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B. National courts

Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), 21 March 2003, Civil Chamber, No. C01/327HR.[1] *Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging Consumentenbond and three others* v. *State of the Netherlands*.

1. Separation of powers versus EC law? Introduction

The case discussed here raises fundamental constitutional issues of national and European law and of their mutual constitutional relations, in particular the separation of powers between courts and legislatures. The separation of powers between executive and legislative powers has been given quite different form in the various Member States. To a perhaps lesser extent, such variety also exists for the separation of powers between courts and the executive, particularly where it concerns the powers and intensity of review of executive action, though European integration has here contributed to some *de facto* harmonization. Perhaps the least variation exists as regards the separation of powers between the courts and the legislature. The case discussed raises the question whether in this area European Community law necessitates further and more radical changes to the boundaries separating legislative from judicial activity. Does EC law require removing what some may conceive of as the last remnants of the separation between judiciary and legislature?

The case concerns the EC Nitrate Directive. Following Italy, Spain, France, Luxembourg, UK, Germany and Ireland, the Netherlands has now also been judged not to have implemented the Directive correctly within the time limits posed – among other things because it failed to provide for rules on fertilizer on steep slopes (the fact that there are no steep slopes to be found in the Netherlands was not deemed sufficient by the Court), and also on the failure to establish maximum limits to emission of nitrogen from animal manure (which is indeed relevant to the present case).[2] But it should be

1. To be found on the internet at www.rechtspraak.nl. Follow the link to *actuele rechtspraak*, search function, and search by LJN-nummer: AE8462. The translations in this article are by the author.

2. See Case C-322/00, *Commission* v. *Netherlands*, judgment of 2 Oct. 2003, nyr; also Cases C-195/97, *Commission* v. *Italy*, [1999] ECR I-1169; C-127/99, *Commission* v. *Italy*,

emphasized that the judgment in infringement proceedings was after the *Hoge Raad* decided the case discussed here: the *Waterpakt* case.

The legal question at issue before the *Hoge Raad* was the following: if the present form of "implementation" of the Directive is unlawful, is a national court under the obligation to set aside a national principle of constitutional law which prevents him from issuing an order to the legislature (parliament and the government) to pass an Act of Parliament in order to ensure correct implementation?

2. Legal background

Under Dutch civil law, many forms of action by public authorities, including the failure to act on the part of State authorities, can be considered a wrongful act similar to tort. If this wrongful act concerns a public authority which belongs to a branch of the national authorities, this act is attributed to the legal person, the State of the Netherlands. It has been established case law that the passing of legislative measures other than an act of parliament can constitute such a wrongful act.[3] A failure to implement an EC directive would also constitute a wrongful act in the sense of the Civil Code of the Netherlands which can lead to an award of damages; under Dutch civil law a sufficiently qualified breach is not a necessary requirement for this type of liability.

It has, moreover, been established case law for a very long time – long before *Francovich* and *Factortame* – that civil courts can give an interim injunction against the State, preventing (further) damage. This may consist also in an injunction not to apply the relevant legislative measure (below the rank of Act of Parliament).[4] However, it was not settled whether an injunction actually to *pass* regulations of any rank or nature is allowed.

As mentioned, in the case under discussion the question arose whether a civil court can give an injunction against the State to pass a legislative measure in the form of an Act of Parliament in order to implement an EC directive.

[2001] ECR I-8305; C-274/98, *Commission* v. *Spain*, [2000] ECR I-2823; C-258/00, *Commission* v. *France*, [2002] ECR I-5959; C-69/99, *Commission* v. *United Kingdom*, [2000] ECR I-10979; C-266/00, *Commission* v. *Luxembourg*, [2001] ECR I-2073; C-161/00, *Commission* v. *Germany*, [2002] ECR I-2753; C-396/01, *Commission* v. *Ireland*, judgment of 11 March 2004, nyr; and Case C-293/97, *R.* v. *Minister of Agriculture ex parte Standley*, [1999] ECR I-2603.

3. HR 15 June 1956, NJ 1959, 7; HR 6 May 1983, NJ 1984, 361; HR 9 May 1986, NJ 1987, 252; HR 18 Jan. 1991, NJ 1992, 638.

4. HR 1 July 1983, NJ 1984, 360; HR 16 May 1986, NJ 1987, 251.

For the sake of completeness I add that, in the proceedings leading up to the case before the *Hoge Raad*, the State invoked a provision in the Civil Code which says that an injunction prohibiting a wrongful measure can be refused on the grounds that this measure must be tolerated for reason of preponderant general interests (Article 6:168 Civil Code); whereas the *Hoge Raad* itself also referred to another provision, which holds that the person who is under an obligation towards another person to give, to do or omit something, shall be so convicted by a court if so requested, unless from the law, the nature of the obligation or legal act it follows otherwise (Art. 3:296 Civil code).

3. The case

Directive 91/676 of the Council,[5] contains provisions aimed at protecting water against pollution caused by nitrates from agricultural sources, and should have been implemented by 19 December 1993. This has proved difficult. There is a large intensive livestock farming sector in the Netherlands, which produces a large quantity of manure, which in turn leads to a large output of nitrates. The Netherlands being a very wet and watery country, this production of manure (if not disposed of differently) will sooner rather than later lead to a seeping of the nitrates it contains into ground and surface water. However, the reduction of nitrate emissions in the environment was not only technically, but foremost politically a difficult thing, because of the very large economic interests of the agricultural sector involved, which strongly resisted measures taken, also in public demonstrations and similar events, and in court. It took several governments to address the issue at heart, made the political life of at least three ministers of Agriculture pretty miserable, and put an end to the political career of at least one of them.

For the implementation of the Directive it meant the following. The government had submitted an Action Programme in the sense of Article 5 of the Directive in 1995, which it withdrew in 1996. It submitted a new one in 1997. However, this was judged insufficient by the Commission in September 1998, which in the end led to infringement proceedings being brought to the ECJ in August 2000.

The *Stichting Waterpakt* (Waterpact Foundation)*, Stichting Natuur en Milieu* (Nature and Environment Foundation), *Consumentenbond* (National Consumers' Organization) are public interest organizations. Together with three individuals they had issued a writ of summons against the State to

5. O.J. 1991, L 375/1.

come up with a new Action Programme on the basis of Article 5 of the Directive, already in March 1998. They asked the *Rechtbank Den Haag* (District Court The Hague), to issue a declaration in law that the failure to issue an appropriate action programme was a wrongful act towards the plaintiffs, and to order the State to adopt an action programme which determines at least that the quantity of nitrates in the groundwater and surface waters must be less than 50 mg per litre[6] and that per hectare no more than an initial 210 and eventual 170 Kg of nitrogen from livestock manure may be brought into the soil.[7]

The State responded with several defences, among which the following three. Firstly, it argued that an intervention by a national court was not opportune, because in the meantime infringement proceedings had started at the ECJ; secondly, the relevant provisions of the Directive have no direct effect; and thirdly, the plaintiffs had not adequately shown that the action programme submitted in 1997 would not reach the targets set by the Directive.

3.1. *Judgment in first instance and on appeal*

In first instance, the *Rechtbank* judged itself competent to review the claims brought by plaintiffs. It found that the Directive was not directly effective as concerns the nitrate emissions from agricultural sources into ground- and surface-waters (the 50 mg/litre criterion), but was indeed directly effective as concerns the emission of nitrogen from animal manure as regards individuals and organizations like plaintiffs. Also it found that the State had not implemented this provision in an adequate and timely manner. It ordered the State "to take such measures as shall assure that in the year between 1 January 2002 and 31 December 2002, the norm of 210 Kg of nitrogen from animal manure per agricultural enterprise shall be observed, on the understanding that if the State will be allowed to use a higher norm by the European Community, this higher norm shall apply."

The State appealed to the *Gerechtshof Den Haag* (Court of Appeal The Hague) with the complaint that as a matter of fact the court had ordered the enactment of an act of parliament, whereas the court lacks this power: only the States General together with the Government can decide to make a legis-

6. See Art. 3(1) and Annex I sub A (2) of the Directive, which provides that waters shall be identified which could be affected by pollution if no action under Art. 5 is taken; for such identification one criterion is that those waters contain or could contain more than 50 mg/litre if no measures are taken.

7. See Art. 5(4)(a) and Annex III sub 2 of the Directive.

lative act.[8] It also relied as a subsidiary complaint on Articles 6:168 and 3:296 of the Civil Code. The plaintiffs in first instance also appealed on the grounds that the District Court had wrongly considered the 50 mg/litre criterion not directly effective. The *Gerechtshof* held in favour of the State's defence that the outcome of the relevant proceedings of the Commission against the Netherlands, then pending at the ECJ, should be awaited. But this did not prevent the *Gerechtshof* from judging:

> "that because of its constitutional position, a court of law is not free to interfere with the process of passing acts of parliament as has been requested by plaintiffs in first instance. Also the passing of other forms of substantive legislative acts is so affected, because such acts are closely intertwined with acts of parliament."

It therefore annulled the injunction in first instance.

3.2. *The Hoge Raad*

The appeal in cassation was directed against the judgment of the *Gerechtshof* and the reasoning on which it was based, as just quoted. The *Hoge Raad* dismissed the appeal. Its train of thought deserves full quotation:

> "3.5 According to Article 81 of the Constitution, acts of parliament are enacted jointly by the Government and the States General, in the course of which the question whether, when and in which form an act of parliament shall be brought about, must be answered on the basis of political decision-making and a balancing of the interests involved. The division of powers of the various state organs, which is also based on the Constitution, has as a consequence that courts cannot intervene in that procedure of political decision-making. This is no different in cases in which the results to be achieved by the act and the time limit within which this result is to be achieved, have been fixed on the basis of a European directive. Also if the legislature has failed to pass the legislation within the time limit for implementation in order to achieve the required result, and if the State must be assumed thus to have acted unlawfully, a court of law cannot impose an injunction to pass such legislation nevertheless, within a time limit specified by it. Then, too, it remains the case that the question whether legislation needs to be passed, and if so, what content it should have, necessitates a balancing of many interests, including interests of other parties than the parties in a law suit such as this one, and it requires a political judgment with which a court cannot interfere. It is equally a matter of political judgment whether the State, in case acts of parliament

8. Art. 81 of the Constitution: "Acts of Parliament shall be enacted jointly by the Government and the States General."

have not, not timely or not in a correct manner been passed in order to implement a directive, wishes to let it come to possible infringement proceedings.

This is not diminished by the norm that a person who is under an obligation to end an unlawful situation, can be so convicted by a court of law under Article 3:296 of the Civil Code, and that this provision also covers this case, if one were to assume that the State is under an obligation to put an end to the unlawful situation which is a consequence of its failure to implement the Nitrate Directive. For this Article of the Civil Code also provides that the law and the nature of the obligation can alter this. It is to be held, in light of the above considerations, that this exception here applies.

In adjudicating [this matter] it is not relevant that a court cannot apply an act of parliament, once it has come into existence, on the basis of Article 94 of the Constitution[9] insofar as the act is in conflict with provisions of treaties and of decisions of international organizations. Not to apply acts of parliament on this basis, is of a different character from giving an order to pass legislation: for not applying a provision only regards plaintiff(s) in a particular proceedings and does not have the consequence that the relevant provision is amended or withdrawn, while an order to pass legislation intends to create regulations which are generally applicable also to others than the parties to the proceedings.

Finally, it may be pointed out that also without a court injunction to pass acts of parliament, those persons whom a directive aims to protect do not lack all legal protection if the State fails to bring about legislation with a view to attaining the results of a directive. For in that case a court is bound to apply existing legislation consistently with the directive, while, moreover, the State can under certain circumstances be liable for damages. If the directive is directly effective – which requires that the directive imposes an unconditional and sufficiently precise obligation on the Member States and in that manner provides rights to the citizens towards the State – citizens can moreover rely on that and find legal protection therein.

3.6 As to the question whether EC law necessitates a different court decision, it is firstly important that according to the judgment of the ECJ ... [in] *Francovich*, 'the national courts whose task it is to apply the provisions of Community law in the framework of their jurisdiction, must ensure that those rules take full effect and must protect the rights which they confer on individuals'. It must be assumed that the task of courts to guarantee the full effect of provisions of Community law in the case which concerns us, can only be fulfilled within the framework of the powers which they have, and that such powers are determined by national law (cf. ... *Van Schijndel*[10]). From what has been considered under 3.5, it follows

9. Art. 94: "Legislative provisions in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone."

10. Case C-430/93, *Van Schijndel*, [1995] ECR I-4705.

that under Dutch law a court is not competent to order the legislature to enact an Act of Parliament.
It furthermore deserves to be remarked that under Article 228 EC the Court of Justice can indeed determine that a State has not complied with an obligation pursuant to the Treaty, in which case that State is bound to take measures for carrying out the judgment of the Court. But this provision does not attribute to the Court the power to order a State to pass acts of parliament. Also in this light, it cannot be assumed that EC law necessitates attributing to Dutch courts the specific power to give an injunction against the State to enact parliamentary legislation, though it does not have this power under Dutch law and has not been attributed to the European court by the EC Treaty.
All this leads to the final conclusion that it is beyond reasonable doubt that no grounds for a different judgment can be found in EC law."

4. Comment

It is evident that this case raises interesting and important questions, particularly on the separation of powers between courts and legislatures in the Member States,[11] which must be viewed in the context of some fundamental questions of European constitutional law and its relation to national constitutional law. I submit a number of reflections which force us to consider afresh the established constitutional case law of the ECJ.[12] We cannot fail to have a brief glance at the new provision contained in Article I-29(1), second sentence of the proposed EU Constitution; this provision may perhaps be understood as a specification of the duty to cooperate under Article I-10(2) of the Constitution and may or may not be the reason for a radical break with any form of separation of powers between courts and legislatures at the national level.[13] As far as present EU constitutional law is concerned, I shall argue that although in principle a case can be made that national courts must set aside generally accepted fundamental principles of the separation of powers

11. For a recent treatment from the perspective of comparative constitutional law of the relations between courts and legislatures, see Koopmans, *Courts and Political Institutions: a Comparative View* (Cambridge CUP, 2003), on an approach from the perspective of the *political question* doctrine, especially chapters 3 and 5; the *Waterpakt* judgment places a somewhat different emphasis from Koopmans' account in ch. 4 of this book.

12. This case note was drafted before the author became acquainted with Monica Claes, "The National Courts' Mandate in the European Constitution", diss. University of Maastricht, (2004), which provides a detailed account of some of the fundamental issues raised in this case note. A commercial edition of this book will be published by Hart Publishers, Oxford in 2005.

13. "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

between judiciary and legislature, it is wiser in the type of case adjudicated by the *Hoge Raad* to practise what Weiler has termed "constitutional tolerance".[14]

Before discussing the main issue, I first point out the particular form of separation of powers which is at issue, and sketch briefly the position this has in national constitutional law.

4.1. *The nature and distinction of judicial and legislative activity*

First of all we should make clear that the case under discussion does *not* concern the judicial activity of reviewing a piece of legislation against law which has priority in case of conflict (against "higher" law). The case under discussion, is not about *reviewing* acts of parliament but about *making* acts of parliament.[15] In the former, an act of parliament is to be reviewed as to its compatibility with higher norms (for the Netherlands: directly effective provisions of treaties and of decisions of international organizations); in the latter there is *no* act of parliament to be reviewed, but the issue is whether one is to be enacted. It is the view of the *Hoge Raad* that in the latter case courts have no role to play. This is based, as *Waterpakt* makes clear, on the division of powers implicit in the Constitution.

In an earlier case – which in the sense of EC law was "purely internal" – the *Hoge Raad* had considered it impossible to intervene with an *injunction* in a matter which was essentially part of enacting an act of parliament.[16] In yet another "purely internal" case, the *Hoge Raad* decided, however, that it could award damages for a failure to enact a piece of legislation with the rank of an act of parliament.[17] This demonstrates that in reviewing the legality of an absence of legislation there is a difference between awarding damage for an illegal failure to pass legislation and giving an injunction to legislate.

We can derive from the *Waterpakt* case that this makes sense: an interim injunction to enact or not to enact a statute is of a different nature from one concerning damage for wrongfully failing to enact a statute. In the EC law

14. See e.g. Weiler, *Un'Europa cristiana* (Milan, 2003).

15. This judgment should therefore not be read in the light of that peculiar Dutch prohibition against reviewing the constitutionality of acts of parliament, contained in Art. 120 of the Constitution: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

16. HR 19 November 1999, C98/096HR, *Tegelen*.

17. HR 19 Feb. 1993, AB 1993; (1999) *Ars Aequi*, 367 et seq.; it concerned a national regulation in the autonomous overseas country Aruba, which regulations – enacted by the country's parliament – have the rank of an act of parliament.

context of the *Waterpakt* case, this latter *Francovich* liability was explicitly distinguished from an injunction to enact statutes. Here we have an essential element in the reasoning of the *Hoge Raad* which seems to be of more general validity: deciding on liability for damages as a result of a failure to enact statutes is to be distinguished from ordering parliament to enact certain legislation with a particular content.

One may wonder what justifies the essential distinction between reviewing (the absence of) legislation and ordering legislation. Central in the considerations of the *Hoge Raad* is the essentially political and general nature of the act of legislation. It concerns "political decision-making and a balancing of the interests involved"; it "necessitates a balancing of many interests, including interests of others parties than the parties in a law suit such as this one, and it requires a political judgment with which a court cannot interfere"; "an order to pass legislation intends to create regulations which are generally applicable also to others than the parties to the proceedings". The unarticulated logical premise is that all this is appropriate to the nature of the work and domain of legislatures but inappropriate to courts and outside their proper domain. The inference is that courts are not to interfere with the essentially political process of legislation.

This is not entirely new in the case law of the *Hoge Raad*. Deference to the legislature has been shown in the context of cases where legislative provisions have been considered to conflict with directly effective provisions of the ECHR and the ICCPR, but where the *Hoge Raad* found that disapplying the relevant provision was no solution to the case at hand. These cases concerned, for instance, discriminatory legal provisions which gave a certain facility to some persons only. Not applying such a provision meant that the persons who were unlawfully excluded from that facility were not actually helped, and those who did enjoy the facility lost it. In some such cases the *Hoge Raad* found enough clues in the existent legislation to devise a remedy through judicial law-making; in substance, it involved judicial legislation, but (allegedly) entirely based on the ingredients already present in the existing legislation. On other occasions, however, the *Hoge Raad* considered that there were too many interests to be balanced, and too many alternative forms of possible solutions, so that the matter must be left to the legislature.

In some recent cases the *Hoge Raad* more explicitly refrained from reviewing an issue because this was up to the political decision-making process – something one may hesitantly consider the application of some form of "political questions doctrine".[18] This happened in a recent judgment in

18. The justification for doing so is that the language of courts leaving matters to "politics" is dominant. The American doctrine applies in cases in which there is no dispute as to whether

one of the unrelenting number of cases brought by pacifist public interest groups, which were previously aimed at nuclear weapons, and now at political and military involvement of the Netherlands in international peace-enforcement missions.[19] In the field of EC decision-making, the *Hoge Raad* has also refused to grant an injunction as this would interfere with the political decision-making of the Council of the European Union.[20]

Apart from the "political" decisional aspect, the *Hoge Raad* stresses the difference between the *effects* of judicial decisions and legislative decisions, in a manner which refers to an old line of reasoning in the European tradition of the division of powers between legislature and courts, which finds points of reference in Montesquieu and as far back as Aristotle. Indeed, the essence of the role of courts remains to adjudicate on issues as they are brought before them by litigants. In doing so, it is not very usual for courts to need to take *full* account of the role of third party interests which have not been articulated by any of the parties in particular litigation. Court judgments in continental systems bind only *inter partes*, and to that extent courts are indeed dealing with particular cases.

Though the judgments of normal courts do not usually and formally have effect *erga omnes*, in practice the consequences of declaring a legal provision not binding in a particular case in highest instance may produce a similar effect, even if there is no national doctrine of *stare decisis*, nor other rules

the legislative or executive power have remained within their respective constitutional confines, but when it involves a matter which pertains to their discretionary powers in a manner which does not (yet) raise a clear-cut, justiciable constitutional question. The similarity is in the discretion within its proper (legislative or executive) domain with which courts are not to interfere. The difference is that in the Dutch context (as in that of other European countries) declaring a case a matter for the legislature (and not the judiciary) is itself seen as a division of powers issue.

19. In it, the *Hoge Raad* judged that, though couched in legal terms, it concerned decisions which crucially depend on foreign policy and defence policy issues which hinge on political circumstances, and that it is "not for civil courts to come to such political decisions, and to prohibit at the request of a citizen certain State (or executive) acts implementing political decisions in the field of foreign policy and defence, or to order it to follow a certain line of behaviour." See HR 6 Feb. 2004, C02/217HR, paragraph 3.4, www.rechtspraak.nl, LJN number AN8071.

20. It concerned an attempt to forbid the representatives of the Kingdom of the Netherlands from participating in a vote in the Council in Brussels in a matter with which the overseas countries of the Kingdom did not agree (which constitutionally should prevent the minister from voting in favour of the decision in question, concerning the interim-revision of the sixth OCT decision by the Council of the European Union in the late 1990s). HR 10 Sept. 1999, Case No. C98/013 HR, Rawb 2000, No. 13 with annotation by Widdershoven; not to be confused with the much more widely reported Case C98/012 of the same date, which concerned an injunction based not on national constitutional law, but on Community law and does not contain the relevant *obiter dictum*.

by which courts are being bound by precedent. Some of the constitutional courts hand down judgments that may under circumstances have at least *de facto*, if not *de iure*, effect *erga omnes*. This effect is a consequence of their power to nullify acts of parliament. And it is not by chance that this power is usually located in a special court, which is often not part of the system of normal courts and sometimes not even considered part of the judiciary.

Given the generalized effect in practice of an injunction in highest instance to disapply a legal provision, which may practically put an end to the effectiveness of a legal provision, it might seem a small step to consider an injunction to enact a legal provision permissible. The whole issue is of course whether this "small" step is not precisely the decisive step which transgresses in an inadmissible manner the boundaries between the judiciary and the legislature. Many considerations enter into an answer of this question. I restrict myself in what follows to questions concerning the relation between Community law and national constitutional law. Two main lines of argument can be set up, which in their cruder versions lead to opposite answers, one based on an exclusive Community law point of view, and another which bases itself on national constitutional law. Predictably, the truth may have to be sought in more subtle versions which combine both perspectives.

4.2. *The Europeanist and the nationalist view*

At one extreme of the spectrum, a Europeanist view could be developed which runs like this. EC primacy means supremacy, crude and simple: all EC instruments overrule any rule or principle, however fundamental to a particular national constitutional order, which might stand in the way of giving full effect to EC law. A rule of national constitutional law which prohibits courts from ordering parliament to enact a particular statute may form an obstacle to enforcing the implementation of EC law. It must therefore be set aside. If EC law trumps national institutional autonomy, so be it. National law, whether it concerns constitutional law, important institutions of the constitution, or any other sort of norm or principle, is irrelevant if it interferes with rendering EC law effective. Authority for this view can be found in *Van Gend en Loos*, *Costa/ENEL* and, in particular, *Simmenthal*. Also from *Francovich*, *Factortame I* and *Brasserie du Pecheur* it follows that sovereign immunity of particular national constitutional institutions from judicial interference cannot be allowed to mitigate the effectiveness of EC law.

The ECJ has been able to create a general legal regime of Member State liability under EC law which has forced some Member States to diverge from national constitutional principles – this even in the absence of any basis in the Treaties, which by the standards of ECJ case law would have rendered

such a regime incompatible with EC law had this regime been adopted by legislative measure of Council and Parliament.[21] *A fortiori,* EC law – though the ECJ may have to lead the way here – is able to create a power for national courts in cases where a national court is acting as enforcing agent of the EC, also in the absence of a treaty basis for creating such powers.

In conclusion, there is overwhelming argument in the case law and otherwise to the effect that in a case like *Waterpakt*, a national court is under an obligation to set aside a principle of national constitutional law which prevents a court from ordering a legislative authority to enact legislation which it is bound under Community law to bring about, also in the absence of a basis in national law for such orders in non-Community law contexts.

At the other extreme of the spectrum one can construe a view based exclusively on national constitutional law, to the effect that EC law cannot interfere with national constitutional values. The argument is as simple as its Europeanist's counterpart: the ECJ has no competence to decide the conformity of national institutions' behaviour with the national constitutional order, so matters like those at stake in *Waterpakt* are to be decided by national courts on the basis of their national constitutional law. Hence, a fundamental principle which prohibits courts from making injunctions to enact specific legislation applies *tout court*, also when it involves the implementation of EC law. A further argument can be derived from Article 6 TEU, which enjoins respect of the national identities of the Member States, democracy and the rule of law, which surely comprises respect for fundamental constitutional principles such as those concerning the separation of powers between the legislature and the judiciary.

4.3. *The two views compared*

A more moderate and tentative version of the first line of argument, the Europeanist view, was put forward by the Advocate General to the *Hoge Raad*, who advised referring a preliminary question to the Court of Justice as the matter is unclear. Below, I will present some arguments as to why this view is constitutionally naïve and fails to take account of the common constitutional tradition of the Member States and the manner in which Member States' constitutions can be relevant for the EU Constitution.

Interestingly, there are no grounds for attributing the second view to the *Hoge Raad* – one of the first supreme courts that actively pursued a policy of referring preliminary questions to Luxembourg.[22] In fact, the *Hoge Raad*'s

21. I owe this insight to Rob Widdershoven.
22. A policy now in fact abandoned given the extreme delays this causes in the administra-

reasoning takes EC law fully into account, though not in all respects successfully – for instance in its reference to *Francovich* and *Van Schijndel*. In its judgment, the *Hoge Raad* takes an approach which intentionally aims at the compatibility of fundamental principles of national constitutional law with Community law. This assumes that the constitutional order of Community law and the constitutional order of the Member States are in harmony, at least in the sense that Community law does not go so far as to do away with core elements of the separation between judicial power and legislative power. A closer scrutiny of the ECJ case law and how the *Hoge Raad* uses it may throw light on the arguments it employs (sometimes only implied) to arrive at the suggested constitutional compatibility.

4.4. *The EC case law*

The *Hoge Raad* first refers to *Francovich*. This seems arbitrary and at first sight infelicitous. *Simmenthal*, which formulates the major rule on principles of national constitutional law which stand in the way of the effectiveness of (directly effective) Community law, seems applicable. And in the field of State liability – which is the context in which *Waterpakt* was brought – a reference to *Factortame* and *Brasserie du Pecheur* might seem more appropriate. The *Hoge Raad* quotes a passage from *Francovich* (part of paragraph 32 of that judgment). Translated literally from the Dutch, it reads:

> "that according to the judgment of the ECJ of 19 November 1991, Reports 1991, p. I-5357 Francovich, 'the national courts whose task it is to apply the provisions of Community law *in the framework of their jurisdiction*, must ensure that those rules take full effect and must protect the rights which they confer on individuals'."

The emphasis within the quotation is added. The *Hoge Raad* tries to make the most of the words "in the framework of their jurisdiction". These words are a faithful rendering of the Dutch version of *Francovich*, which the *Hoge Raad* uses, and also of the French version, which is the main language used by the judges in Luxembourg. The official English version, however, reads differently: "the national courts whose task it is to apply the provisions of Community law *in areas within their jurisdiction*". That is fundamentally different, as it refers to the substantive remit of their activity in terms of the fields of law in which they are competent; *not* to *limits* of courts' powers of review. In other language versions that I have been able to consult, the word-

tion of justice, which is viewed as potentially contrary to Art. 6 ECHR (a fundamental supra-constitutional norm under Dutch law).

ing is either more like the Dutch and French or ambiguous.[23] Yet, the English rendering may be considered crucial because the ECJ must have been well aware that in some Member States there exist strict limitations to State liability under national law. And these rapidly emerged also in Luxembourg, as *Brasserie du Pecheur* made abundantly clear. Yet, precisely this point was left unclear in *Francovich*, which merely referred to the "right on the part of individuals to obtain reparation, a right founded directly on Community law" (para 41), and immediately added that "[s]ubject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law" (para 42).

Before examining the relevance of *Brasserie de Pecheur*, we ought to look at *Simmenthal*,[24] which, as we said, seems the most appropriate case law. That the *Hoge Raad* overlooked this case is significant, and must be conscious: where the quotation from paragraph 32 of *Francovich* by the *Hoge Raad* stops, the ECJ goes on to refer to *Simmenthal*. *Simmenthal* seems to lead to a conclusion which is opposite to that arrived at by the *Hoge Raad*. And yet, precisely this case uses the phrase so cherished by the *Hoge Raad*, to the effect that "a national court which is called upon, *within the limits of its jurisdiction*, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation" (para 24). However, the ECJ again did not mean to refer to constitutional limits to courts' powers to review legislation – quite the contrary: the issue concerned a constitutional limitation to such review, and the ECJ was adamant that "it is not necessary" for a national court to use "constitutional means" to set aside obstacles to Community law. Once again, therefore the words "within the limits of its jurisdiction" is not about the scope of powers of review, but is, like in *Francovich*, about the difference between civil courts, administrative courts,

23. The French is more like the Dutch, but perhaps more ambiguously so: "dans le cadre de leurs compétences"; Danish: "inden for deres kompetenceomraade"; German: "im Rahmen ihrer Zuständigkeiten"; Spanish: "en el marco de sus competencias"; Italian: "nell' ambito delle loro competenze"; Swedish; "inom ramen för sin behörighet"; the Finnish – as far as I can judge – seems to be more like the English: Finnish: "toimivaltansa rajoissa".

24. There have been five or six *Simmenthal* cases before the ECJ. I mean Case 106/77, of 9 March 1978, [1978] ECR, 629, which I always thought was the second *Simmenthal* case, as it usually referred to as *Simmenthal II*, but it is actually the third case brought, though this particular judgment concerned the case as it came to the ECJ a second time.

tax courts, criminal courts, etc. Thus, the formula about "courts acting within the limits of their jurisdiction" so central in the reasoning of the *Hoge Raad*, does not immediately provide the firm ground it was seeking.

If we look at the structure of arguments in *Simmenthal* and *Brasserie du Pecheur*, we can see why the view which we called "Europeanist" might have much in favour of it. We briefly examine these well-known cases, in order to show why, against some of our intuitions, the approach of the *Hoge Raad* has something to be said in its favour; truly canonical texts hold surprises in store.

4.5. *Trumping national constitutional principles: National courts unbounded?*

The quintessence of *Simmenthal* is well known: national courts must set aside national obstacles to EC law, even if this is unconstitutional under national law. But it is notable that the case was not about simply any norm of EC law, nor about setting aside national obstacles under all and any circumstances, so it might leave room for more "constitutional tolerance" than is sometimes thought. This is confirmed in *IN.CO.GE and others*[25] in which the ECJ clarified that *Simmenthal* only concerned the relationship between an EC provision which grants a right to individuals and later conflicting national provisions. It made clear that it is wrong to infer from *Simmenthal* that the duty to disapply such national provisions renders them non-existent. In particular, such national provisions retain their character if that is necessary to render EC law, particularly a ruling by the ECJ, effective in national courts on the basis of national procedural law, where competence may be determined by the nature of the norm which infringed EC law. Moreover, the implication is that EC law does not impose on national courts not having such power the obligation to annul national legislation.

Constitutional tolerance is perhaps not easily found in *Francovich* and still less in *Brasserie du Pecheur*. In *Francovich* the Court reasoned that if Community law gives rights to individuals, even though these are not directly effective, "particularly" when they depend on "prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law" (para 34), there should be a means of obtaining redress from the Member State concerned for the individual whose rights are thus

25. Joined Cases C-10/97 & C-22/97, *Ministero delle Finanze* v. *IN.CO.GE. '90* [1998] ECR I-6307.

withheld. From the duty of loyal cooperation of (then) Article 5 EC, the Court derived the "the obligation to nullify the unlawful consequences of a breach of Community law" (para 36). So in fact, the EC rights of individuals, or in the *Francovich* context rather the rights they have been withheld by national authorities, are supreme.

This point was also evident in *Brasserie du Pecheur*. Here, the ECJ adopted a Grotian approach to law, considering *damni culpa dati reparatio* inherent in the "law" whose observance it has the duty to guarantee under Article 220 (then 164) EC, and as a common principle of the law of the EC and of the Member States.[26] An explicit legal basis for such a regime of liability in the Treaties was deemed unnecessary (paras. 27–28). From this it drew the not very cogent conclusion that "it follows that that principle holds good for any case in which a Member State breaches Community law, *whatever be the organ of the State whose act or omission was responsible for the breach*" (para 32). Seeking a further basis in the argument of the uniform application of EC law it added that "the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities". This ushered in the even broader conclusion: "35. The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach." The breadth of this conclusion is in the words "in this instance". This implies that when individuals rely on EC law the fact that a breach is attributable to a national legislature can *never* affect the protection of their rights, of which the case presented is merely an instance. Individual rights, so the implication seems to be, *always* trump separation of powers arguments which are based on principles of national constitutional law.

These readings of *Francovich* and *Brasserie* would seem to lead to the conclusion that national courts are under an obligation to ignore fundamental principles of constitutional law, also those based on core issues such as the separation of powers between the judiciary and the legislature. However, we know from the history of fundamental rights protection that the ECJ, when things come to a head, is prepared to solve the tension between fundamental conceptions of national constitutional law and the EU constitutional system. That would give reason to believe that the conclusion as to trumping prin-

26. Grotius considered *damni culpa dati reparatio* one of the four principles inherent in law and therefore part of the core of natural law; see *De iure belli ac pacis*, Prolegomena, para 15.

ciples of separation of powers is true only so far as those particular cases go. Some constitutional tolerance may be left after all.

We should notice that *Francovich* was about "the obligation to nullify the unlawful *consequences* of a breach of Community law", and does not speak of an obligation to nullify the *breach* itself of Community law: it is about *liability* for damages caused, not about imposing a judicial order to *implement* a directive which a legislature had unlawfully failed to implement. Even in *Brasserie du Pecheur,* the Court's bark may be worse than its bite. True, it called for provisions of the German civil code, restricting state liability for acts and omissions of the legislature, to be set aside – provisions which were inspired by considerations of separation of powers –, as it had suggested British courts should do with a rule of common law prohibiting injunctions against the Crown (*Factortame I*). Like *Simmenthal*, *Brasserie* concerned the consequences of a breach of Community law as established in earlier ECJ rulings in the same case. Firm lines are to be expected then, though the status of ECJ rulings was not the direct object of the preliminary questions and consequently not at the forefront of deciding the principles of the obligation to set aside rules based on constitutional considerations (but it is indeed one of the considerations in establishing whether the breach is sufficiently serious, as was recently confirmed in *Köbler*[27]). Still, and this is when things become less ferocious, issues of judicial competence in deciding issues of liability remain in principle a matter for national law (*Brasserie*, para 67) as long as this does not discriminate against EC claims and render the remedy futile.

What does this judicial competence which is governed by national law comprise? We already pointed out that the *Hoge Raad* in *Waterpakt* seemed to rely too much on the particular wording of *Francovich* on the limits of court jurisdiction. And perhaps also the reference which the *Hoge Raad* makes to *Van Schijndel* in extolling the national limits of courts' jurisdiction is not immediately appropriate. *Van Schijndel* concerned the question whether national courts are to apply EC law of their own motion in civil cases when none of the litigants have invoked it. No such problem is at hand in *Waterpakt*, which has the reliance on Community law at its core.

So the judicial competence which *Simmenthal*, *Francovich* and *Brasserie du Pecheur* and *Van Schijndel* allow as matters of national law, is not quite the same as the constitutional restriction of judicial review, rooted in the separation between judicial and legislative power, which is at stake in *Waterpakt*. But this does not automatically mean that such separation of

27. Case C-224/01, *Köbler*, judgment of 30 Sept. 2003, nyr.

powers is always and entirely irrelevant from the EC perspective. For one thing, these same cases leave room for national law governing the position and role of the judiciary. Viewed in that light the reference to *Van Schijndel* is not necessarily so bad. *Van Schijndel* made allowance for compulsory national rules of civil procedure; these rules and principles of civil procedure were respected by the ECJ as a preserve of national law, albeit a contingent and conditional preserve. In fact, a case like *IN.CO.GE* also stakes out a similar role for national procedural law in the context of EC rights of individuals as against claims that in case of directly effective EC rights of individuals all national rules and regulations are overridden.

4.6. *The argumentative strategy of the Hoge Raad: The composite nature of the EU constitutional and legal order*

Instead of taking the approach of the *Hoge Raad* in a literalist sense, we should understand its references to the case law, particularly to *Van Schijndel* and *Francovich*, as symbolic. Equally symbolic is the silence of the *Hoge Raad* on *Factortame I* – a silence which is even more deafening than that on *Simmenthal*. If there is any case law relevant to injunctions aimed at a constitutional body which enjoys immunity from judicial interference under national law, then it is this, where the Court ruled: "a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule" – a ruling that would lead in quite a different direction, particularly as it in fact created a new remedy under English law.[28] The references to ECJ case law – and the silences thereon – symbolize the attempt to sculpt out and protect a role for national constitutional principles concerning the function of the judiciary.

We can, and should, understand the EU legal order as being composite: that is to say, a legal order composed of both the EU constitutional and legal order *and* the national legal and constitutional orders, one compound in which the two are mutually dependent. The approach of the *Hoge Raad* can

28. Case C-213/89, *Factortame I*, [1990] ECR I-2433. From the national legal point of view, the case did not, technically speaking, really involve *setting aside* the common law prohibition, but the question whether there is a power to give injunctions against the Crown under Community law *pursuant to the European Communities Act*, which otherwise leaves the common law rule intact. That is at least also how the House of Lords posed the question to the ECJ. That was different under Italian law in *Simmenthal*. But such niceties of national law, though they potentially contribute to EC law legitimacy in terms of national legal systems, are not always spent on the ECJ.

also be understood in that vein. This composite nature is not very evident from the surface text of the EU constitutional documents, but is at least partly visible in some of their structures. That transpires notably from the prevalent form of executive federalism and the cooperational structure of judicial protection. This composite structure presumes a sense of mutual respect and "constitutional tolerance". Such an assumption is not, and cannot be, decided in a constitutional text itself, but is an *praeter*-constitutional assumption which, so to say, makes the constitutional clockwork tick.[29] As we know from the lengthy story on the protection of fundamental rights, the (limits of) direct effect of directives, and the ongoing discussion as to what is termed the question of (particularly judicial) *Kompetenz-Kompetenz*, these matters are in a constant dynamic in the legal and constitutional practice of the EU and the Member States' organs. This practice is referred to – in certain respects inappropriately – as a constitutional and judicial "dialogue" or "conversation".

The *Waterpakt* judgment of the *Hoge Raad*, I submit, should also be seen in this context. The bold assertion that the decision not to pass legislation and let things come to the ECJ in infringement proceedings is an utterly political choice (which is undeniable) and the equally bold assertion that "it is beyond reasonable doubt that no grounds for a different judgment can be found in EC law" (which of course begs the question), is a digging in of heels, which seems to be a sure sign of the kind of constitutional dynamic which I mean, part and parcel of the process of articulating the composite nature of the European constitutional order.

4.7. *Sculpting arguments for the separation of powers between judiciary and legislature*

Notwithstanding the above, some good arguments can be found for the position of the *Hoge Raad* regarding the case law of the ECJ, the constitutional principles common to the Member states and the nature and legitimacy of the judiciary as compared to that of the legislature. These three types of argument are, I submit, the major arguments of the *Hoge Raad*. The case law mentioned so far concerns questions which are crucially different from the

29. Art. 6, esp. paras. 1 and 3, TEU (the foundation of the EU on the fundamental constitutional principles common to the Members States, and the EU's respect for the national identity of the Member States) and on the other hand Art. 10 EC (Community loyalty of the Member States) are only partial entrenchments of this composite nature of the European constitutional and legal order. Moreover, these provisions as such are not decisive, but the practice which expresses their substance. One can be sceptical about the extent to which Art. 6(3) TEU is taken seriously. I know of no case in which the ECJ felt it necessary to refer to it.

central issue in *Waterpakt*. *Factortame (I)* concerns a court injunction to *end* the application of an act of parliament. *Simmenthal* is about not applying *existent* legislation which infringes EC law. *Francovich* and *Brasserie du Pecheur* concern the unmaking of the *consequences* of the infringement which exists in a failure to pass certain acts of parliament, not the unmaking of that failure itself. *Waterpakt*, though, is about the *passing* of an act of parliament, about *creating* as yet *non-existent* acts of parliament, and about the *unmaking of the failure itself* to enact statutes. The former is the domain of courts of law, the latter the domain of the legislature — so the *Hoge Raad* says, and I would agree. The subtle difference between disapplying an act of parliament, which may in practice have a generalized effect, and ordering an act to be made, is crucial.

In fact, this distinction is probably a constitutional principle common to the Member States.[30] I know of no court of law, not even a constitutional court, which is competent to order parliament to enact a statute of particular content. It is true that constitutional courts such as the *Bundesverfassungsgericht* do pose time limits within which the legislature is to pass legislation to bring existing legislation in line with the *Grundgesetz*, but this is not an injunction to pass certain legislation at all. It is connected to the distinction between the nullification (*Nichtigerklärung*) of an act which is deemed unconstitutional, and declaring an act incompatible with the Constitution (*Unvereinbarerklärung*). In the framework of a declaration of incompatibility, the *Bundesverfassungsgericht* can determine an interim period within which the legislature can adapt legislation, on pain of which the existing legislation can become null and void. But the doctrine is quite clear that it is entirely up to the legislature to decide whether to pass legislation or not. And this is precisely why we must say that the *Bundesverfassungsgericht* does not cross the line between judiciary and legislature either.

The *Hoge Raad*'s infelicitous reference to the powers of the ECJ under Article 228 EC, which is inappropriate and in itself neither conclusive nor convincing,[31] can with some modification be understood to signify that also the ECJ shares that common constitutional principle. In fact, it does not have the

30. The presence of a principle common to "most" Member States plays a role in *Van Schijndel*, to uphold national law on the relevant point at issue there.

31. On the contrary, Art. 228 EC's emphasis on the Member States' duty to take measures might imply that in a way the ECJ's judgment can be seen as an order to the Member State involved; one might speculate that also national courts are under an obligation to take the "measures", e.g. order the legislature to enact the relevant statutes when so requested in legal proceedings. It is true, however, that in the absence of a possibility under national law for courts to give such an injunction, it is difficult to see why EC law (Art. 228 EC) should provide them with a legal basis to do so. So the argument seems no definitive answer to our problem.

power to give an injunction to the Community legislature of Council and European Parliament under Article 230 EC; and even under the most relevant provision, Article 232 EC (which I would consider the better analogy), the Court does not have a proper power to give an order to legislate but can only declare a failure to act as contrary to the Treaty; the obligation subsequently to take "all necessary measures" follows from the Treaty itself (Art. 233 EC), not from a Court order.[32] That the ECJ does not have the power to order the institutions to legislate is therefore a plausible view, and is in agreement with the constitutional principles common to the Member States.

Arguably, if courts were able to order the highest legislature to pass acts of parliament of a particular content, this would shift the legislative power from the legislature to the courts, and make the legislature totally subject to the judiciary. The counter-argument may be advanced that under circumstances in which the legislature is already under a legal obligation to pass legislation with a particular content – as with EC directives – the court is not arrogating legislative power, but merely acting on the authority of the higher norm. In the case of ordering a directive to be implemented in the form of an act of parliament, such a court would merely be enforcing existing legislation, i.e. EC legislation; it acts only as agent and enforcer of existing law of a higher order. However, this argument reduces courts to a long abandoned view of *bouche de la loi – bouche de la loi Européenne* to be precise. But even if this view in its more literal sense were not outdated, one may doubt its appropriateness given the very definition of directives. It is in the nature of the legal instrument of the directive that it defines a specific result to be achieved, "but shall leave to the national authorities the choice of form and methods", as Article 249 EC puts it. Can *Community law* under this wording provide a basis for national courts to determine that the implementation has to take the form of a particular act of parliament? Not without bringing *national (constitutional) law* into the argument. And it is precisely this national law which prohibits courts to order parliament to enact such legislation. So the counter-argument runs into severe difficulties.

There is also, naturally, the argument of the legitimacy of the judiciary as compared to the legislature. This might be brought under the same heading as that of judges as *bouche de la loi*. However, it also raises the issue of hierarchy and the subjection of national legislatures as well as national courts to the overriding hierarchical supremacy of EC law. It would seem that the *Hoge Raad*, the national court which was the first, and for years most active,

32. Whether the Court could give an order to legislate ex Art. 243 by way of interim measures, depends on whether it has the power to order legislation otherwise – which is has not.

poser of preliminary questions and faithful follower of EC law and the ECJ, has decided that sometimes it is not merely an instrument for EC law in its relation to the national legislature. It has been and remains instrumental, entirely along the lines of *Van Gend & Loos*, *Costa/ENEL* and *Simmenthal*, in favour of directly effective individual rights. And if there are such concrete individual rights granted at EU level, then there may be a certain logic that internal arrangements concerning the relations between state institutions, may not stand cause obstructions so that those rights are merely illusory.[33] But it is not clear that such rights were at stake in *Waterpakt*.

4.8. *Rights: Individual rights or the general interest?*

It is worth noting that the reasoning in *Simmenthal* is entirely in the key of the courts' role in protecting directly effective rights conferred upon individuals by Community law. Similarly, *Factortame (I)* is about "granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the *rights claimed under Community law*" (para 21). *Francovich* is about "rights conferred on individuals" (which were not directly effective), just as *Brasserie du Pecheur* is about "rights conferred on individuals" (which, in the cases adjudicated, were indeed directly effective).

Again, *Waterpakt* is different. We do not know to what extent the provisions of Article 3(1) and Annex I sub A (2) of the Directive, and Article 5(4) (a) and Annex III sub 2 of the Nitrate Directive confer directly effective rights – in the final judgment, the question of direct effect was not an issue and remained unsolved. Nor is there any conclusive ECJ case law. It is even, and more importantly, questionable whether they confer any rights at all, particularly rights in the sense of *Francovich*. It would seem that the first requirement of a right is that there is an individualized legal subject that is carrier of the right, but in the case of the environmental rights involved, there is no particular individualized carrier of such a right. This is borne out by the fact that the matter brought to court in the Netherlands was public interest litigation, brought by environmental and consumers organizations (and a number of unidentified individuals). This shows that a general interest rather than individual rights is involved.

This has consequences. Firstly, it may be mentioned that under Dutch law there is no problem of standing in civil procedure. The question of an interest of the legal person involved is decided by the legal person's statutes; and if

33. I notice in passing the irony that the separation of powers was originally devised as promoting the rights and liberty of the citizen and his State. *Vide* Montesquieu, *L'Esprit des lois*.

the aim of the legal person involves a general interest, it has *locus standi*. But constitutionally, at least in comparative perspective (the matter is hardly discussed in the Netherlands constitutional literature), this is not uncontroversial. The articulation of the general interest is, after all, primarily a matter for the political arena dominated by parliament, where the popular representatives deliberate and together with the government determine what the general interest requires. This is the essence of public policy-making in parliamentary systems of government. It is, of course, quite clear that this picture of the public domain of political life is old-fashioned and in certain respects has become complemented with all kinds of mechanisms of citizens' participation in many forms of political decision-making and policy formation. Courts are also part of this. Their main constitutional function is to guard legal rules which form the confines of the political process – the rules of the game, so to say, including respect for individual rights. The political process is mainly in the hands of the legislature and (nowadays perhaps to an even larger extent) of the executive. It is not only based on legal rules, the rules of the game, i.e. the rule of law, but also aims at producing law. Courts are there to interpret the law which is brought about through legislative action on the part of the legislature and executive (in parliamentary systems of government with the mandate and under the scrutiny of the legislature). Only in particular circumstances do courts have a law-making function in the properly legislative sense of this term. Here, they are limited by the rules of the game (the constitution) and the laws made by the legislature. If this were not so, there would be no intrinsic reason to divide powers between legislature and judiciary, or to give them an entirely different basis of legitimization.

The substantive political process of articulating the general interest in the form of legislative acts, is beyond the reach of courts. This is also why in most legal systems there are rules which limit the standing of parties in normal courts of law to persons (legal or natural) which have an individualized interest in bringing a case. This is already the case for the review of the constitutionality or legality of decisions of the executive, and the more so with decisions of the legislature – *pace* all the European lawyers who think that there is no good sense in the requirement of Article 230(4) EC. This is *a fortiori* the case when courts are petitioned to interfere with the policy-making and law-making powers which have been attributed to the legislature. Restrictions on the proper powers of courts come to the forefront when they themselves are requested to create new generally applicable laws, imposing obligations on some citizens and giving rights to others, or when they are petitioned to order legislatures to do so. Here in all systems we come to boundaries where issues arise which are deemed non-justiciable. It is not that such

petitions and requests are not legitimate in themselves; but they are addressed to the wrong institution.

Does this analysis support the view of the *Hoge Raad* as expressed in *Waterpakt*?

I think so. *Waterpakt* is typically a case where the *Hoge Raad* was confronted with general interest groups asking for legislation which farmers and their unions had in earlier cases asked the *Hoge Raad* to declare incompatible with higher norms (notably the market organization rules of EC law and the right to property under the ECHR). *Waterpakt* concerned legislation which the government was defending in Luxembourg as adequate implementation of the Nitrate Directive, legislation which intended to be more "clever" than merely imposing prohibitions and attempted to make farmers responsible (and financially liable) for producing too high levels of nitrates (and phosphates), which is all the more important as the legislation had huge consequences for the viability of the livestock farming sector – enormous consequences which any implementing legislation would have. It involves, in short, politically highly charged pieces of legislation. This need not always preclude an important role for courts, but does so, I submit, when the relevant interests are not clearly defined directly effective rights of citizens, but require a difficult balancing. In this case, the general interest "rights" which are read into a directive are immediately opposed to the obligations the directive automatically engender for other citizens: a "right" for the general public not to have more than 210 or 170 kg of nitrates per hectare produced in animal manure versus the obligation of farmers not to produce more than precisely those amounts of nitrates. Only a very restricted, and arguably entirely "empty" order to implement the Nitrate Directive, might avoid running into the difficulties bound up intrinsically with the different domains of the legislature and judiciary respectively – but obviously such an "empty" order, merely repeating that the directive ought to be implemented, would not amount to anything beyond what was already a duty of the legislature, and would therefore itself not render EC law in any respect more effective.

4.9. *Separation of powers under hierarchical conditions*

Granted, one might want to argue that within a *national* system the distinct roles for judiciary and legislature are appropriate, but the "rules of the game" are different when a national system has become subject to an overarching order, which claims not just priority in cases of conflict, but hierarchical superiority. The margins for political and law-making decisions have been narrowed and limited by the rules produced at the superior level. Hence, there is no reason to respect any presumed political or legislative

scope. The national parliaments in such instances do not produce primary legislation, but – from the EC point of view – no more than executive regulations. Such regulations are not outside the remit of courts. But this begs the question of the nature and scope of the hierarchical subjection: does it go so far as to reduce acts of parliament to executive regulations? And does the hierarchical subjection go so far as to wipe out any inherent distinction between judicial and legislative powers in terms of their competence towards each other? Moreover, this argument on hierarchical superiority and inferiority does not say why a *national* court should have the power to give such an injunction. It is one thing for a truly supranational court to have such power – which, I repeat, it does not – but another to grant such a right to national court.

One might wonder whether a power to order legislation would be more acceptable once the ECJ has established an infringement under Article 228 EC. But then the question arises what the point would be. Article 228 EC already states in so many words that such a finding necessitates the Member State involved to take all necessary measures to rectify it. It is hard to see what a national court could add to this on the basis of *Community* law.

I would also grant that there may even be situations within national systems in which there is a constitutional duty to legislate, for instance under constitutional provisions on social and economic rights. Under very exceptional circumstances these duties might even be sanctioned by constitutional court orders, though I know of no such cases. But it is more than questionable whether this should ever go so far as to grant a general power of courts to give injunctions to parliament to legislate.

Finally I would argue against this also for the collateral effects of giving such a power to national courts. If they are given such a power, which to my knowledge is non-existent in the national context (and if it exists, is highly exceptional), then indeed courts would use this power also in other contexts. This might in a sense seem a small step. Historically, however it would be the decisive step towards formal powers of courts as judge-legislature.

4.10. *The Constitution*

In these days, full of constitutional momentum, one cannot fail to say a few words on relevant new provisions. There is one which is relevant to our case. It concerns Article I-29, where in the first paragraph a new duty is imposed on the Member States:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[34]

The history of this new provision is obscure. I have found no trace calling for this provision in the working groups or, perhaps more relevant, the discussion group on the ECJ. The text is fraught with questions and difficulties. Does it concern an attribution of powers? Does the reference to the Member States mean that these addressees are the subject of the relevant power? Can for instance the Court no longer create legal remedies in the way it has done in the past, for instance in *Factortame*? Is the creation *ex nihilo* of a liability regime, as in *Francovich,* impossible in future, should the case arise? Can the EC/EU no longer be considered to devise relevant rules of EU law, which means under the famous *Rewe* formula that it is definitively up to the national legal order of the Member States to lay down the procedural conditions governing the actions at law for the protection of rights under EU law?

Or is it the opposite: are the Member States merely the object of those powers? When the Court observes insufficient means of legal protection, can it devise them? Does the new provision mean that it remains the case that if the Member States create remedies they can do so only within the limits imposed by their national constitutional frameworks? Or is Article 29 of the Constitution itself to provide the legal basis for whatever national organ deems itself capable of determining whether extent national remedies are sufficiently effective or not, and moreover a legal basis for remedying this? Alternatively, is this provision other than a reformulation of the duty of Community loyalty of Article 10 EC, but now aimed more specifically at the national courts? But why would one need this particular provision? Is the further codification of this existent obligation in the proposed Articles 5(2) and 10(2) of the EU Constitution (during the IGC merged into Art. I-5(2) second and following sentences)[35] not sufficient? Should it provide the national courts with a direct legal basis for their operation in the EU Constitution? Can the EU Constitution provide a basis for national courts' jurisdiction without there being any basis in national law at all? If the latter, should this happen in the haphazard manner in which this provision seems to be smuggled into the Constitution? Is it self-evident that national courts can be given a mandate entirely separate from any basis in national law, without this having been made clear, let alone discussed, either in the Convention or dur-

34. In earlier versions of the constitutional treaty, this Article (previously number 28) had erroneously spoken of "rights of appeal". We now refer to the (corrected) version of August 2004, CIG 87/04.

35. CIG 60/03 ADD 1.

ing the IGC? And if this were the intended meaning of the new provision, are there any limits whatsoever of such a power of national courts, or do they have truly unbounded powers?

The answers to such questions can be fateful for a case like *Waterpakt*. Certainly, this is potentially a highly explosive new provision which has slipped into the "accidental Constitution". Nevertheless, it is conceivable that problems will not be raised by the national judiciary: they may be empowered by such a provision, and the history of EC law has shown that such empowerment has not been wasted on national judiciaries. Or does *Waterpakt* prove the opposite: that courts may see the point in not divesting legislatures of their proper powers to the advantage of courts?

Food for much more thought than fits in a single case note.

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