

The roots of Dutch strategic human rights litigation: comparing ‘Engel’ to ‘SGP’

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1. Individuals and institutions are needed to make law work

It is a socio-legal truism that the law in itself cannot achieve anything. The law and thus also human rights law needs actors to mobilize it, and those actors most of the time need institutional embedding, and are helped by (some) moral support from and upcoming new ideas in society. The role of individual actors in the mobilization of the law should not be overestimated, yet they cannot be left out of theorizing about changes in law and society, since individual actors indeed ‘pull’ or ‘push’ the law in a certain direction.¹ Yet again, as single individuals they can achieve nothing if they do not make use of the (sometimes rudimentary) organizations and institutions that are already there. New ideas in society, a hint of changing norms, or indignation over people who appear to be ‘unnecessary victims’ of one thing or another, are helpful support. An actor can ‘row upstream’ and against dominant discourse in society, but this is only possible if the system is principally open to the critique that (even radically) different views on ‘reality’ and ‘truth’ are possible.²

Titia Loenen has always had an interest in the problematic aspects of and the tensions that exist between law and society. In the few years I worked with her, we developed research on the advantages and disadvantages of

1 The Dutch and Flemish journal for socio-legal studies *Recht der Werkelijkheid* (‘Reality’s Law’) recently devoted a special issue to ‘The Actor as a Factor in the Development of Law’ (*De actor als factor in de rechtsonwikkeling*, 2013 no. 3). It has articles devoted to, for example, Raphael Lemkin and his involvement in the introduction of the concept of genocide, Beate Sirota’s involvement in gender equality in Japan, Eddie Mabo in indigenous land rights in Australia, and Hugo Sinzheimer in collective agreements in labour law.

2 See FOQUÉ and ‘T HART 1990.

'framing' multicultural issues in terms of human rights.³ Human rights law may be strategically used or evaded by actors, and may have desirable legal consequences but undesirable social consequences (or the other way around). Human rights law may find fertile ground in the dominant discourse in society, but at the same time may backfire on ethnic or religious minorities that may be labelled as 'backward', for example when they 'lack' the ideal of gender equality. All these strategic and problematic aspects of mobilizing human rights law came to the fore in the much-debated case of the SGP, the political party that held as one of their rules that women should not be allowed to stand for election for public office. Titia Loenen defended the decision of the Dutch Supreme Court on principled grounds.⁴ Most interesting for my research, however, focusing on actors in the legal process, is that she also discussed briefly the role of 'outsiders' in the SGP debate, especially the Stichting Proefprocessenfonds Clara Wichmann that (together with other organizations) initiated the case. The Stichting Proefprocessenfonds Clara Wichmann is a privately funded organisation that aims to improve the legal and social position of women. To that end it provides financial guarantees for people going to court, and it wants to influence the legal and law-making process in a broad sense, as well as public opinion.⁵ In her article on the SGP case Titia counters arguments against the 'interference of outsiders', and she does so with the help of empirical research that shows that consensus among SGP women does not exist and that SGP women who want to change things from the inside out have a hard time when they do try, and they meet resistance from conservative forces in their community. At the same time Titia stresses the fact that the treatment of women within SGP circles has 'gendered repercussions' in society at large. Both arguments show the need for activist lawyers and supporting organizations to develop law.⁶ This may

3 See the special issue in the *Utrecht Law Review*, LOENEN, VAN ROSSUM and TIGCHELAAR 2010 and VAN ROSSUM 2012.

4 The Supreme Court (HR 9 April 2010, ECLI:NL:PHR:2010:BK4549) stated that the SGP violated the Dutch Constitution and several treaties. See also LOENEN 2010. On 10 July 2012 the European Court declared the application of the SGP inadmissible.

5 See www.clara-wichmann.nl.

6 I presume that 'enemies' of human rights law are needed as well, to prevent possible derailment. See LARSON, VAN ROSSUM and SCHMIDT 2014.

seem obvious, but it is not. In this contribution I want to reflect on this role of actors, institutions and social ideas in developing human rights law by describing the process that led to the very first case against the Netherlands at the European Court of Human Rights (ECtHR or the Court): the Engel case.⁷ The underlying question in the Engel case was whether conscript soldiers could fully invoke human rights, especially the fair trial principle; in other words: whether conscript soldiers are legally equal to other human beings. Apart from this central question, the case just as importantly gives insights into the role of activist lawyers, their supporters, and dominant views in society.

2. Alkema, Van der Schans, and the construction of ‘Engel’

The European Convention on Human Rights (ECHR) was adopted in 1950 and ratified by the Netherlands in 1954. The Court has functioned since 1959, and already in 1960 the Netherlands recognized the right of individuals to complain to the Court. The interesting thing is that it took rather a long time before cases were actually brought before the Court. The first case was in 1961, and it took another fifteen years for the first case against the Netherlands. Why did the ‘human rights arguments’ take so long to develop (see table 1 for the cases up until 1990; the Netherlands had eleven cases in this period)? We can find part of the answers in the context of the Engel case.

7 ECtHR, *Engel and others v. the Netherlands*, 8 June 1976, (Appl.nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72). Actually five applicants had lodged their application with the Commission in 1971, namely Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul.

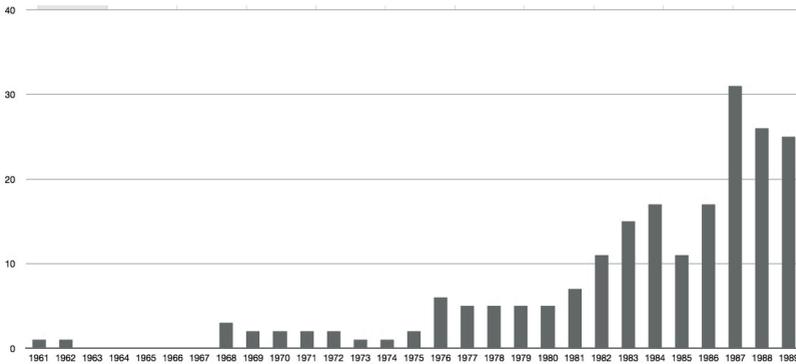


Table 1

The Engel case resulted in a condemnation on 8 June 1976. The procedure in the military courts 'behind closed doors' was said to violate the fair trial principle (Article 6 ECHR), and some disciplinary sanctions did not meet the requirements of being meted out by a judicial official (Article 5 ECHR).⁸ On several occasions in 1970 and 1971 the soldiers had had penalties meted out to them by commanding officers. Engel, for example, had pretended to be ill but in the meantime went to a meeting of the VVDM (Vereniging van Dienstplichtige Militairen, Conscript Servicemen's Association), a very critical (towards the state) association that had as its main goal the liberation and emancipation of conscript soldiers. Others were late for duty or had driven an army vehicle irresponsibly, or had written and distributed a critical article about high-ranking officers. Higher-ranked officers decided on sanctions ranging from 'light arrest' to 'aggravated arrest' with additionally 'committal to a disciplinary unit'. The applicants had all appealed to the complaints officer and finally to the Supreme Military Court which in substance confirmed the original decisions.

8 Article 14 on the prohibition of discrimination hardly ever figures prominently in human rights cases. This is because the anti-discrimination principle could only be used to 'back up' claims on substantive rights based on other articles of the Convention (see DE VRIES 2013, especially chapter 8). Recently 'Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' of 4 November 2000 provides for a general prohibition of discrimination.

Their applications to the European Commission of Human Rights in 1971 were based on the allegations that the state had violated Article 5 (impartial tribunal, the right of liberty and security of the person) and Article 6 (fair trial). Until 1999 the Commission was an intermediary between complaining individuals and the Court. The Commission would hear cases and then decide to reject the complaint or to bring the case before the Court. The Commission joined the separate complaints of the five applicants, and referred the case to the Court in October 1974. The oral hearings were held a year later. The Court found that most forms of disciplinary sanctions remained ‘more or less, within the ordinary framework of their army life’. Some sanctions, however, amounted to a violation of Article 5 because they did not serve ‘the purpose of bringing him before the competent legal authority’ and exceeded the time allowed in the Military Discipline Act. As regards Article 6, the Court found that *some* of the disciplinary sanctions meted out could be said to lie within the criminal sphere, and this meant that the procedure in the Military Court should have been public, and not ‘in camera’ as it was. The Netherlands was in violation of the Convention. Engel was offered a ‘token indemnity’ of 100 Dutch Guilders, in accordance with his claim for a purely symbolic compensation.

‘Military disciplinary law deemed contrary to human rights’ and ‘Human rights also valid in the military’ were some of the headlines in the newspapers after the Court decision.⁹ Earlier the VVDM had already reported on the Court session in its journal called *Twintig* (Twenty) of 11 November 1975 under the headline ‘The state in the dock’. But even though the headlines were quite bold, the articles substantively concluded that the violations only regarded minor issues and were easy to repair by a minor change in the law. At first sight, one may think that the conscript soldiers involved were hardliners fighting for an acceptable legal position. Up to a certain level this is true. However, below that anti-authoritative atmosphere of the emancipatory 1970s were other, legal forces at work. One of the main characters was Evert

9 NRC 18 and 19 June 1976.

Alkema, who turned out to be the 'hidden driving force' behind the Engel case.¹⁰

Evert Alkema had studied law in Groningen and started working in Leiden at the European Institute of the university in 1966.¹¹ In that institute he had to work on the 'leftovers' from his colleagues, which basically amounted to him studying human rights and the rest of the world outside Europe. He became a specialist in the European Convention and, among others, had contact with the Dutch judge at the European Court at that time, Van Asbeck. Van Asbeck wanted to promote the Convention but as a judge had never had a case. According to Alkema, the Commission was the biggest hurdle to overcome, in general but also in the Engel case.¹²

Alkema: So we had to get past the Commission. We needed to get the system going. And after the Commission, onwards to the Court, preferably with a case that would lead to the Court's finding of a violation. But that case also needed to be deemed 'acceptable' by the state. This was my strategy: I was looking for cases that would get past the Commission, that would amount to a violation of the Convention, and that the state would be willing to accept and repair. So that you would not have too much resistance from the sovereign state in Strasbourg. The Engel case was a good case.¹³ There was some commotion in the news [about conscript soldiers that were 'wrongfully punished'; WvR] that originated with the VVDM. The then minister of the justice department Van Agt also had the idea that things needed to change. I contacted the president of the VVDM and suggested to him to take action. That is what he did. He called on the conscript soldiers to report disciplinary sanctions to him, he collected them, and contacted the lawyer Van der Schans whom they already knew. I also called a Member of Parliament whom I knew and asked him to put the issue on the parliamentary agenda for debate. I

10 While writing, I learned that Evert Alkema was one of the supervisors of Titia Loenen's PhD research.

11 I interviewed Evert Alkema about his role in the development of human rights in the Netherlands on 30 November 2011.

12 Apparently at one moment in the 1970s the judges of the Court complained publicly that the Commission allowed too few cases to pass through.

13 Another good case was ECtHR, *X and Y v. The Netherlands*, 26 March 1985 (Appl.no. 8978/80), which came about in more or less the same vein.

instructed him how to push the minister in order to make him submit that the Dutch government would not resist if the Commission would accept the complaint. The minister gave the right answer and I took care that that answer eventually arrived with the Commission, because then the Commission had one argument less to consider. And then we went to Strasbourg!

The Engel case was thus carefully constructed or maybe one should say ‘orchestrated’ by the academia, more specifically by one academic.¹⁴ He sensed how to play the game and get past the difficult posts. The advantage was that the lawyer Enno van der Schans was involved.¹⁵ He knew the VVDM from the inside out. He had studied law and then fulfilled his duty as a conscript soldier. He was idealistic and not an anti-authoritarian activist, as he said himself. He became very active in the VVDM by helping find legal ways to improve the inferior position of soldiers. Soldiers sometimes refused to follow orders, their hair was too long, and their public writings encouraged resistance so they met with interference from the authorities etcetera. In the legal commission of the VVDM, the idea came up that it should not be allowed to treat soldiers differently from ordinary human beings. Van der Schans:

Human rights were not yet ‘alive’ in society. The Netherlands had not yet discovered them. But in that Commission we had an eye on Strasbourg. There were contacts between our head Reintjes and Bergamin who worked in Rotterdam and Alkema in Leiden. Alkema was very young then but he stood behind us and helped us. They decided to collect some cases for a pilot case for the European Court. In 1970 my conscript duty was done and I started a career as an idealist lawyer in a rather large, liberal law

14 Academic life and legal practice with some people are intermingled. For example, the later European Court judge Egbert Myjer (2004-2012) first worked at Leiden University in the criminal law department, while he was inspired by his Utrecht law professor Toon Peters who put much stress on the humane character of law and the need for human rights. Myjer left academia in 1979 to work at the judges’ academy and as a part-time judge in Zutphen. From 1981 he was a full-time judge and from 1991 worked full time at the public prosecution office. As a judge in Zutphen he had acquired the nickname ‘The Supreme Court of Zutphen’. In the meantime he was also appointed endowed human rights professor at the Free University in Amsterdam (in 2000).

15 I interviewed Enno van der Schans about his role in the Engel case on 1 September 2011.

firm. I still had contact with the VVDM so that is probably why they contacted me in 1972 and asked me to take this case. Reintjes had started it in 1971 and 1972 with the Commission, but they said that this needed to be done by a lawyer. I needed to think for some time because all I dealt with was criminal law, divorce, and contracts. But my idealism said to go ahead. After all I had also initiated, together with a small group of young lawyers, the first 'piket service', which entailed giving legal aid to suspects as early as possible at the police station. I went to Leiden to talk to Alkema, and I spent days at the European Institute in Amsterdam to study. Fortunately my employer supported me. They could not help me but they gave me all the space I needed because I continued to deal with my ordinary cases well.

Of course the type of case – conscript military pushing against traditional authorities and working on emancipation – is typically a sign of the times. The revolt from below in the 1960s had resulted in a liberal atmosphere where the 'old' had to be done away with and the 'new' was in fashion. 'Power to imagination' was the most radical of the slogans in those days. Developing human rights law and getting it on the agenda was part of the movement, because human rights could be a 'partner' in the liberation and emancipation of minorities and sub-cultural groups. Still, the Engel cases were selected due to their reasonableness. If they had been too extreme, the Dutch government would have probably shown opposition. It is interesting what Alkema says about this period and about how the game was played, especially when keeping in mind that the SGP case was completely the opposite:

We did not have a fight with the Dutch government! We needed to get the system going and we needed the cooperation of the state. The government was already working on the new military law and they were just as interested as we were about what was allowed in terms of the Convention. Engel was a case that worked, because the sharp edges had already been smoothed out. I did try other cases as well, but they did not work. One of the cases I tried to get to Strasbourg was that of the

COC, the Dutch organization for gays.¹⁶ At the beginning of the 1970s they wanted to change their by-laws in order to legalise the admittance of married people, who were excluded from membership. Married! In those days those by-laws had to be approved by the minister of justice and he just said, 'I will not agree to that!' The appeal was with the Crown and I said to their lawyer that he had to argue that the Administrative Litigation Division of the Council of State was not a tribunal in the sense of Article 6 of the Convention. He did not dare to do this. He said 'Mr. Alkema, I have to plead there again one day'. In the end the case did not make it to Strasbourg. The general meeting of the COC decided not to pursue the case, because they did not want to damage the liberal and gay-tolerant image of the Netherlands. 'Suppose the Netherlands would be condemned for violating the human rights of gay people', they said, 'then the progressive image of our country will be gone.'

Apart from the societal context, the right lawyer at the right time, and support from academic circles, the Commission and the Court themselves also helped in facilitating their discovery. Van der Schans, for example, mentioned that the administration in Strasbourg was very helpful in providing information, forms for legal aid, it reimbursed travel costs, and other forms of help. Members of the Commission took their time to provide information about their roles and the procedure. The Commission also made clear that they found the case important not only because it was the first case against the Netherlands, but also because it was a matter of great interest for all conscript soldiers in Europe. The Court also seemed eager to 'settle its position in Europe', said Van der Schans, and they wanted to show this 'by handling the case with all thirteen judges and not just five'. Van der Schans also said that the head clerk of the Court signalled to him that it would please the Court if he would ask permission to argue the case himself. The Court wanted to strengthen the position of the claimants by allowing them have their own lawyer. Van der Schans was officially merely an assistant with the Commission, but granting him the right to argue the case would set the procedural rules in motion. Van der Schans was also signalled to ask the Court to allow for his pleadings to be made in Dutch.

16 See their website, available at: www.coc.nl/engels.

For the hearing in Strasbourg, Van der Schans asked Alkema to join him. He also managed to persuade the five ex-soldiers to come to Strasbourg too. 'They were on the front row. The Court asked me all kinds of detailed questions about who had said what and how much pressure had been exerted on the soldiers. I could ask them during a break and so directly had the answers.'¹⁷ Alkema recalled that the soldiers held up a clenched fist to show that they still had a fighting spirit, and that despite the unruly times with the Baader-Meinhof Group and other violent movements, there were no security measures at all at the Court.

3. Four reflections in comparing 'Engel' to 'SGP'

Reflecting on the role of outside actors in developing human rights law and comparing the SGP case with the Engel case, I first want to note the obvious, namely that outsiders frame a case deliberately in terms of human rights in order to achieve a further-lying goal. Ordinary, lay people most of the time just want to see 'justice being done', while outsiders also use the case to reach specific purposes. Sometimes we may suspect that the 'state' as an actor is more or less complicit: there may be a state interest not to resist or even to cooperate. Ordinary people like Engel and his colleagues were put on a stage in order to function as a battering ram to change the situation for a whole group, including those in the rest of Europe.¹⁸ Not Engel himself, but Alkema had set the case in motion. The SGP case was similarly constructed by outsiders. Their goal was not only to change the by-laws of the SGP, but also the position of women in society in general. The idea with this was, according to Titia Loenen, that women in general are affected even if only a small group is excluded from some functions in a political party. It will probably lead to women being excluded from local politics where the SGP

17 Note that the case was constructed by legal professionals, and that the soldiers themselves – even if the case bears their name – were hardly involved. See for that same mechanism of legal professionals 'juridifying' social conflicts in order to get them to the Supreme Court, BRUINSMA 2010.

18 Alkema for example said that at the court session certain people from Switzerland were extensively taking notes and back home quickly worked on bringing the law into line with the European Convention.

has a strong voice, and it might even work as a signal to society at large that gender equality is not always a very serious principle after all.¹⁹

Second, mobilizing human rights law sometimes needs specialists and academics who see it as their task to further the development of human rights and who keep track of interesting discussions in the media. When they know there is a possibility to push a door open and to make a change, they will organize people and suggest making a case out of it. If necessary, their network is put to use to get media coverage and questions asked in Parliament. This is true not only of human rights law, but of every law that aims to change social structures and values, like, for example, laws on the equal treatment of men and women, the inclusion of minorities, but also the protection of the environment.²⁰ The Engel case is one of the first Dutch examples in human rights law of what is usually called ‘cause lawyering’, ‘strategic litigation’ or ‘public interest litigation’, that has today become a well-known practice and strategy.²¹

Third, the use of human rights law needs ‘the right time’. Without the emancipatory and flower-power youth movement in the 1960s and the ‘anti-authoritarian winds of change’, changing the status of subordinate groups like conscript soldiers would not have become such an issue at the time. The state realized this too and was willing to go along, even though not too quickly. A comparison with today’s times, however, is tricky. The idea and relevance of human rights seems to be fully settled and accepted, but at the same time their scope and preferred impact on national law and policy is contested. Moreover, people are aware of the fact that rights may conflict, and that in balancing them political ideas seep through. It is not very clear, therefore, that the ‘times were right’ for the SGP case. In fact there was a lot of opposition against bringing the case to court. As Titia Loenen and others

19 LOENEN 2010, at p. 2273.

20 See for example the Gender Equality Network of the European Commission (available at: www.uu.nl/faculty/leg/EN/organisation/schools/schooloflaw/organisation/departments/europa_institute/gender/Pages/default.aspx and ec.europa.eu/justice/gender-equality/index_en.htm) and the European Network against Racism (available at: enar-eu.org).

21 See for example SARAT and SCHEINGOLD 1998, and the recent initiative by the Dutch Section of the International Commission of Jurists (NJCM) to start the ‘Public Interest Litigation Project’ (available at: pilpnjcm.nl/over-pilp/). An internet search using the terms ‘cause lawyering’ or ‘strategic/public litigation’ also renders many interesting active organizations in this field.

made clear, there was discussion over whether playing it the 'legal way' was the right way, whether the effect of 'juridifying' this 'essentially political and religious issue' could be the alienation of a traditional minority from the Dutch political landscape, and also whether the liberal and emancipatory principles of the Enlightenment were being used as a fundamentalist stick with which to beat religious minorities. As a matter of fact, orthodox religious communities do complain about anti-religious sentiment, which is shown in discussions on ritual slaughter, the access of openly homosexual teachers to religious schools, vaccination in religious communities, and civil servants refusing to conclude same-sex marriages.²² It may well be that the dominant discourse in society today favours equality over religious freedom, which may have been supportive for the SGP case in the background. Support, however, was not as clear-cut as in the 1970s for the conscript soldiers' case. Fourth, the Court as a social institution in the 1970s helped in promoting its own discovery by showing a great willingness to help. The administration provided documents on legal aid and the reimbursement of travel costs, and all kinds of information on procedure. The Head Court clerk even took the time to convene with Van der Schans about his expectations and about what he should request in order to further the procedural rules of the Court. The friendlier the Court shows itself, the more willing lawyers are to take the next steps, and the more it attracts attention. This is one thing that has really changed in the times of the SGP case. Recently, both the Supreme Court of the Netherlands and the ECtHR were given new procedural rules in order to be able to deal with their overwhelming popularity. The roots of the Engel case have apparently grown into a dense bush in SGP times. Outsiders are therefore still needed: no longer to get human rights law going, but to help push through the bushes of procedural rules that in some cases may hinder access to the court.

22 There is an abundance of Dutch legal literature on these topics, but the perspective of religious minorities themselves is mostly absent. See for an exception for example OOMEN, GUIJT and PLOEG 2010. The 'anti-religious atmosphere' might be overstated, since in a recent survey Christians hardly reported any discrimination because of their religious conviction (while Muslims did). See ANDRIESEN, FERNEE and WITTEBROOD 2014, at p. 76.

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