through other sources. Below is a summary of the empirical data; for further information see the country report.[21]

3.2 Sharp decline in the number of environmental and planning cases since 1997

Since 1997, the number of cases before the Administrative Law Division of the Council of State has been in decline. The number of cases that were pending on January 1st went down from 4834 in 1997 to 2846 in 2001, to 1847 in 2002.[22] These are cases in which the Administrative Law Division of the Council of State decides in first and only instance. It is estimated that about 80% of these cases are related to environmental law and planning law in a 2:1 ratio. The same trend is visible with regard to the number of preliminary (suspension) procedures. The sharp decline can be largely explained by a series of changes in legislation to reduce legal procedures. The most important change is that about 75% of all installations that originally needed an environmental permit have been brought under national regulations. These installations have to comply with environmental rules laid down in an order in council. They no longer have to apply for a permit to local or regional authorities. Since for these installations, there no longer are individual decisions, there no longer exists a possibility for appeal.

In 2002, a dramatic further decline took place as a consequence of a political assassination. On 6 May 2002, the leader of a new right wing political party, Pim Fortuyn, was killed by a person who was working for an environmental NGO, *Vereniging Milieuoffensief*. This particular NGO mainly operated through court procedures against environmental permits that were issued for cattle raising installations. Vereniging Milieuoffensief accounted for about 50% of all cases in this field of environmental law that were brought before the Administrative Law Division of the Council of State. The legal activities of this NGO practically came to a halt after the assassination. Other NGOs have kept quiet since the assassination as well.

At the same time, the political climate in the Netherlands has turned against environmental policy. This amplifies the decline of the number of cases brought before the Council of State. People seem to be reluctant to start court procedures on environmental issues.

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[20] A.A.J. de Gier, J. Robbe, Ch.W. Backes and P.J.J. van Buuren, *De actio popularis in het ruimtelijke ordenings- en milieurecht* (Utrecht 1999).

[21] J.M. Verschuuren, 'Country report and Case study: The Netherlands, annexe 6a', in: N. de Sadeleer, G. Roller, M. Dross (eds.), *Access to justice in environmental matters*, Vol. II, Brussels/Bingen am Rhein/Darmstadt 2002.

[22] Figures taken from the annual reports of the Council of State, available at the Council's website: http://www.raadvanstate.nl

A third reason for the decline in 2002 is a discussion on the effect of court procedures. NGOs feel that they often win cases on legal grounds, but that the effect of a court case won is very limited. Usually, the competent authority takes a new decision, this time without making formal mistakes, and then the plan or project goes ahead anyway. This is a consequence of the rather formal approach the Administrative Law Division usually takes. The Administrative Law Division tends to annihilate decisions because they have not been carefully prepared (e.g., without a thorough research into environmental effects), or because they are ill-motivated. When a decision has been well prepared and well motivated, administrative courts usually test it in a very marginal way.

3.3 Number of cases brought before an administrative court by NGOs and other parties

Within the environmental and planning law cases, the majority of cases is brought before the Administrative Law Division by local residents or a group of local residents (a local group), i.e., about 55% of the cases. The remainder of the cases is more or less equally shared by environmental NGOs (25%) and operators of installations (20%). Non-interested parties hardly ever address the courts (less than 1%). Combining these figures with the number of cases mentioned above leads to the conclusion that NGOs in 1997 brought 966 cases before the Administrative Law Division, diminishing to 569 cases in 2001 and 370 cases in 2002.

3.4 Civil law cases

To get an estimate of the number of civil law cases, I have used the research through the internet database mentioned above. From the 199 environmental cases initiated by NGOs found in the database, only four are civil law cases. Since civil law cases are very expensive, they often are not very successful for the NGOs, and there exists a good system of administrative procedures (see above), NGOs only rarely address the civil court. This means that about 2% of all cases brought before courts by NGOs are civil law cases. This seems to be an accurate estimate. The number is more or less constant for many years now. However, according to the lawyer of the *Stichting Natuur en Milieu*, a co-ordinating organization for all environmental NGOs in the Netherlands, NGOs often send a summons, threatening to start a civil law suit. Usually this leads to negotiations with the company involved, without a law suit being pursued in the end.

3.5 Number of cases won and lost by NGOs and local citizen groups

The 1999 research project on the actio popularis mentioned above, also provides some insight in the number of cases won by interested parties, NGOs and non-interested parties. Because this was not the main topic of the project, these results can only be used as a first impression. From the survey and the selected case studies, the researchers find that non-interested parties, interested parties and NGOs usually put forward the same arguments against a decision by the authorities. In the majority of cases these arguments are declared not valid. It seems that interested parties and NGOs win a slightly larger number of the cases than non-interested parties.[23] Unfortunately, the 1999 research project did not produce figures to underpin this conclusion.

[23] De Gier, Robbe, Backes and Van Buuren (1999), 35 and 38.

Jongma and Michiels in 2002 researched the same question in a case study on one specific environmental NGO, *Vereniging Milieuoffensief*, already mentioned above.[24] This particular NGO is a non-typical NGO because it almost exclusively uses court procedures to achieve its goals. This is non-typical, because most NGOs use court procedures only as a last resort. In addition, this NGO only deals with environmental and animal welfare problems relating to bio-industry. Jongma and Michiels found out that this NGO between 1992 and 2002 initiated 2200 procedures. According to the NGO's own records, they won 80% of these cases. When looking at the cases initiated by the *Vereniging Milieuoffensief* and decided by the Administrative Law Division of the Council of State between April and November 2002, the NGO won 52% of the 50 cases that were decided. The authors conclude that the quality of decisions regarding livestock farms taken by public authorities is poor.

According to the president of the Environmental Law Chamber of the Administrative Law Division of the Council of State this figure is not entirely representative for all NGOs. His estimate is that NGOs win between 30% and 40% of all cases, which is about the same for individual citizens or groups of local residents.

Research through the internet database shows a slightly better result for NGOs, i.e., 50%. It was, however, pointed out that the number of cases won does not necessarily imply that the environment is better of as a consequence of the case. Very often, NGOs (like individuals or other interested parties) win a case on a formal legal aspect. The competent authority usually corrects this aspect in a new decision, and then the project goes ahead anyway. This especially is true for cases that were only partially won.

It is remarkable that the data show that some NGOs are more successful than other NGOs. For instance, of the 68 cases by the Vereniging Milieuoffensief in 2002, this NGO won 34 plus an additional 6 partly won cases. They lost 26 cases, and were declared 2 times inadmissible. This is a success ratio of 40:28. In other words, they won more than 60%. Greenpeace, on the other hand, lost 5 of its 6 cases.

For local citizen groups, the situation is radically different. Of the 199 cases studied, 37 cases were initiated by local groups. In only 7 cases these groups acted by themselves, i.e., without a regional or national NGO being a plaintiff as well. Local groups won only 30% of the cases. The latter amount goes for individually interested citizens as well.

The data make it very clear that administrative courts in the Netherlands usually only test government decisions in a very marginal way. Of the 96 cases won by NGOs and local citizen groups, a staggering 70 were won on formal grounds. This is almost 70%! The quality of appeals by NGOs is much higher than the quality of appeals by individually interested parties. According to the president of the Environmental Law Chamber of the Administrative Law Division, legal claims by NGOs usually oblige the court to go into the matter more profoundly, and therefore enhances the quality of case-law.

4. Case study

4.1 Introduction

The case selected here is a civil law case. The case is selected because of its great environmental relevance. However, it is a rather exceptional case. Because of the effective system of (administrative) judicial review, and because of the fact that civil procedures are very costly, the

[24] Jongma and Michiels (2002), 2238.

number of cases brought before a civil court by NGOs is extremely low (probably only 2% of all cases brought before a court by NGOs). Nevertheless, I have decided to select this civil law case because of the impact on environmental law. Civil environmental law cases decided by the Dutch Supreme Court, sometimes change environmental law in the Netherlands substantially, because of the fact that usually fundamental issues are at stake, and because of the authority of Supreme Court decisions.

4.2 Setting of the case

4.2.1 District Court of The Hague 24 November 1999

On 10 July 1995, the European Commission sent a formal notice to the Netherlands for not having implemented Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources. On 13 July 1997, the Commission sent an additional formal notice. On 15 December 1997, the Netherlands submitted, pursuant to Article 5 of the Directive, an action programme in respect of designated vulnerable zones for the purpose of realizing the objectives specified in Article 1.[25] Several NGOs, most importantly the *Stichting Waterpakt* (Waterpact Foundation), the *Stichting Natuur en Milieu* (Nature and Environment Foundation), and the *Consumentenbond* (Consumers' Association), on 22 December 1997 requested the national government to take all measures necessary to implement Directive 91/676/EEC. On 5 February 1998, the government informed the NGOs that the action programme was a sufficient implementation of the Directive. However, on 29 December 1998, the European Commission again sent a formal notice to the Netherlands because of poor implementation of the Directive. On 3 August 1999, the Netherlands received a reasoned opinion.

In 1999 the NGOs filed a lawsuit against the Netherlands State for not having implemented Directive 91/676/EEC. They had three claims. The NGOs requested the court to (1) declare that the State has acted unlawful towards the NGOs by not having implemented Directive 91/676/EEC, to (2) sentence the State to develop a new action programme according to which measures have to be taken to make sure that there will be no more than 50mg of nitrates in groundwater and surface waters, and that on 18 December 1999 not more than 210kg, and on 18 December 2003 not more than 170kg nitrogen from animal manure will be applied to the land, and (3) to sentence the State for the costs of the procedure. The District Court of The Hague issued its decision on 24 November 1999.[26]

The Court first dealt with the question whether the NGOs have the power to address this issue to the Court. The State had argued for inadmissibility of the NGOs. However, according to the Court, the claims of the NGOs are admissible. The NGOs fall under the scope of Article 3:305a(2) of the Dutch Civil Code. They are legal associations that have as their objective the protection of the environment. The fact that the NGOs have been discussing the implementation of Directive 91/676/EEC with the government for many years, shows that these NGOs also have a specific interest in the implementation of Directive 91/676/EEC. Both their statutory objectives and their actions in practice show that they have an interest as defined under Article 3:305a of the Civil Code.

[25] The Netherlands had already done so on 18 December 1995, but this action programme was withdrawn by the Netherlands on 12 November 1996.
[26] District Court The Hague 24 November 1999, *Milieu en Recht* 2000/3, No. 24.

Secondly, the Court rejects the State's argument that the Court is not competent to address this case because the European Commission has initiated an infraction procedure under Article 230 EC. According to the State, the District Court has to wait until the European Court of Justice has rendered its decision in this case to prevent contradictory decisions on the same case. However, the Dutch District Court finds that the Commission did no (yet) refer the case to the ECJ.

The third question dealt with, is the question whether Directive 91/676/EEC has direct effect. According to the Court this is the case. The obligation to reach a limit value of 50mg of nitrate (per litre) in groundwater, and the maximum quantities of nitrates from manure to be applied to farming lands (210kg for the first four year period, 170kg thereafter), are very specific and clear obligations. The objective of 210kg N has to be met between 18 December 1998 and 18 December 2002. The Court also finds that the Netherlands for this period did not apply for derogation of these objectives.[27] Since the State admitted that it cannot guarantee that this objective has been/will be met in the period between 18 December 1998 and 18 December 1999, the Court concludes that the Directive has taken direct effect and that the State did not comply with the provisions of the Directive.

Thus, the Court established that the Netherlands State acts unlawful against the NGOs by not guaranteeing that the objectives of Directive 91/676/EEC are met between 18 December 1998 and 18 December 1999. The NGOs had brought forward other arguments as well (such as the argument that failure to implement Directive 91/676/EEC also is contrary to the precautionary principle and the principle of sustainable development), but these arguments were rejected by the Court.

The final question dealt with by the Court is whether the Court can order the State to implement Directive 91/676/EEC since this *de facto* implicates that it orders the legislature to establish acts and regulations. The State argued that such an order infringes the separation of powers. The Court rejects this argument. According to the Court, the State will only be ordered to end the unlawful act. The State can choose its own means to do so.

Therefore, the Court (1) declares that the State has acted unlawful towards the NGOs by not having guaranteed that no more than 210kg N will be applied to farmlands in the period of 18 December 1998 and 18 December 1999, (2) sentences the State to take the measures necessary to ascertain that in the period between 1 January 2002 and 31 December 2002 no more than 210kg N will be applied, or a higher level in case the European Commission agrees to such a higher level, and (3) sentences the State for the costs of the procedure.

4.2.2 Court of Appeal of The Hague 2 August 2001

The Netherlands State appealed this decision with the Court of Appeal. In its decision of 2 August 2001, the higher court overturned the decision of the District Court.[28] The Court of Appeal has two arguments to overturn the decision.

On 28 August 2000, the European Commission has referred the nitrates case against the Netherlands to the ECJ (case C-322/00). The Court of Appeal thinks it is undesirable for national courts to interfere with similar cases during an infraction case that is pending before the ECJ. This may lead to conflicting judgements. National courts should abstain from giving a decision until the ECJ has given its judgement.

[27] Annex II, under 2(b) opens this possibility.
[28] Court of Appeal The Hague 2 August 2001, *Milieu en Recht* 2001/10, No. 95.

The Court of Appeal agrees with the State's argument that the order to ascertain that no more than 210kg N will be applied, implies that the current Animal Manure Act has to be amended or that new legislation has to be established. However, in the Netherlands the legislature decides whether or not, and within what timeframe, new legislation is to be established. Courts do not have the power to interfere with the legislature as a consequence of the principle of the division of powers.

The Court of Appeal reverses the decision of the District Court of 29 November 1999 as far as the sentencing to take measures to ascertain that in the period between 1 January 2002 and 31 December 2002 no more than 210kg N will be applied, is concerned, and it postpones a decision on the District Court's declaration that the State has acted unlawful towards the NGOs by not having guaranteed that no more than 210kg N will be applied to farmlands in the period of 18 December 1998 and 18 December 1999 until the ECJ has rendered its judgement in case C-322/00.

4.2.3 Supreme Court 21 March 2003

The NGOs referred the case to the Dutch Supreme Court. The Dutch Supreme Court gave its view on the case on 21 March 2003.[29] In its judgment, the Supreme Court follows the Court of Appeal's decision. According to the Supreme Court, national courts indeed are not allowed to force the State to enact legislation implementing EC-law. It is a political decision whether or not to implement an EC-Directive, in which the (national) judiciary cannot interfere. The Supreme Court does not refer to Art. 10 of the EC-Treaty, although the NGOs argued that this Article does not allow a Member State to decide *not* to implement a Directive. The Supreme Court argues that this point of view does not limit the rights of citizens, because individual citizens still can, in administrative procedures, invoke provisions that have direct effect. Also the opportunity to apply for damages under the *Francovich* judgment[30] remains intact, according to the Supreme Court. The Supreme Court ends its judgment by stating that the European Court of Justice, in a procedure under Article 228 EC-Treaty, *can* force the State to enact legislation. Since this has been regulated in the EC-Treaty, there is no need for national courts to do the same. As a matter of fact, an infringement procedure against the Netherlands for not having implemented Directive 91/676/EEC was at the time of this national procedure in a well advanced stage. In November 2002, AG Léger concluded to condemn the Netherlands in this case. In October 2003, the ECJ indeed did so. In its decision, the Court made it perfectly clear that the Dutch policy with regard to animal manure is totally inadequate to fulfil the obligations laid down in Directive 91/676/EEC.[31]

4.3 Environmental effectiveness

So far, the environmental effectiveness of this case has been limited because of the judgement of the Court of Appeal. Since the Supreme Court takes the same position as the District Court, NGOs do not have a powerful new weapon to force authorities to implement EC-Directives. Under Dutch law NGOs already can invoke provisions of Directives that have taken direct effect

[29] Supreme Court 21 March 2003, *Milieu en Recht* 2003/11, nr. 115.
[30] Joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-535.
[31] Case C-322/00 *Commission v. The Netherlands*, not yet published, available through http://curia.eu.int. See, H.E. Woldendorp, 'Tobben met de Nitraatrichtlijn', (2003/12) *Milieu en Recht*, 342.

in administrative law cases (i.e. in case a decision was taken on the basis of national legislation that is not considered to be a correct implementation of a provision of a Directive). In the District Court's view, NGOs should also have the possibility to initiate a procedure under civil law to generally order the State to implement a Directive. Obviously, the threat of such civil law procedures will force the authorities to seriously and timely take EC law obligations into account.

4.4 Legal and 'democratic' aspects

The Court of Appeal's judgement has been heavily criticised on both its arguments, not only by the NGOs, but also in legal literature. Jans and De Jong, for instance, point out that under EC law, national courts have the obligation to apply provisions of Directives that take direct effect. They cannot ignore EC law simply because the European Commission has started an infraction procedure against the member state in question.[32] Tort procedures under national law have a totally different nature than infraction procedures under Article 230 EC. Moreover, adopting the view that courts cannot interfere with the legislative process, not only implies that the State is allowed to act unlawful vis-à-vis these NGOs, but also that Directive 91/676/EEC has no *effet utile*. It is clear that these questions are important ones. They deal with fundamental issues concerning the division of powers and concerning the role of EC law. Like in many other cases before, both in administrative and in civil law, NGOs often bring forward such fundamental legal issues.

The case also shows the 'democratic' aspects that often can be heard in discussions on access to justice. The State argues that the legislature has the power to put in place a set of rules governing the behaviour of farmers, not the judiciary. It's the legislature that has to transpose the provisions of EC-Directives into national law, not the judiciary. The State argues that NGOs should not have the power to go to a civil court in a tort procedure to force the State to take actions to implement EC-law. Implementing EC-law is up to democratic institutions, such as the legislature; NGOs should interfere in this process through their regular political influence, not through court procedures.

NGOs take the opposite position. In their view, the State acts illegally by not transposing the Directive. The duty to implement this Directive is a legal duty that follows from the EC-Treaty. NGOs simply try to make sure that public authorities observe the law.

4.5 Socio-Economic aspects

As discussed above, the main argument against access to justice for a large number of people (including NGOs) is from a socio-economic point of view. It has become too easy to obstruct socially desirable projects by going to court. Relating to the case of Directive 91/676/EEC: the court order to impose the strict objectives of Directive 91/676/EEC has a lot of consequences for agriculture in the Netherlands. As shown above this was later reversed by the Court of Appeal and the Supreme Court. However, now the ECJ has condemned the Netherlands for not having adequately implemented Directive 91/676/EEC, the socio-economic effect is even bigger. The Minister for Agriculture has announced to withdraw the current policy and legislation and to create a new policy that is in line with the Directive.

[32] Annotation in *Milieu en Recht* 2000/3, No. 24.

5. Conclusion

The Netherlands had a liberal system of access to justice in environmental matters. Over the years, this system has been gradually reduced to the minimum requirements of the Aarhus Convention. By bringing installations under the obligation to follow orders in council rather than having them apply for an individual permit, a great deal of cases no longer can be brought before courts. In 2004, this development is followed by the abolishment of the actio popularis. Especially the first development caused an enormous decline in the number of cases, because non-interested parties account for less than 1% of all cases. The abolishment of the actio popularis will not lead to a further reduction of cases. NGOs win about 40-50% of the cases. This is higher than groups of local residents, that win about 30% of the cases. The latter amount goes for individually interested citizens as well. From the cases won, only 30% was won on substantive grounds. However, the quality of appeals by NGOs is higher than the quality of appeals by individually interested parties. Legal claims by NGOs usually oblige the court to go into the matter more profoundly, and therefore enhances the quality of case-law.