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THE CONSTITUTIONAL RIGHT TO PROTECTION OF THE ENVIRONMENT IN THE NETHERLANDS

par
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1. Introduction (*)

Environmental law in the Netherlands has long been used as an instrument to solve environmental problems, without paying attention to the legal position of individuals. Only since the 1980's the attention in legislation and case law has shifted to the role of individual people and organisations for the protection of the environment. It has now generally been acknowledged that individual people have a fundamental right to a healthy environment and that environmental law must safeguard the rights of individuals and environmental organisations within the constitional system.

This paper has a double starting-point :

1. Everyone has the right to live in a natural environment as healthy as possible.

2. People are responsible towards nature and the environment.

That living in a healthy environment is important for the well-being of man needs no explanation. His existence depends on it. Not only does his health depend on a clean environment, but also the production of food and drinking water and the supply of energy. He also needs a clean soil to build his house on it and material to build the house, not just now but also in the future. So future generations have a right to live in a healthy environment as well.

The second starting-point originates from the view that nature is an entity worthy of moral consideration in itself (1). Law can help to give this moral

(*) This paper is a summary of my thesis titled « Het grondrecht op bescherming van het leefmilieu » (The fundamental right on environmental protection), that will appear in the Netherlands (W.E.J. Tjeenk Willink, Zwolle) in the spring of 1993. My address : Tilburg University, Faculty of Law, P.O. Box 90153, 5000 Le Tilburg.

(1) This is now the basis of environmental policy in the Netherlands, not only for the Ministry of Housing, Planning and the Environment, but also for the Ministry of Agriculture, Naturemanagement and Fischeries (which is responsible for the policies for pollution by animal manure and pesticides and for the preservation of nature, like the protection of landscapes, forests, animals and biological diversity) and the Ministry of Transport, Public works and Water Management (responsible for environmental policies for traffic and water management).

consideration a practical (and legal) meaning. It can for example give individuals legal rights which help them to take responsibility for natural objects.

Since 1983, the first chapter of the Dutch Constitution comprises all fundamental rights. The fundamental right to a clean environment has been laid down in article 21. However, this right has not been phrased as an individual right for everyone, but as a duty for the State. In this paper I will have a look at article 21 trying to set out the meaning of it in the light of the two starting-points given above.

2. Article 21 of the Constitution

Article 21 reads as follows : « The State is entrusted with the care to keep the land fit for human occupation and to preserve and improve the environment. »

As this article is put into the chapter on fundamental rights, it cannot be said to be merely an « instruction norm » for the government, or as it is called in Germany, a « Staatszielbestimmung ». The fundamental right concerning the protection of the environment is considered to be a social right, and this means that it is the first responsibility of the government to give meaning to the right to a clean environment. Because of the fundamental status of the article, the government can not easily disregard environmental interests : there is a duty to consider environmental interests at all times.

The usual fundamental rules that stem from constitutional law (or more specifically the « rechtsstaat », as we say) like the possibility for citizens to participate in the decision-making process and the rights of access to information and of access to justice, apply here as well. They are indeed of great importance in this matter since only with a working democratic and judicial system citizens can take the quality of their environment into account, which is of vital interest to them. Participation and judicial review also give people the possibility to take responsibility for the natural environment and for future generations, for which interests we have moral obligations (2). This idea leads to liberal rules on admissibility in administrative and judicial procedures, because everyone should be able to prevent the environment from being affected.

In this paragraph I will investigate how legislative, executive and judicial authorities have dealt with their constitutional task to protect the environment (the three powers can be seen as organs of the State). Because of the limited space here, I will especially look at the judiciary (§ 2-3), in order to establish whether individuals have an enforceable right to environmental protection in the Netherlands. The emphasis will lay on the per-

(2) Cf. (among many others) Ch. D. Stone, « Should trees have standing ? » revisited : how far will law and morals reach ? A pluralistic perspective, *in Southern Californian Law Review* 1985-1.

mits given on the basis of the new Environmental Policy Act ; this new consolidating Act will replace most existing law and will come into force on 1 april 1993 (3).

2.1. Article 21 and the legislator

Article 21 is considered to aim mainly at the legislator. It imposes a duty on the legislator to enact laws that give sufficient protection to the natural environment and that enable citizens to take responsibility for the environment themselves.

2.1.1. Substantive law to implement article 21

Dutch legislation has adopted an integrated approach towards environmental problems. As a result, an applicant for permits for several sectoral acts (e.g. a factory both polluting the air and producing too much noise) will only need one permit, in which all environmental matters are dealt with. The main advantage is that possible environmental damage can be prevented in a better way, because all polluting actions are assessed at the same time. This integrated approach can also be brought under the meaning of the fundamental right to a clean environment : the environment has to be regarded as a whole and every aspect of environmental protection has to be reviewed (which included paying attention to environmental values *per se*).

Other important aspects of environmental law implementing the right to a clean environment are the level of protection that is guaranteed (in the Netherlands permits have to assure that « best possible protection » is offered) [4], and the possibility (or even the duty) for executive bodies to constantly review permits in order to assure that the best possible protection will always be given to the environment (5). Planning is also part of the integral approach to get a cleaner environment.

Furthermore, the legislator is not allowed to withdraw environmental protection statutes, thus reducing the level of protection (unless new statutes with at least the same level of protection are proclaimed) [6]. He must also implement environmental protection directives of the EEC, to keep up with the latest standards.

(3) The date of coming into force is not sure yet (somewhere in the first half of 1993). The Environmental Policy Act replaces (among others) the Nuisance Act and the General Environmental Provisions Act. Most of my paper is based on jurisprudence on these two acts.

(4) Article 8-11 of the Environmental Policy Act. This resembles very much the well known « alara » principle (as low as reasonable achievable). It is not yet certain whether in all cases such a high standard can be reached without closing down a lot of industries. We will have to wait for the interpretation which the judiciary will give of this new principle.

(5) Article 8-22 of the Environmental Policy Act. Permits can be changed when the competent authority thinks that the best possible protection is no longer given.

(6) During the parliamentary debates on the making of article 21, this was thought to be one of the more important meanings of the fundamental right, *Tweede Kamer,* 1975-1976, 13873, n° 3, p. 6.

2.1.2. Formal/procedural law to implement article 21

As stated above, the right to environmental information, to participation and judicial review for everyone, including organisations, is an important way to implement the right to environmental protection as laid down in the Dutch Constitution. By these means individual citizens and environmental organisations can keep an eye on governmental action based on the laws that are supposed to implement the fundamental right to protection of the environment.

In Dutch legislation these principles have been carefully worked out. The Environmental Policy Act, for example, gives everyone the right to be heard and to raise objections to draft decisions on pemits. Everyone who has entered this process of public participation can also start proceedings before an administrative court, even when there is no specific interest of the particular citizen at stake. Especially private environmental organisations thus play an important part in the protection of natural objects. They often come up with data on the quality of the environment or point at faults made by the government in the decision-making process and can, by addressing the judiciary, either provoke further action by the authorities or try to have a decision quashed.

2.2. Article 21 and executive bodies

It needs not much explanation that executive bodies must first and foremost carry out the legislation that is meant to implement the fundamental right to environmental protection. Environmental interests must be given much weight against other interests in decision-making processes. This is logical, as environmental interests have obtained special protection in the Constitution. Recent case law of all judges show that when environmental interests are at stake, the competent authority at least has to review these interests ; it can not just lay them aside without motivation (cf. § 2-3).

The same holds for the procedural rules : authorities may not deprive individuals or organisations of their right to information or participation, e.g. by avoiding administrative decision-making procedures (7). Again there is a lot of case law which shows that judges are very strict in applying rules concerning participation and judicial review for citizens when the quality of the environment is at stake (cf. § 2-3).

To execute the constitutional task, executive bodies also must have a policy of their own. When legislation grants some discretionary powers to executive bodies, they have a good opportunity to implement the fundamental right to environmental protection themselves. They can do so, not only by granting permits (although it must be admitted that there is not much discretionary power left when principles like « best possible protection » are used in the statutes), but also by making plans in which they

(7) Examples are several cases in which the government came to an agreement with polluters that they could do without a licence, provided that they reached a certain emission target. In this way third parties could not interfere with these agreements the way they could have, had the normal administrative procedures been followed E.g. President of the Council of State, 24 october 1991, *AB* 1992-303.

set out their environmental policy goals. Through plans like the National Environmental Policy Plan (8) the authorities can show how they will deal with environmental problems in an integral way and how they will fulfill the constitutional task of article 21.

2.3. Article 21 and the judiciary

There are two ways in which article 21 can play its role in proceedings before the courts. First, citizens and environmental organisations can use the article in legal proceedings against the government, and secondly judges can use the constitutional right, or the value that it represents, when interpreting legal or constitutional standards.

2.3.1. Direct enforcement of article 21

Can organisations and individuals enforce the entire scope of article 21 ? According to the Dutch Constitution, statutes, or the refusal to make them, cannot be reviewed by any judge. Due to this supremacy of statutes, the most important meaning of article 21 (that is, for the legislator) cannot be enforced. This means that it only has a political meaning : Parliament can control the implementation of the fundamental right to environmental protection.

However, any action by executive bodies can be reviewed in the light of the fundamental right, both by the administrative and the ordinary courts. Although judges do attach importance to procedural rights of citizens and organisations and to substantive rights for the environment, they only rarely mention article 21, let alone that they test actions directly against the Constitution.

The most important reason for this reluctance to test against article 21 is the large amount of environmental statutes that we have in the Netherlands. In almost all cases the judge can test actions with « normal » environmental law. An administrative judge who reviewed a licence for a waste dump did not directly test the decision to grant a licence against the Constitution (although put forward by the appellant, an environmental organisation), because « there is a lot of legislation that implements article 21 of the Constitution, like the Waste Management Act that forbids licenses to be granted when damage can be done to the environment. So there is no need to review the decision directly with the Constitution » (9).

(8) NEPP, *Tweede Kamer*, 1988-1989, 21137, n[os] 1-2. The Plan has been given the title « To choose or to lose ». This plan describes the problems that have arisen and sets out the paths for environmental policy between 1990 and 1994. It aims at a reduction of all pollution by 75-90 %. In 1990, the newly elected government published the so-called NEPP-Plus, which elaborates some issues of the NEPP. Other official reports from the government are the Water-household Plan (issued by the Minister of Transport, Public works and Water Management) and the Policy Plan on Nature (issued by the Minister of Agriculture, Nature Management and Fischeries). Such plans also exist on the provincial and municipal level.

(9) Council of State, 12 november 1990, *AB* 1991-232. This reasoning is frequently used by the Council (e.g. 27 april 1992, *ABK* 1992-789).

The second reason for the restraints which judges exercise with regard to article 21 is the alleged vagueness of this social right. It is true that it leaves the government much freedom when implementing the right to environmental protection. This is also the view of the Council of State in an opinion of 27 april 1992 : « due to the many discretionary powers it leaves the authorities, governmental actions can only in exceptional cases be reviewed with article 21 of the Constitution » (10). But, as has been stated above, duties arise from this constitutional right for both the executive and the legislator. The many data on the condition of the environment that have been published and the elaborate National Environmental Policy Plans give indications about which quality must at least be guaranteed by the authorities. Thus I think that the administrative courts adopt a too reserved attitude when asked to review decisions with article 21 of the Constitution.

The third reason is closely related to the second. Because of the alleged vagueness of article 21, only very few plaintiffs mention this constitutional right. Using the fundamental right to environmental protection more frequently will no doubt raise the importance of the article, as judges will be obliged to fill in its meaning.

Fortunately there are some examples of the enforcement of article 21, mostly by the courts with civil jurisdiction. In a dispute between a drinking water supplier (who exploited groundwater in the area) and the State over the construction of a national road, the court stated that the costs for preventing oil and other chemicals from leaking from trucks into the ground water should be paid by the State, since it is not the responsibility of the drinking water supplier to protect the quality of the groundwater against pollution by chemicals from cars and trucks. Since environmental protection is in the common interest, according to article 21, the State must bear the costs that go with a possible deterioration of the environment ; the supplier of drinking water may trust that the groundwater is of good quality (11).

In another case environmental protection groups thought the fundamental right to be violated by the authorities which came to an agreement with several companies on the storage of radioactive waste and on the discharge of manure in a certain area without using the normal administrative procedures. The court pointed at the importance of procedural rights that are linked to the right to environmental protection, but saw in this case no problems as the administrative statutes have to be followed anyway, regardless what the authorities and the companies have agreed upon (12).

(10) *ABK* 1992-789. This was a case in which a permit was granted to dump chemicals in a river where otters live, brought to the attention of the court by an organisation for the protection of badgers and otters.

(11) District Court of The Hague, 29 December 1988, *NJ* 1990-320.

(12) President of the Court of Appeal of The Hague, 13 august 1985, *KG* 1985-266.

But in most cases where environmental issues are at stake, courts do not refer to the Constitution. They merely check whether environmental interests have been given sufficient attention. This in fact can be seen as a test on the environmental protection. The same holds for the test whether procedural rights for citizens and organisations have been guaranteed sufficiently (13).

2.3.2. Judicial interpretation in the light of article 21

It is commonly accepted that social rights can play a part in the intrepretation of other constitutional and legal standards. As far as other fundamental rights are concerned, we indeed see that environmental interests can limit the realisation of such rights. The aim to preserve landscapes can justify a ban on the erection of antennas thus restricting the right to receive information as protected by article 10 of the European Convenant on Human Rights (14). Printing establishments can be made subject to environmental licenses, although the right to freedom of press does not allow that prior governmental consent must be demanded (article 7 of the Dutch Constitution). In this case, however, the government does not intend to limit the freedom of speech, but it intends to fulfill its duty of care for the environment (15).

Similar judgements can be found for other fundamental rights, such as property rights. First, it is not allowed to use one's proprety in an environmentally dangerous way, and second, the government can infringe on property rights of citizens when trying to protect the environment. An interesting case was that of a dispute between the State, whick had encouraged the settling of a large population of cormorants in a natural area, and a fishery that already existed close to the natural area. The judge did not find the actions by the State (causing a lot of damage to the fishery) unlawful since it is the task of the State to care for an develop nature (16).

Interpretation of administrative statutes and general legal principles in the light of article 21 and its meaning for the « Rechtsstaat » can influence the opinion of courts both on procedural and substantive questions.

To make the right to environmental protection work for everyone, the court can be lenient on questions of access to the court by individuals who want to represent common environmental interests. As stated before, most Dutch legislation already stems from the principle that everyone must have

(13) E.g. Supreme Court of the Netherlands, 26 january 1990, *AB* 1991-40 (Windmill-case).

(14) E.g. District Court of Leeuwarden, 23 march 1983, *NJ* 1984-380 and Council of State, 26 june 1981, t *B/S* III, nr. 273.

(15) E.g. Supreme Court of the Netherlands, 11 february 1986, *NJ* 1986-674, Council of State, 9 april 1992, ABK 1992-513, President of Council of State, 26 april 1991, *Gemeentestem* 6931 (1991), p. 587.

(16) In this case the State was condemned to pay some compensation, but the actions to promote the stay of the birds itself was not forbidden, Supreme Court of the Netherlands, 15 february 1991, *AB* 1991-394.

the right to participate in decision-making that has an impact on the environment and that everyone also can go to an administrative court. In civil law such an *actio popularis* is not (yet) accepted. Group action by environmental organisations is possible in tort proceedings, however (17). Not only can they demand that by actions governmental authorities and individuals are stopped, they even can reclaim costs that they have made when cleaning up the environment (18). In a recent case, an environment protection group was able to prevent a farmer from using a recently and legally granted permit to raise cattle next to a valuable natural area. According to the civil court using the permit would be illegal towards the organisation because it was obvious that environmental damage would occur (19).

A clear case of influence of article 21 on procedural rules was that of Benckiser, where the Dutch State demanded in a procedure before a civil court that Benckiser, who had dumped polluting materials on several sites across the Netherlands, take away the dangerous materials. Such a civil action can only succeed when the acts of a defendant can be called illegal *vis-à-vis* the plaintiff. To justify this, the court referred to article 21 which clearly states that it is the responsibility of the State to care for the environment, and therefore any action endangering the environment can be called illegal towards the State (20).

3. Conclusion : do citizens have an enforceable constitutional right to environmental protection in the Netherlands ?

The fundamental right to environmental protection which has been laid down in the Dutch constitution as an obligation for the State, can only indirectly be enforced by citizens. Only when the legislator has fulfilled its constitutional task to enact sufficient legislation, which enables everyone to participate in the decision-making process and gives everyone the right of access to the judiciary, can we speak of an enforceable fundamental right to environmental protection. Since it is not possible to let any court review formal legislation, that is, issued by joint action of Parliament and Crown (Ministers and Queen), the duty that is imposed on the legislator by article 21 cannot be enforced.

This by no means implies that article 21 is without significane at all. It offers a safety net against systematic environmentally dangerous actions

(17) Important decision by the Supreme Court of the Netherlands, 27 june 1986, *NJ* 1987-743 (De Nieuwe Meer-case).

(18) District Court of Rotterdam, 15 march 1991, *Environmental Liability Law Review* 1992, p. 27 (with English summary). This is the remarkable decision in the Borcea-case : a Rumanian ship illegally dumps oil near the Dutch coast, causing oilcovered birds to end up on the beach. Environmentalists cleaned up these birds and were allowed to reclaim these costs from the Rumanian shipowner, even though there was no legal obligation for the environmental organisation to do that job.

(19) District Court of's Hertogenbosch, 13 november 1991, *Milieu en Recht* 1992, p. 357.

(20) Supreme Court of the Netherlands, 14 april 1989, *Environmental Liability Law Review* 1989, p. 90 (with English summary).

by the government. Actions by lower legislative authorities and by executive bodies can be reviewed with article 21. The fundamental right protects against the repeal of environmental protection measures and obliges governmental bodies to constantly consider environmental interests, not only when deciding on a clear environmental matter, but also on other matters that may have consequences for the quality of the natural environment.

Unfortunately there have been only very few cases in which judges had to pass judgement over article 21, and when they did, they did so with much restraint. The same holds for the legislator and executive bodies. Both organs of the State can refer to the Constitution when making new laws or setting out environmental policies, but this dit not happen much until now. The consequence of this attitude towards article 21 of the Constitution is that the meaning of it stays needlessly vague, as I tried to show in this paper.

Already during the debates about the Constitution in Parliament there was little attention to article 21. The fundamental right to environmental protection came into the Constitution relatively easily, without much thought about the possible meaning. This may explain the reluctance the legislative, executive and judicial bodies have to use article 21. The profound way in which a « Staatszielbestimmung » for the environment is being studied in Germany, shows that this fault will not be made there (21).

Still, one cannot say that the environment does not live as an issue in the Netherlands. On the contrary, in recent years a lot of good legislation has come about which offers a high level of protection to natural objects and the natural environment. Because of the fact that everyone can participate in environmental decisions and subsequently has access to the judiciary, the right to environmental protection in fact is guaranteed on a « subconstitutional level ». Apparently there is a kind of moral pressure on the legislator, on executive bodies and on judges, to pay special attention to environmental issues, and this may be caused by the fact that environmental interests are protected on the highest possible level : in the chapter on fundamental rights in the Constitution.

RÉSUMÉ

Depuis 1983, le droit à l'environnement est un droit fondamental inscrit dans l'article 21 de la Constitution des Pays-Bas. Toutefois, il ne s'agit pas d'un droit des citoyens, mais d'un devoir de l'Etat. Cet article étudie les obligations qui en découlent pour les pouvoirs législatif, exécutif et judiciaire et observe une certaine réticence à recourir à l'article 21, qui conserve pour le moment une valeur plus morale que strictement juridique.

(21) Besides many scientific reports on the issue (since it was first proposed in 1971), a hearing was held in Parliament in 1983, to learn more about the possible meaning of a « Staatszielbestimmung » from legal scientists and legal practitioners. Cf. the dissertation by B. Bock, « Umweltschutz im Spielgel von Verfassungsrecht und Verfassungspolitik », Schriften zum Umweltrecht Band 14, Duncker und Humblot, Berlin 1990.