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Recent Developments In Administrative Law In The Netherlands and the European Union

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Perkembangan berbagai segi kehidupan, baik politik, ekononomi, budaya, dan lain sebagainya telah mempengaruhi perkembangan ilmu hukum di berbagai belahan dunia. Sebagai contoh, perkembangan ilmu hukum administrasi negara di kawasan Eropa juga telah berlangsung dengan pesat, terutama disebabkan oleh perluasan keanggotaan Uni Eropa, dengan masuknya 10 negara baru kedalam organisasi regional tersebut sejak 1 Mei 2004. Tulisan ini menjelaskan tentang perkembangan terakhir hukum administrasi negara di Belanda dan Uni Eropa, terutama dengan berbagai perkembangan aktual yang terjadi dalam bidang legislatif di Belanda dan Uni Eropa, serta berbagai pengaturan mengenai hukum administrasi negara di dalam draf Konstitusi Uni Eropa.

1. Introduction

This is an adapted version of a guest lecture that was given at the Universitas Indonesia on 27th May and at the Trisakti University on 29th May 2004. Writer was asked to tell something about recent developments in administrative law in the Netherlands and in the European Union. Obviously, there is a great deal to say about both these areas of the law, so writer had to restrict himself to discussing just one or two key developments.

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The main issues concerning administrative law in the Netherlands surround the application and scope of the General Administrative Law Act (Algemene wet bestuursrecht, Awb). Writer will try to make some comparisons between Indonesia's Administrative Law Act (WB) and the Dutch Awb.[1] This article shall pay attention to the key elements that give access to the Awb, and will also discuss one or two notable aspects of procedural law in Dutch administrative court proceedings. Finally, it will cover some legislative developments.

In terms of the development of administrative law in the European Union, this article will limit to just two topics: the enlargement of the EU on 1 May 2004 to include ten new member states, and the drafting of a new European Constitution.

2. Administrative law in the Netherlands

The General Administrative Law Act plays a key role in administrative law in the Netherlands. And within the Act, there are three crucial factors which regulate access to the administrative court. These are the administrative decision, the administrative authority and the interested party. Article 8:1 paragraph 1 of the General Administrative Law Act states that only an interested party can register an objection against an administrative decision.

2.1. Administrative decisions

It is understood that the administrative decision occupies a central place in the Indonesian Administrative Law Act (WB), just as it does in the Netherlands. Although the Indonesian definition of an administrative decision is broader, it nevertheless encompasses the same key elements. These are: that the administrative decision must be in a written form, that it must involve a legal act, which is

[1] However, my knowledge of the Indonesian Administrative Law Act dates from 2001. It is based on an article by Adriaan Bedner in the Dutch Journal of Administrative Law (NTB 2001/6 p. 149-156), so it may not be entirely up to date.

to say that it must have a legal consequence (in the Netherlands we refer to this as a *proposed* legal consequence) and that it must have a basis in public law (whereas in Indonesia it is based on the applicable law). Although the written form criterion is the least important of these aspects, it can nevertheless result in an administrative decision being unable to be addressed by a court of law. However, such problems can often be overcome by registering an objection to the *absence* of an administrative decision – which also of course involves an unwritten decision.

2.1.1. Legal consequences

Administrative decisions are widely interpreted in the Netherlands in terms of their proposed legal consequences. Many decisions, which strictly speaking have no proposed legal consequences and therefore cannot by definition have such consequences, are nevertheless still regarded as administrative decisions. There are many such examples in case law. Some of the more obvious are 'legal interpretations'. These are responses to requests for the clarification of laws which in some circumstances can be regarded as administrative decisions. One example in Dutch jurisprudence concerned a stud farm that wanted to put on a public display in Wassenaar, a wealthy suburb of The Hague. However, the organisers weren't sure if such events were allowed by the local planning regulations. They therefore asked for clarification from the Wassenaar Board of Burgomaster and Aldermen, the executive board of the municipality. The written response to their request was that local regulations prohibited such displays. When the administrative court was asked for its opinion on this response, the court regarded the response of the Board as an administrative decision. In the view of the court, the appellant had 'no acceptable alternative' for finding out whether the horse show was allowed. Going ahead with the display and waiting to see if the Board would take action to prevent it was not, in the court's opinion, an acceptable option. So the judgement was at least sympathetic in terms of affording the appellant legal protection. Strictly speaking,

however, the clarification of the local planning regulations did not alter the legal position in which the stud farm found itself.[2]

2.1.2. Basis in public law

A second key characteristic of the administrative decision is that it must have a basis in public law, or, in the words of your Administrative Law Act (WB), 'a basis in applicable law'. Under Dutch administrative law, a basis in public law can be found not just in the law itself but also in a public mandate. Sometimes the nature of the activities carried out by an administrative authority is such that they can be regarded as part of the public mandate of that administrative authority. This 'task-based criterion' then constitutes the basis in public law. For instance, some years ago, invalidity benefits were paid out to former mine workers in the Dutch province of Limburg who were suffering from the lung disease silicosis. Although these payments weren't based on a statutory provision but on a regulation established by a foundation, they nevertheless constituted a form of government intervention. This was because the foundation had been specially created by the provincial authority and was funded by central government.[3] It seems more or less like the problems Indonesia is having with the 'sertifikat tanah', the proof of ownership issued by the land registry. Although the 'sertifikat tanah' is governed by private law, it is nevertheless regarded as an administrative decision because the law regulating ground rent in Indonesia is a mixture of private and public law. So a public law element and with this a public law basis is involved.

A very different and far more striking new phenomenon is the so-called 'pure' decision governing compensation. This is a response from an administrative authority following a request to that authority to pay compensation for damages. The aforesaid response is regarded as an administrative decision if the damage or

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[2] ABRvS (Administrative Law Division of the Coucil of State) 16 November 1998, AB (Journal of Administrative Decisions) 1999, 426 with note by de Gier.

[3] ABRvS 30 November 1995, AB 1996, 136.

injury caused is the result of a previous administrative decision. The proviso, however, is that the original decision which gave rise to the damage has to be an administrative decision itself and also an administrative decision an administrative court can make a judgement on.[4] There are many examples of such judgements by administrative courts. Obviously, this raises the question of whether there is still a role to be played by a civil court in dealing with illegal government activities. Up till now, both procedures have existed side by side. But once again, it is obvious that when a court has made its pronouncement, another court cannot pass a new judgement. 'Forum shopping' is not an option.

2. 2. The administrative authority

An administrative decision must be issued by an administrative authority. If it does not emanate from such an authority, it cannot be regarded as an administrative decision. Indonesian administrative courts broadly define the term 'administrative authority', with even notaries ('pejabats') being regarded as administrative bodies. There are two types of administrative authority under Dutch administrative law: the administrative authorities of legal entities constituted under public law (so-called 'A authorities' because they are cited in Article 1:1 paragraph 1 (a) of the General Administrative Law Act) and other persons or bodies with a public mandate (so-called 'B authorities'). The importance of this distinction is that all the activities of A authorities are covered by the whole of public law and those of B authorities are only covered in so far as these authorities are engaged in public duties.

2.2.1. 'A authorities'

The best-known of these two types of bodies are 'A authorities'. These are the administrative authorities of legal entities which are constituted under public law, such as the aforementioned Wassenaar Board of Burgomaster and Aldermen. Ministers are also 'A authorities', since they are administrative bodies of a legal entity

[4] ABRvS 6 May 1997, AB 1997, 229.

constituted under public law, in this case the State of the Netherlands. However, things become more complicated when we begin to deal with bodies that are not municipalities, provinces or the State. For example, a university board of examiners such as the examining board of Erasmus University is an 'A authority'. This is because it is an administrative authority of the legal entity Erasmus University, which was established under public law (in accordance with the Higher Education and Research Act) and has been given the status of a legal entity.

2.2.2 'B authorities'

It is more difficult to establish whether an authority is a 'B authority', and hence an administrative authority that is empowered to take decisions of a public nature. To begin with, it is necessary to find out whether, and to what extent, the authority in question has a public mandate. A public mandate is the capacity to unilaterally (not by private agreement) alter someone's legal position. One common example under Dutch administrative law is that of a privately owned garage which has a license under public law to carry out annual MOTs. Such a garage is an administrative authority in so far as it is authorised to perform MOTs, and it is therefore governed by public law. However, most garage owners are of course unaware of this fact.

The opposite situation also occurs. For instance, a health insurance company, which is covered by a large section of public law, is not always an administrative authority. The Netherlands' highest civil court, the Supreme Court, has ruled that a regional health fund is not performing an activity under public law when it purchases medical equipment, a task, which is nevertheless closely linked to its public mandate. The fact that the aim of a health insurance fund is to meet public needs and that in order to do so it is largely state-funded, does not necessarily mean that its procurement activities should be governed by public law, written or unwritten. So not only is such a health insurance fund not a 'B authority' as regards its purchase of medical equipment, but its procurement

activities are also not covered by the unwritten principles of good governance.[5]

2.3. The interested party

In order to be able to register an objection against a decision with the administrative court, the appellant must be regarded as an interested party. In other words, the decision concerned must directly affect his or her interests. Not everyone can be regarded as having direct interests. For example, the courts have determined that a third party who objects to another person being given a Royal decoration does not constitute an interested party. Although the bestowing of such a decoration does constitute an administrative decision – since it is a criminal offence for someone to wear a decoration to which he or she is not entitled – such a decision does not directly affect the interests of that third party. The fact that he or she considers the decision to have been unjustified is not sufficient reason.

Many more problems have arisen recently concerning the question of whether legal persons and interest groups (such as NGOs) can be regarded as interested parties. The General Administrative Law Act states that legal persons can be defined as interested parties if their interests can also be regarded as general and collective interests, which they are representing by virtue of their goals and the work they do. Collective interests are a particularly tricky area. For example, the Administrative Law Division of the Council of State ruled that an association of motorway service restaurants could not be regarded as an interested party when it registered an objection to the proposed closure of a particular restaurant, on the grounds that this did not involve a 'shared interest'. The thinking behind this was that the individual restaurant operator would be capable of representing his own interests.[6]

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[5] HR (Supreme Court) 4 April 2003, JB (Journal of Administrative Jurisprudence) 2003, 121.

[6] ABRvS 19 November 2003, JB 2004, 20.

2.4. Aspects relating to procedural law

There are many procedural law problems inherent in administrative law, so my selection will have to be restricted. In the Netherlands, as in Indonesia, objections must be registered within a specific period of time. Consequently, many cases involve the question of whether these deadlines have been met or exceeded. In Indonesia, the deadline for submitting objections is 90 days. In the Netherlands, the standard period for registering objections is shorter, namely six weeks. There following examples from jurisprudence illustrate some of the problems that arise with these periods.

The General Administrative Law Act assumes that the statutory period for notifying objections to a decision begins on the day following the date on which the decision was notified (Art. 6:8, paragraph 2 of the General Administrative Law Act). In one case, where, for cost reasons, notifications of decisions were deposited in the so called pigeon-holes (letter boxes) of municipal council members, it was impossible to establish precisely when the decision had been notified. Since the exact date of the notification could not be clearly established, the court gave the appellant the benefit of the doubt.[7]

The appellants were also given the benefit of the doubt in another case where decisions were not sent by the regular postal service (TGP Post, the former Dutch PTT). Since it had arranged for its staff to distribute the notification papers instead of using the regular postal service, the municipality in question was unable to prove that the documents had been delivered on the date it claimed. If deliveries are made by the official postal service, the court will assume that the delivery date is the date of notification, unless there is clear evidence to the contrary. So this concerns a matter of evidence also.

[7] ABRvS 10 December 2003, AB 2003, 52.

The submission of a defence to an objection by the administrative authority is also generally tied to a fixed period. In one case, when an administrative authority had missed its deadline, the court nevertheless allowed it to press its case since it had submitted its defence before the overall deadline for the hearing, during which time both parties were still allowed to submit other documents (10 days).[8]

One unusual ruling by the Central Board of Appeal[9] was the reversal of an earlier administrative decision at the request of an interested party. A civil servant had asked for a review of the decision on study costs. The Central Board of Appeal ruled that if the administrative authority saw no reason to reverse its earlier decision, the administrative court should judge only whether there were any new facts or circumstances arising and whether in that case the administrative authority should have responded to them by reversing its original decision. The correctness or incorrectness of the earlier decision was immaterial, and was therefore disregarded.[10]

A ruling by the Administrative Law Division of the Council of State, is to some extent related to this case. This ruling concerned an objection to a decision, which the court annulled. Then a fresh decision was taken by the same administrative authority and a new objection against this decision was registered tot the court of first instance. In higher appeal against the second judgement of the court in this case, the Administrative Law Division ruled that if grounds for objection were submitted to a court of first instance and these grounds had already been expressly and unreservedly overturned by that court with no higher appeal being registered, the court judging the second decision should abide by the initial judgement. In other

[8] Article 8:58, paragraph 2 of the General Administrative Law Act. ABRvS 18 September 2003, JB 2003, 315.

[9] One of the three Highest Administrative Law Courts. The other two are the Administrative Law Division of the Council of State and the Industrial Board of Appeal.

[10] CRvB (Central Board of Appeal) 4 December 2003, JB 2004, 32.

words, while fresh judicial investigations would be permitted, an entirely new appeal would not.[11]

2.5. New legislation

The Dutch General Administrative Law Act is build up in sections ('tranches') which can be supplemented over time. New elements are therefore constantly being added. We are currently awaiting what is known as the Fourth Tranche. This will include a provision regulating the payment of debts to the government, as well as a general regulation governing administrative fines and the investment of subordinates with administrative power.

The draft Fourth Tranche contains a provision under which the obligation to pay a financial sum to the government is governed by an administrative decision. Objections to this decision can be notified to the administrative court. The regulation governing the administrative fine is likely to take the form of an unconditional obligation to pay a financial penalty aimed at punishing the offender. And the regulation governing the delegation of powers to subordinates is likely to state that where necessary, *instructions* can be issued to subordinates, although they are invested with power directly by the legislator.

There are also two other draft Bills in the Netherlands regulating subsidiary aspects of administrative law, both of which have now reached an advanced stage. The first will allow the mandatory procedure for notifying objections preceding an appeal under the General Administrative Law Act to be waived if both parties agree this.[12] The second one is the Electronic Transmission of Administrative Notifications Bill.[13] This Bill regulates the sending of administrative decisions and the registration of

[11] ABRvS 6 August 2003 JB 2003, 216.
[12] Documents of Parliament no. 27 563.
[13] Documents of Parliament no. 28 483.

objections by electronic mail, provided this is permitted by the relevant sectoral law.[14]

3. EU law

European Union (EU) law influences the law of individual member states, including their administrative law, mainly through what is known as 'direct applicability' and 'conforming interpretation'. 'Direct applicability' means that supranational EU laws take precedence over the national laws of individual member states. If necessary, they can even set national laws aside. 'Conforming interpretation' means that the national law of the member states, including administrative law, should be interpreted wherever possible in the light of EU law. EU jurisprudence, that is, the case law of the European Court of Justice in Luxembourg, contains many examples of how EU law influences the administrative law of the member states. However, this matter will not be elaborated here. This article restricts to two recent developments in EU law, namely the enlargement of the European Union on 1 May 2004 to include ten new member states, and the drafting of a new European Constitution.

3.1. Enlargement

Following the ratification of the Accession Treaty[15] on 1 May 2004, ten new member states joined the European Union: the Czech Republic, the Slovak Republic, Hungary, Slovenia, Estonia, Latvia, Lithuania, Poland, Malta and Cyprus. This marked the completion of the longest and most ambitious accession process in the history of the EU. The European Union gained almost 75 million extra citizens overnight, although the euro wasn't immediately adopted as legal tender in these new member states. Not all the EU regulations will take effect straightaway. But all the EU regulations consist of administrative law.

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[14] And I ask my students: 'What about decisions given by SMS?'

[15] Official Journal of the EU 2003, L 236/1.

In legal terms, accession has created a complex structure due to the fact that in some policy areas, participation by the new member states has been excluded or postponed. This means that the ten new member states will be treated differently to the 15 existing member states as regards their compliance with the so called *aquis communautair*, the acquired amount of European rules.

In terms of institutional adjustments, the principle that each member state must provide one EU Commissioner for the European Commission - the executive board of the European Union - will remain unchanged. So although the Commission will be expanded, the draft European Constitution will propose reducing the number of EU Commissioners to 15. Other EU institutions will also be reviewed because of the enlargement. In the European Court of Justice, specialist judicial chambers will be created and the Court of First Instance will be given authority to issue judgements in pre-judicial procedures, that is, judgements on requests for clarification of EU law by the courts of member states. This will be necessary given that we now have ten new national legal orders, since it is primarily through them that the unity and consistency of EU law will be upheld. The national courts therefore bear considerable responsibilities.

3.2. The new European Constitution

The new European Constitution - a Treaty which was drawn up by a committee chaired by the former French president Valéry Giscard d'Estaing and which is currently still in a draft form – will radically alter the institutional structure of the European Union. Not only will it change the composition of the European Commission, but it will also end the rotating presidency of the European Council, the conference of ministers of the member states. In the future, a fixed presidency will be appointed for a two-and-a-half year period.[16] The EU will also have its own Minister of Foreign Affairs.[17]

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[16] Article I-21.
[17] Article I-27.

In terms of administrative law, the main change will be that part II of the Constitution, to be entitled the Charter of the Fundamental Rights of the European Union, will include provisions which can be directly applied to resolve disputes under administrative law. Although the member states are not entirely unfamiliar with rules like these, some of the rules, like the articles II-41 and II-51 are especially important, because of the way they are written down in the Convention.

Article II-41, for example, regulates the right to good governance. Paragraph 1 of this Article states that every EU citizen is entitled to have his or her case handled in a fair and impartial way by the institutions, bodies and agencies of the European Union, and within a reasonable period of time.

Paragraph 2 states that the right to good governance is primarily defined by:

a) the right of every EU citizen to have his or her case heard before any measures are taken that may individually disadvantage him or her,

b) the right of every EU citizen to inspect a file concerning him or her, with due regard for the need to maintain commercial confidentiality

c) the obligation of the authorities concerned to justify their decisions (give reasoning).

Paragraph 3 of Article II-41 regulates the right to payment of compensation by the Union in accordance with the common principles shared by the member states. And paragraph 4 contains a provision governing the languages in which the EU institutions must issue their responses.

Furthermore, article II-42 regulates the right of inspection of documents and Article II-47 enshrines the crucial right of access to

the court, which is also important in administrative law matters. Article II-54 prohibits the misuse of EU law.

Article II-51 specifies that the provisions contained in the EU Charter are directed at the institutions, bodies and agencies of the Union *and to the member states* only in so far as they are implementing EU law.

If all this is compared to the Dutch General Administrative Law Act, it can be seen that the overall decision-making period envisaged by the EU Charter – even though it is not precisely defined – goes further than what is specified by the General Administrative Law Act and that the right to a court hearing and the obligation to justify decisions are both formulated more broadly than in the General Administrative Law Act.

Ultimately, the impact of the rights and principles enshrined in the EU Constitution could go beyond EU law alone and could have the effect of harmonising the law of the individual member states. As a result, national administrative law will increasingly be drawn into line with EU administrative law, as is already the case for large sections of national administrative law, which has been formulated for the purpose of implementing EU law. So in the future there probably will be one uniform European administrative law in all member states of the European Union.