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The Constitution and the Armed Forces

As of July 2000 the provisions on the armed forces in the Constitution of the Netherlands have been amended. A number of provisions have been repealed, others have been changed and a new one has been introduced.[1] The most important aspect of the changes concern the increased international role of the armed forces. Whereas previously the use of the armed forces has been geared to the defence of the territory and independence of the own country, it now has a role to play in maintaining the international legal order as well. In this article we briefly sketch the nature and importance of some of these constitutional changes.

The existence of the armed forces

In political history, the existence of a standing army and its relation to the nature of the state has been highly controversial. The story of the relation between the development of the state and the existence of a standing army has been told too often to need rehearsal. It may suffice to point to the 20th century examples of post-war Germany (until 1956), Iceland and Japan to see that there is no constitutional self-evidence in the existence of armed forces.[2] As a matter of fact, from the Glorious Revolution's Bill of Rights to this day, strictly speaking every year a decision is taken on the continued existence of the armed forces in the UK. To the Dutch, however, it has seemed constitutionally self-evident that there are at all armed forces. This went so far as the proposal by the Government during the constitutional revision which led to the Constitution of 1983 to abolish the constitutive provision concerning the armed forces. This led to a veto of the Upper House (*Eerste Kamer*) of the States-General, the Netherlands parliament. Hence the text of the provision remained as it was until July 2000:

> Article 98 1. To protect the State's interests, there shall be armed forces [...]

Institutional aspects

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[1]Rijkswet van 22 juni 2000 tot verandering in de Grondwet van de bepalingen inzake de verdediging, Staatblad 2000, 294.

[2]Japanese Constitution of 1947, Article 9: "(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained." This provision did not stand in the way of establishing a Self Defense Force in 1956 (declared constitutional by the Supreme Court in 1959; Case (A) 710/ 1959, see http://courtdomino2.courts.go.jp/ promjudg.nsf/, last consulted on 8 May 2001), although Japan does not have military equipment such as intercontinental ballistic missiles, long range bombers or offensive aircraft carriers, since this is considered unconstitutional. Participation in peace keeping operations in Cambodia and Mozambique between 1992 and 1995, have been considered legitimate. On these issues see http:// www.jda.go.jp/e/policy/f_work/f_work_.htm (last consulted on 8 May 2001).

The Constitution of Costa Rica provides in Article 12: "The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order. Military forces may only be organized under a continental agreement or for the national defense; in either case, they shall always be subordinate to the civil power: they may not deliberate or make statements or representations individually or collectively."

One aspect of the constitutional provisions on the armed forces which remained unchanged is the supreme authority over them, which lies with the government (now Article 97 (2), previously 98 (2)). This implies that the supreme command lies with the government and not with the head of state or the head of the army. In previous constitutions the formulation may have suggested that it is the King who is supreme commander. However, the formulation also in those days did not use the expression "supreme command" but "supreme authority" ("*oppergezag*"), but since the introduction of overall the ministerial responsibility for acts of the king, this was understood to mean to refer to the king acting under the responsibility of the cabinet and not to the king in person as head of state. This has also meant that the armed forces came indirectly under scrutiny of parliament, as the Netherlands has had a parliamentary system of government in which ministers are held to account to parliament and have to resign if they loose the confidence of the Lower House of parliament. That supreme authority lies with the government, has played a role in the drafting of the new Article 100, as we will see.

In the Netherlands the most persistent controversy has been over the nature of the armed forces as an army of the voluntary *cadre* of officers and draftees as soldiers. The compulsory military service has always been very unpopular. It has not been supported by any deeply entrenched ideology of citizenship backing up the system. The provisions on the armed forces have throughout the 19th century contained a large number of elaborate articles. Except the constitution of the German Empire no other European constitution contained such detailed and elaborate provisions on the armed forces. A contemporary constitutionalist pointed out that this was for the opposite reason: to restrain the legislature in reinforcing the armed forces rather than to restrain its possibilities to limit its powers.[3] After the events in Europe of 1989, the discomfort with the levy has been definitively decided in favour of an army of volunteers and professionals, to which purpose the formulation of the relevant provision in the Constitution was changed. Since 1887 it spoke of "armed forces consisting of volunteers and conscripts", but since 1995 it says that "the armed forces shall consist of volunteers, and may also include conscripts"(Article 98). Although strictly speaking compulsory military service has not been abolished, the call-up to active service is deferred until by Royal Decree it is activated.

Regulating the armed forces

The most important function of constitutional provisions concerning armed forces is to regulate them and restrain them to the functions they can legitimately perform. Traditionally the function of the armed forces were restrained to the defence of the country against external attack. Also related powers, regulated by act of parliament, to use the army internally in cases of war or similar emergencies, such as assistance to the regular police authorities, disasters such as flooding, etcetera. This was reflected in the relevant constitutional provisions. Before the revision of the year 2000, the Constitution provided that those "who are capable of doing so shall have a duty to cooperate in

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[3] J.T. Buijs, De Grondwet, vol. II Arnhem 1887, p. 623-624: "Was it there the desire durably to protect the powerful army organization, to which the Empire owed its existence and its greatness, against the not unnatural disposition of the legislature to cut back on it, with us it was the contrary fear that the legislature would pose too high demands which was the leading thought. There the Constitution exudes a strong military spirit; here a no less forceful anti-militarism. In the interest of personal liberty and to pose a limit on the sacrifices which could be imposed on the people for the purpose of the country's defence, the framers of the Constitution were led to a measure of elaborateness which they were able to avoid elsewhere in the Constitution." (author's translation)

maintaining the independence of the State and defending its territory" (former Article 97) and specified that "*to protect the State's interests,* there shall be armed forces" (former Article 98).

The national orientation of these constitutional terms of reference of the armed forces has become too restrictive with respect to the changes in the international climate which have occurred, first in the period after the Second World War up to 1989, and then in the period since the end of the Cold War. Since the end of the 1940's, geopolitics in combination with the development of military technology (nuclear capability) necessitated the formation of military alliances and the formation of multinational command structures such as the integrated command structure of NATO. This international cooperation, however, was strictly speaking all still geared towards self-defence, and in that sense directed towards the defence of national independence. In this respect, the period since 1989 was quite different. The national interest as the ultimate interest to be served by the armed forces has been supplemented quite strongly with serving the interest of the international legal order. The Gulf War is a case in point, as are the later interventions in Iraq and (former) Yugoslavia. Although these military operations in a much larger sense also served a national interest, they primarily purported to serve a international interest which went beyond the merely national interest.

In the Constitution of the Netherlands, there is a provision on serving the international interest. It is Article 90 which provides:

> "The Government shall promote the development of the international rule of law (Dutch: *internationale rechtsorde*; literally: international legal order)".

As a basis for any specific action this provision is of quite a broad range, to say the least. This is all the more the case as such actions as the bombing of the no-fly zones in Iraq (which did not involve the Netherlands armed forces) and of Yugoslavia during the Kosova-crisis (which did involve the air force of the Netherlands) are in strictly legal respect highly doubtful, and hence one may wonder what their contribution to the "development of the international rule of law" actually is. Also members of parliament from all political affiliations, when considering the matter in a detached manner and in the abstract, concurred in finding this too broad a provision to base military participation in international operations on.[4] This has further contributed to the amendment of the Constitution, which now reads in the new Article 97 (previously 98):

> "For the purpose of the defence and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the international rule of law [*internationale rechtsorde*], there shall be armed forces."

Although this provision indicates far better the role which armed forces can have within the present international context, one may wonder to what extent this provision suffices as a basis for actually sending troops abroad to act within the framework of peace-keeping, peace-enforcement and humanitarian missions. Legal provisions which regulate the exercise of powers or formulate goals and aims do not as such *confer* competence but only regulate existing competence. The line between a provision which formulates a task of a certain public institution which must be considered merely regulative and one which is to understood as attributing powers to such an institution, can in practice

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[4]Kamerstuk [Parliamentary documents], 1995-1996, 23591, nr. 6, 15 January 1996, *Betrokkenheid van het parlement bij de uitzending van militaire eenheden* [The Involvement of Parliament in the Sending of Military Units Abroad].

be quite thin; saying what the armed forces are for, can amount to saying what they are supposed to do. This may especially be the case with public institutions which are traditionally given wide powers of discretion to act within a certain sphere of public authority. This is the case with for instance the police. In the Netherlands there is a Police Act [*Politiewet*], which states that "in subjection to the competent authorities, the police has as its task to take care for the factual maintenance of public order and providing assistance to those who need it" (Article 2). Although this is not very specific at all, it has been generally accepted not merely to be regulative in nature, but also as attributing competence to within the indicated field of activity also in the case law. This state of affairs is probably also the case with the armed forces. A general act of parliament on the competence attributed to the armed forces is lacking. This has much to do with the nature of action by armed forces, which is also to take place within circumstances which cannot be defined in advance, let alone that one can satisfactorily describe what kind of action is to be taken in the various imaginable circumstances. At least in times of armed conflict, necessity and contingency are determining keywords in connection with military action Yet, in modern times it may also be obvious that the armed forces cannot be impervious to the normal principles of the democratic states under the rule of law, including the principle which holds that public bodies can only derive their authority only from a specific empowerment either directly in the provisions of the constitution or in an act of parliament.

Parliamentary scrutiny

What could have been the most significant modernization of the provisions on the armed forces in the Constitution of the Netherlands concerned the powers of parliament with regard to the decision to participate in international operations by the military. In 1994 the Lower House (*Tweede Kamer*) passed a motion unanimously, asking for the introduction of the "formal right of approval" of parliament with the participation of the armed forces in international operations.[5] The government was negative about this proposal, hesitated endlessly and finally proposed not to introduce a formal right of approval, but a duty on the part of the government timely to inform parliament on the deployment or placing at the disposal of the armed forces for the maintenance or promotion of the international rule of law.

Amazingly, parliament accepted this proposal, with the most prominent supporters of the initial motion retreating into the unconvincing argument that substantially this duty of providing information meant that parliament could stop the government from finalizing any intended participation in international operations; it enabled parliament to engage in a debate in which it could express its disagreement with a proposed participation in an international operation. This argument had also been put forward by the government. But legally it is not entirely correct. Parliament can try to convince the government that an intended participation in an international operation is unwise or wrong. It can even threaten to withdraw support for the government and pass a vote of no confidence, which entails the fall of the cabinet.[6] But even if this were to happen, it cannot undo a decision to engage the armed forces if the government would wish to persist in its intentions.

Also the government came up with an argument of an allegedly constitutional nature. The argument must sound absurd to anyone acquainted with parliamentarian systems of government, and

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[5]Kamerstuk [Parliamentary documents] 23591, nr. 2.

[6]Theoretically, the government might in this case even stay on and dissolve parliament.

so it is indeed. It claimed that the constitutional principles governing the relationship between government and parliament prohibit a formal right of approval for parliament. It formulated the adage "The government is to govern and parliament is to supervise". Although in the ears of politicians this may have sounded convincing, it is either meaningless or it means the opposite of what it was intended to mean; after all if the government is truly under the supervision of parliament, there is no reason why parliament should not have the formal right of approval over acts of government which it is supposed to supervise and control. In this connection, however, the government pointed to the provision in the Constitution which states: "The government shall have supreme authority over the armed forces" (Article 97 (2), previously 98 (2)). This is a false argument for refusing a right of parliamentary approval. Clearly the provision aims at the government in its executive function and in no way can detract from the parliament's supervisory powers. As is the case for instance with regard to public expenditure, ultimate responsibility lies with the government, which is constitutionally under the obligation to submit a budget to parliament every year. But parliament has a full say and right of veto and therefore the budget has to take the form of an act of parliament. Similarly, the ultimate executive responsibility for the conduct of foreign affairs rests with the government. Yet, it cannot bind the kingdom to a treaty unless it has received the prior approval of parliament. And although the government has supreme authority over the armed forces, it cannot engage the armed forces in a declared war without the explicit approval of parliament.[7]

The government got its way, although the proposal was changed slightly by the Lower House from "timely" information to "prior information". The new Article 100 now reads as follows:

> "1. The government shall provide the States General in advance with information concerning the deployment [Dutch: *inzet*] of or making available the armed forces for the maintenance or promotion of the international rule of law [*internationale rechtsorde*]. This includes providing information concerning the engagement of [Dutch: *inzet*] or making available the armed forces for humanitarian assistance in cases of armed conflict.
> 2. The first paragraph shall not apply if peremptory considerations prevent the prior provision of information In this case, the information shall be provided as soon as possible."

So instead of a further modernization of parliamentary control over the use of the armed forces, the new provision is more like an official retreat of parliamentary control over the only actual use which has been made in international armed conflict since the end of the Second World War.[8] Parliament will be informed by the government - as if that is not self-evident - and will comment from the sideline, and it may even threaten to censure it, but will not have powers formally to stop a governmental decision to deploy the armed forces in armed conflict.

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[7]Article 96(1) A declaration that the Kingdom is in a state of war shall not be made without the prior approval of the States General. (2) Such approval shall not be required in cases where consultation with Parliament proves to be impossible as a consequence of the actual existence of a state of war. (3) The two Houses of the States General shall consider and decide upon the matter in joint session.(4) The provisions of the first and third paragraphs shall apply mutatis mutandis to a declaration that a state of war has ceased.

[8]Strictly speaking the use of the armed forces in repressing the independence movement in Netherlands East India (present-day Indonesia) was in a national conflict, although of course it had evident international dimensions.

Appendix: an overview of the provisions

Article 90. The Government shall promote the development of the international rule of law[9].

Article 96 1. A declaration that the Kingdom is in a state of war shall not be made without the prior approval of the States General.
2. Such approval shall not be required in cases where consultation with Parliament proves to be impossible as a consequence of the actual existence of a state of war.
3. The two Houses of the States General shall consider and decide upon the matter in joint session.
4. The provisions of the first and third paragraphs shall apply mutatis mutandis to a declaration that a state of war has ceased.

Article 97 [Amended as of 22 June 2000]
1. For the purpose of the defense and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the international rule of law[10], there shall be armed forces.
2. The government shall have supreme authority over the armed forces.

[Previously:
Article 98 1. To protect the State's interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts. 2. The Government shall have supreme authority over the armed forces.]

Article 98 [Amended as of 22 June 2000]
1. The armed forces shall consist of volunteers, and may also include conscripts.
2. Compulsory service in the armed forces and the power to defer the call-up to active service shall be regulated by act of parliament.

[Previously:
Article 98 1. To protect the State's interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts. [...]
3. Compulsory service in the armed forces and the power to defer the call-up to active service shall be regulated by act of parliament. The obligations which may be imposed on persons not belonging to the armed forces in relation to the defence of the country shall also be regulated by act of parliament.]

Article 99 [Amended as of 22 June 2000]
The conditions on which exemption is granted from military service because of serious conscientious objections shall be regulated by act of parliament.

[Previously:
Article 99
The conditions on which exemption is granted from military service because of serious conscientious objections shall be specified by act of parliament.]

Article 99a [As of 22 June 2000]
The obligations which may be imposed for the civilian defence of the country shall be regulated by

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[9]Dutch: *internationale rechtsorde*; literally: international legal order

[10]See footnote 1.

act of parliament.

[Previously:
Article 97
1. All Dutch nationals who are capable of doing so shall have a duty to cooperate in maintaining the independence of the State and defending its territory.
2. This duty may also be imposed on residents of the Netherlands who are not Dutch nationals.]

Article 100 [Newly inserted as of 22 June 2000]
1. The government shall provide the States General in advance with information concerning the engagement of [Dutch: *inzet*] or making available the armed forces for the maintenance or promotion of the international rule of law [*internationale rechtsorde*]. This includes providing information concerning the engagement of [Dutch: *inzet*] or making available the armed forces for humanitarian assistance in cases of armed conflict.
2. The first paragraph shall not apply if peremptory considerations prevent the prior provision of information In this case, the information shall be provided as soon as possible.

[Previously there was the following provision which has not be retained:
Article 100 Foreign troops shall not be employed other than pursuant to an act of parliament.]

Article 101 (Lapsed in accordance with Act for the Realm of 10 July 1995, Staatsblad 401)

Article 102 (Lapsed in accordance with *Rijkswet* [Act for the Realm] of 22 June 2000, Staatsblad 294)

[Previously:
Article 102
1. All expenses in connection with the armies of the State shall be met from central government funds.
2. No inhabitant or municipality may be required to assist with the billeting or maintenance of troops, or with transports or supplies of any description whatsoever requisitioned by the State for the armies or defences of the country, other than in accordance with general rules laid down by act of parliament and upon payment of compensation.
3. Exceptions to the general rules shall be laid down by act of parliament for application in time of war or threat of war or in other exceptional circumstances.]