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## 1 INTRODUCTION

British legal philosopher H.L.A. Hart once published an article entitled "American Jurisprudence through English Eyes."<sup>2</sup> Today, it would not be entirely appropriate to publish an article with such a title. Our "eyes" are no longer exclusively, or even predominantly, British, Dutch, or American, but a highly idiosyncratic mixture of cultural influence. We are Dutch in the sense that we were born and raised in the Netherlands and are subject to Dutch laws, but from a cultural point of view our education is a mixture of French, English, American, Greek and Roman influences as well as Dutch, although this last plays only a minor role. Victorian authors like Dicey and Carlyle appeal much more to the writers of this contribution than do Dutch scholars like Huizinga or Erasmus. Our appreciation of Anglo-Saxon political culture is much greater than our estimation of that of the Netherlands. And finally: the French *philosophes*, Voltaire and Diderot, wrote treatises the significance and aesthetic qualities of which far surpass anything that has been written in Dutch. So when we are commenting on Dutch and American culture this can hardly be considered a purely "Dutch contribution."

Of course, our situation is far from exceptional. Most modern scholars are "multicultural," in that many influences have made themselves felt on their mental make-up.<sup>3</sup> It is perhaps this predicament that makes it possible for us as Dutch scholars to comment on the Dutch constitution with a sense of detachment. When we compare the Dutch constitution to the American constitution one element stands out, to wit, the *ambivalence* of the Dutch constitution. The Dutch have a written constitution, but they refrained from adopting judicial review as the logical consequence of the idea of higher law.<sup>4</sup> The

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- 1 We want to thank Carla Zoethout for critical remarks on matters of style and content.
  - 2 Cf. H.L.A. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," *Georgia Law Review* 11.5 (1977), reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 123-145.
  - 3 Cf. Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," *University of Michigan Journal of Law Reform* 25 (1992): 751-793.
  - 4 Cf. article 120 of the Dutch Constitution: "The constitutionality of acts of parliament and treaties shall not be reviewed by the courts." For a commentary: P.B. Cliteur, "Traditionalism, Democracy, and Judicial Review," in B. van Roermund, ed., *Constitutional Review, Verfassungsgerichtbarkeit, Constitutionele toetsing* (Deventer / Zwolle: Kluwer / Tjeenk Willink,

Dutch have a democracy, but they still have a queen and are therefore a monarchy. So a democracy in conjunction with a monarchy – a combination that sounds peculiar if not downright contradictory to those thinking and acting under the influence of Thomas Paine’s devastating criticism of monarchy in his *Rights of Man*.<sup>5</sup>

Despite their preference for a monarchy (and this has not diminished under the present queen) the Dutch consider their state a pure democracy. They have two reasons for doing so. First, the queen has no real political influence: she is a symbol of the state. Second, the Dutch think that, since the 1960s Dutch society has changed considerably from a rather traditional, conservative, religiously oriented society to one of the most secular<sup>6</sup> and progressive countries in the world. And progressive, they think, also means democratic.

The way Dutch society has changed from a traditional to a more progressive-liberal one has been analyzed by James Kennedy in his excellent book *Nieuw Babylon in aanbouw*.<sup>7</sup> No doubt, many of the contributions in *Regulating Morality* (implicitly or explicitly) praise the Dutch model. In the field of abortion and euthanasia it seems to be a beacon for other parts of the world.<sup>8</sup> But does this equally apply to Dutch democracy? Were the sixties a constructive period for the Dutch conception of democracy? Were the sixties a period of efflorescence for Dutch democracy or a period of decline? In this contribution we assert that although the sixties may have been beneficial in a certain re-

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1993), 55-77; Jan ten Kate and Peter J. Koppen, “The Netherlands: Toward a Form of Judicial Review,” in C. Neal Tate and Torbjörn Vallender, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 369-381.

5 Thomas Paine, *Rights of Man: Being an Answer to Mr. Burkes’ Attack on the French Revolution* (1791), in Thomas Paine, *Collected Writings* (New York: The Library of America, 1995), 433-661.

6 The Sociaal Cultureel Planbureau, an organization for advice and research in social and political affairs, found in 1994 that to the question “Do you believe in God?” fifty percent of the Dutch people answered “no.” Cf. J.W. Becker and R. Vink, *Secularisatie in Nederland, 1966-1991* (Rijswijk: Sociaal en Cultureel Planbureau, 1994). Cf. also Gerard Dekker, Joep de Hart, and Jan Peters, *God in Nederland, 1966-1996* (Anthos/RKK/KRO, 1997) that confirms the earlier research.

7 James C. Kennedy, *Nieuw Babylon in aanbouw. Nederland in de jaren zestig* (Amsterdam/Meppel: Boom, 1995).

8 Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1995), 178: “There is only one country in which doctors can openly help their patients to die in a peaceful and dignified way. In the Netherlands, a series of court cases during the 1980s upheld a doctor’s right to assist a patient to die, even if that assistance amounted to giving the patient a lethal injection. Doctors in the Netherlands who comply with certain guidelines ... can now quite openly carry out euthanasia and can report this on the death certificate without fear of prosecution.”

spect,<sup>9</sup> the influence of the ideology of the sixties *on democracy* has been an unmitigated disaster.

As Fukuyama explains in his recent book on the sixties,<sup>10</sup> its advocates label the period as anti-authoritarian. Advocates of the sixties criticized the fifties for the supposed hierarchic and authoritarian period of that decade. Although this may sound paradoxical, it is precisely this anti-authoritarian character that is responsible for the undemocratic strain in current Dutch political thinking.

Let us analyze this paradox paradox paradox by showing how the Dutch managed to reconcile monarchy with democracy. Subsequently, we shall see that we have to continue with the process of democratization of society, which means that we have to go back to the foundations of our constitutional system.

## 2 MONARCHY AND DEMOCRACY

In their literal sense, monarchy and democracy are irreconcilable.<sup>11</sup> A monarchy is (1) government by a monarch or (2) a state ruled or headed by a monarch. A monarch is a person who reigns over a state or territory, usually for life and by hereditary right, especially as an absolute ruler.

As Paine made abundantly clear, this system of government is inherently irreconcilable with democracy. Monarchy is government by *one* person. Democracy is rule by many. Monarchy means government by *a hereditary person*. Democracy is government by or by their elected representatives.

How is it possible that in the Netherlands (and in Great Britain, but we will concentrate on the Dutch case)<sup>12</sup> a system of government has evolved with the pretension of being a monarchy and a democracy at the same time? The answer is this: because in their constitutions the Dutch and British realized that which from a rationalist perspective (Paine's for instance)<sup>13</sup> is utterly absurd. The ancient phrase "the king can do no wrong" was interpreted in a completely new way. It used to be interpreted as "the king is so wise, in-

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9 Cf. for a positive assessment: Arthur Marwick, *The Sixties: Cultural Revolution in Britain, France, Italy, and the United States*, c. 1958-c. 1974 (New York: Oxford University Press, 1998) and for the Netherlands: Hans Righart, *De eindeloze jaren zestig. Geschiedenis van een generatieconflict* (Amsterdam/Antwerpen: De Arbeiderspers, 1995).

10 Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (London: Profile Books, 1999).

11 Cf. for an excellent appraisal of the different views: S.W. Couwenberg, "Monarchie en democratie," *Tijdschrift voor Bestuurswetenschappen & Publiekrecht* 3 (March 1999): 180-186 and S.W. Couwenberg, "Einde van de monarchie?" *Liberaal Reveil* 5 (1998): 182-190. The republican view is expressed in Tom Rooduijn, ed., *De Republiek der Nederlanden. Pleidooien voor het afschaffen van de monarchie* (Amsterdam: De Bezige Bij, 1998).

12 An excellent book on the British scene is Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1997).

13 But also our latter-day anti-monarchists assembled in Rooduijn, *De Republiek der Nederlanden*.

spired by divine wisdom, that it would be a great injustice to contradict him." As the apostles were divinely inspired in their mission, so the kings ruled by divine right and were infallible for that very reason (like the pope).

But in its modern interpretation this maxim means: the king must be placed in a position where criticism can no longer affect him. That is, he must be absolved from political influence. In a sense Paine led the way to such an interpretation of the ancient maxim. He criticizes the maxim "the king can no wrong" as follows. "When it is laid down as a maxim, that a *King can do no wrong*, it places him in a state of similar security with that of idiots and persons insane, and responsibility is out of the question with respect to himself. It then descends upon the Minister...."<sup>14</sup>

What Paine rejects as absurd is exactly what happened in the Netherlands and other parts of the world where monarchy survived under new and democratic conditions. Although the king is not considered to be "insane," he (or in the Dutch case: she) is not responsible for government policy. The one who is responsible is the minister. Paine puts this well: "When there is a Part in a Government which can do no wrong, it implies that it does nothing; and is only the machine of another power, by whose advice and direction it acts. What is supposed to be the King in mixed Governments, is the Cabinet."<sup>15</sup> The king is a *Roi fainéant* as royalists in the last century mockingly remarked.

Dutch constitutional history is primarily a history of the quarrels between king and ministers. Those quarrels proved necessary in order to make the king understand that "the king can do no wrong" implies that *he does nothing* and that *he is only the machine of another power*, namely that of the minister.<sup>16</sup> Some of our kings had great difficulties with this lesson. William II was rather docile, but William III and Queen Wilhelmina fell back on the older interpretation of "the king can do no wrong."<sup>17</sup> That is, he can exert all political power and never be criticized because of his high position or his relationship with God as the source of justice. But kings and queens who understood the signs of the time, modern royalty in the sense of monarchical government which is in accordance with democratic ideas and values, accepted that, as Paine said appropriately, "responsibility is out of the question with respect to himself."

Article 42 of the Dutch constitution settles this situation in cryptic words: "(1) The Government shall comprise the King and the Ministers. (2) The King

14 Cf. Paine, *Collected Writings*, 534.

15 Ibid.

16 Cf. H.A. van Wijnen, *Van de macht des konings. Mythe en werkelijkheid van de constitutionele monarchie* (Amsterdam: Contact, 1975), 48 and A.M. Donner, "Erfelijk en onschendbaar," in C.A. Tamse, ed., *De monarchie in Nederland* (Amsterdam/Brussel: Elsevier, 1980), 135-154.

17 Cf. on William III, Joris Abeling, *Teloorgang en wederopstanding van de Nederlandse monarchie (1848-1898)* (Amsterdam: Prometheus, 1996); Paul van 't Veer, "De merkwaardigheden van A.W.P. Weitzel," in A.W.P. Weitzel, *Maar Majesteit! Koning Willem III en zijn tijd. De geheime dagboeken van minister A.W.P. Weitzel*. Bewerkt en geleid door Paul van 't Veer (Amsterdam: De Arbeiderspers, 1968), 7-23.

is immune; the Ministers are responsible." Hence *formally* the king is still part of the government, but *in reality* his political influence is reduced by the subsequent paragraph: the ministers are responsible.<sup>18</sup>

In theory, the phrase "the ministers are responsible" could mean "they are responsible for other people whose actions they are not authorised to forbid or control." The concept of responsibility in Greek tragedy and in the penal systems of primitive people is one without the power to avoid or avert. But in enlightened thinking we consider it unjust to punish people or even reproach people for things over which they have no control. So the legal and moral counterpart of ministerial *responsibility* is ministerial *power*. This is the legal power to control: (1) the king, and (2) the bureaucracy.

As far as the king is concerned, this was kept implicit in our constitution, in deference to the king. But it is implied in our constitution, of course, and the king is well aware of this. He can only act with the consent of the minister. Not only is his *behavior* subject to ministerial approval, but his *speech* as well. "Freedom of speech" for a king in constitutional monarchy would therefore be nonsensical.<sup>19</sup>

That summarizes the role of the king. But what can we say about bureaucracy? As far as the bureaucracy is concerned, there was no need to be so cautious and evasive of the real dilemmas. Article 44 of the Dutch constitution states of departments: that "they shall be headed by a Minister." So a minister is "the head" of the bureaucracy. In every real democracy two maxims are essential: One is responsible for one's power; but also one can only be responsible if one *has* power.<sup>20</sup>

The first maxim is well known and beyond dispute; the second maxim is often forgotten. It cannot be married with our assumption that power is bad or dangerous. Power corrupts and absolute power corrupts absolutely.<sup>21</sup> This is music to our ears. But power is a fact of life. The only thing we can and, indeed, should do is to counter a certain power with another power. Without the power to control power, we have no democracy. So power is essential.

18 Cf. for the history of this article: J. Heemskerk, *De Praktijk onzer grondwet*, 2 vols. (Utrecht: J.L. Beijers, 1881), 1:46.

19 In 1853 the king delivered a speech against the will of the cabinet. Subsequently, the cabinet resigned. Cf. Abeling, *Teloorgang en wederopstanding*, 30.

20 Cf. P.B. Cliteur, "Indien verantwoordelijk dan bevoegd?" in M.C. Burkens, M. Jurgens, A.K. Koekkoek, and J.J. Vis, eds., *Gelet op de Grondwet* (Deventer: Kluwer, 1998), 124-137.

21 "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men," according to English historian Lord Acton (1834-1902). Cf. his letter of 3 April 1887, to Bishop Mandell Creighton (in *The Life and Letters of Mandell Creighton*, 1904) and John Emerich Edward Dalberg-Acton (Lord Acton), in J. Rufus Fears, ed., *Essays in Religion, Politics, and Morality: Selected Writings of Lord Acton*, 3 vols. (Indianapolis: Liberty Classics, 1988), 3:519.

The only question is: How to limit power and how to make those in power democratically accountable?<sup>22</sup>

This brings us to parliament. Ministerial responsibility is, of course, a responsibility to *parliament*. Parliament can send both individual ministers and an entire cabinet home. This rule evolved in the years of 1866 and 1868 when parliament clashed with the king and his ministers.<sup>23</sup> When we add to this state of affairs the fact that every citizen had the right to vote in 1919, it is tempting to consider the Netherlands a democracy since the beginning of this century.

### 3 DEMOCRACY: APPEARANCE OR REALITY?

Is the Netherlands really a democracy? In order to answer this question, we have to consider in more detail what is the *essence of democracy*. This may sound ambitious and a bit philosophical, but it could be easier than it seems. Let us first exclude the possibility of direct democracy as it was practiced in ancient Athens with its small population.<sup>24</sup> In modern, large-scale societies this is no longer practicable and it is unrealistic to have illusions about it.<sup>25</sup> We have to limit ourselves to an indirect – more specifically parliamentary – democracy. A well-functioning indirect democracy can be defined as the political system where the people have great and, in ideal circumstances, even absolute influence over governmental policy. The people not only *appoint* their own leaders, but those leaders resign once they have fallen from grace. And because direct democracy is impossible in a modern, large-scale society, “democratic” in an indirect democracy means that *the representatives* of the people have maximum influence on government policy. They decide, on our behalf, when our political leaders have to go.

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- 22 Cf. the great American politician Madison in *The Federalist* 51 (1787): “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.” James Madison, *Writings* (New York: The Library of America, 1999), 295.
- 23 Cf. W.J. Baron van Welderen Rengers, “Ministerie van Zuijlen-Heemskerk,” in *Schets eener parlementaire geschiedenis van Nederland van 1849 tot 1901*. Vierde bijgewerkte uitgave met aantekeningen van C.W. de Vries, 5 vols. (’s-Gravenhage: Martinus Nijhoff, 1948), 1:361-412; P.J. Oud, “Kroon of vertegenwoordiging?” in *Honderd jaren. Een eeuw van staatkundige vormgeving in Nederland 1840-1940* (Assen: Van Gorcum, 1979), 73-86.
- 24 George Klosko, *The Development of Plato’s Political Theory* (New York: Methuen, 1986), 6: “The small size of the typical *polis* fostered intense political involvement in its citizens.”
- 25 Benjamin Constant knew this well. Cf. Benjamin Constant, *De la Liberté des Anciens comparée à celle des Modernes. Discours prononcé à l’Athénée royal de Paris en 1819* in Benjamin Constant, *Écrits politiques. Textes choisis présentés et annotés par Marcel Gauchet* (Paris: Gallimard, 1997), 591-619.

In our political system there are two sorts of representatives of the people: Those who do the actual job of governing the state: ministers, and those concerned with exercising the right to control those who rule: members of parliament.

In an ideal democracy, parliamentarians have maximum influence over the ministers, and the ministers control every aspect of government policy. In a democracy all political power that cannot be reduced to the power of parliamentarians and ministers is illegitimate.

In the last century, the great threat to democracy was royalty.<sup>26</sup> The king exercised power that was neither controlled by parliament, or by ministers. The ministers were servants of the king and not of parliament (and therefore of “us,” “the people”).<sup>27</sup>

This was a peculiar opinion, even in 1820. But after 1848, when the principle of ministerial responsibility (and consequently ministerial power) was established it became an anachronism.

#### 4 ANTI-AUTHORITARIANISM IN GENERAL

From the second half of the nineteenth century to the second half of the twentieth century, the Netherlands was on the secure path of becoming a democracy. Less and less power was put in the hands of the king, and more and more power became vested in the hands of democratically chosen or legitimized persons or institutions. But, contrary to most accounts of that period, this all changed in the 1960s.

One of the central features of the development of democracy since the sixties is that the king has been replaced by a new illegitimate power: bureaucracy. Nowadays, bureaucracy almost reigns supremely.

Many scholars have emphasized this, of course. Some authors use the words “the fourth branch”<sup>28</sup> – a rather silly expression, to be sure, because it suggests that the three branches of Montesquieu were comparable to this new fourth branch. And that is not so. Montesquieu dealt with *legitimate*

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26 Cf. John Alder, “Ministerial Responsibility and Civil Servants,” in *Constitutional & Administrative Law* (1989; reprint, Houndmills and London: MacMillan, 1994), 223-233. Alder makes clear that ministerial responsibility developed as the royal power eroded.

27 Around 1820, when the king had a conflict with parliament, he said to his secretary Sirtema van Grovestin: “Why do they (members of parliament; PC) accuse the ministers? What are ministers? Absolutely nothing ... I can rule without ministers, or, when it suits me, I can put whoever I want at the head of a ministry, even one of my coachmen; because I, I am the man who acts and who is responsible for the acts of government.” Cited by: N. Cramer, “De kroon op het werk van 1813,” in Tamse, *Monarchie in Nederland*, 11-60, especially 21. Cramer comments: “Those outbursts could not stop the constitutional development.”

28 In the Netherlands: R. Crinice le Roy, *De vierde macht. Een hernieuwde kennismaking* (Den Haag: VUGA Boekerij, 1976), a somewhat confusing contribution to constitutional theory because the author is uncertain how to evaluate the rise to power of bureaucracy.

government actions or *formal* power.<sup>29</sup> That is power attributed by the law. Scholars who talk about a “fourth branch,” however, deal with *illegitimate* power, power that has been taken, not attributed. The most astonishing (and frightening aspect) of the reign of bureaucracy is that most scholars do not recognize bureaucratic power as *illegitimate* and as *unconstitutional* power. They consider it as a fact of life, something you have to accept as a necessity in the modern world. Many scholars, especially political scientists and those reflecting on public administration, even *defend* bureaucracy against democratically chosen and legitimized rulers. This is a paradoxical state of affairs, of course. How did this come about? We believe this was a result of the 1960s.

## 5 THE TRAUMA OF POSTWAR SOCIETY

Postwar society suffers from a trauma: the trauma of Nazism. In the history of the western world the period between 1933 to 1945 has been stigmatised by the rise to power of an appalling regime: that of Adolf Hitler. How was it possible that in western democratic states such abhorrent ideas as those of Nazism could flourish. How is it possible that in Germany, the country of Kant and Goethe, such primitive and barbarian ideas prevailed? Every commentator has his own theory. Psychoanalysis, Marxism – they all tried to explain the genesis of Nazism. Individual thinkers such as Hannah Arendt, Jean Paul Sartre, Karl Popper and many others tried to come to grips with “the origins of totalitarianism.” Also, the ideologues of the sixties struggled with this question. They reached the following conclusion. *Nazism has to do with obedience*. Nazism is to say “Jawohl!” and do what has been ordered, whatever that may be. The famous experiments of Stanley Milgram<sup>30</sup> showed us that people execute orders, as long as they are given by somebody who seemed to have legitimate authority.

Adolf Eichmann, responsible for the deaths of countless Jews in the concentration camps, became the symbol of the mentality of “Befehl ist Befehl” and “Ich habe gehorcht.”<sup>31</sup> The ideologues of the sixties drew a very simple conclusion from this state of affairs: hierarchy, commands, bosses, authority – all the things that seemed characteristic of Nazism – had to be rejected. Dutch writer Harry Mulisch explains his own anti-German attitude and that of the younger generation.<sup>32</sup> He loathed “fathers, teachers, policemen and those kind of people, who always know better, take things away, forbid things, do not

29 Cf. Montesquieu, *Oeuvres complètes*, 2 vols. Texte présenté et annoté par Roger Caillois (Paris: Gallimard, 1951), 2: 396-407 (*De l'Esprit des lois*, Chapitre VI, De la Constitution d'Angleterre).

30 Stanley Milgram, *Obedience to Authority* (New York: Harper and Row, 1974).

31 Cf. Harry Mulisch, *De zaak 40/61. Een reportage* (Amsterdam: Uitgeverij De Bezige Bij), 124.

32 Cf. his lively portrait of the Dutch youngsters of 1966 in Harry Mulisch, *Bericht aan de rattenkoning* (Amsterdam: De Bezige Bij, 1966).

listen, but ultimately are stupid, servile and professionally arrogant, and what is worse: unjust.”<sup>33</sup> Although he is older than members of the protest-generation of the sixties were, Mulisch was one of their foremost spokesmen. “Il est interdit d’interdire,” was written on the walls in Paris during the revolution of May 1968.<sup>34</sup> This was a gross exaggeration, as some more rational scholars knew well.<sup>35</sup> Every state has to forbid certain kinds of behavior: racism, homicide, theft, fraud – “il est nécessaire d’interdire” such harmful behavior, one is tempted to retort. A peaceful society cannot exist without prohibitions. “Order is heaven’s first law.”

But this rejection of all prohibition was not only a symbol: it was *dangerous* nonsense. Because of this mentality criminologists were hesitant to state the true figures of rising crime.<sup>36</sup> It became a taboo to propose adequate measures of crime control. Now we are confronted with the mess of the sixties in this respect. The prophets of those times are silent, and a few even show remorse (although not many). But the devastating influence of the sixties in this respect is a hard fact.

What concerns us here, however, is the effect of the self-indulgent and anarchistic ideology of the sixties on democracy. This effect was disastrous. Let us see why.

## 6 THE HARMFUL CONSEQUENCES OF ANTI-AUTHORITARIANISM FOR DEMOCRACY

In *The Federalist* 51 James Madison states “You must first enable the government to control the governed.” According to the ideologues of the sixties, there was no need to govern, because men were considered to be angels. Every form of power had to be eradicated, because they believed that when nobody had power, everything would run itself.<sup>37</sup> The central idea behind all this, is Rousseau’s conception of human nature. Naive maybe, but influential nonetheless.

33 Harry Mulisch, *De toekomst van gisteren* (Amsterdam: De Bezige Bij, 1972), 37. All translations are by the authors of this article, unless stated otherwise.

34 Régis Debray, *La République expliquée à ma fille* (Paris: Seuil, 1998).

35 “The most striking thing about it was the verbal delirium,” Raymond Aron wrote in May 1968. Cf. Raymond Aron, *La révolution introuvable* (Paris: Fayard, 1968) and H. Stuart Hughes, *Rebels: The Political Culture of European Dissent 1968-1987* (1988; reprint, Cambridge, MA and London: Harvard University Press, 1990), 6. Cf. for a later assessment of 1968: Luc Ferry and Alain Renaut, 68-86, *Itinéraires de l’individu* (Paris: Gallimard, 1987).

36 As they were hesitant to confess that rising crime is a phenomenon since the sixties. Cf. on the fifties: John Updike, “The Fifties,” in *More Matter: Essays and Criticism* (London: Hamish Hamilton, 1999), 25-29, especially 25: “You could walk most city streets without a qualm at two in the morning, and as to family values – boy, did we have family values!”

37 This explains the popularity of self-regulation by the Dutch. Cf. on this topic the contribution of Griffiths in this volume.

In the more realistic conception of politics, which we encounter in, for instance, *The Federalist Papers*, power is considered a fact of life. The question is not "how to annul power" or "how to make every sort of authority impossible" but "how to control power." How to get power into the hands of the right persons and that – in a democracy – is the people. Lord Acton states the same in a much less known and undoubtedly less popular quotation: "Argument for absolute power: You must put confidence somewhere. You can't escape the conditions of human nature. Put it where responsibility is concentrated."<sup>38</sup>

Because all centralized power was considered wrong by the ideologues of the sixties, power by cabinet or individual ministers was considered to be an anathema. This bias against all central power fostered a kind of illegitimate and informal power, comparable to the royal power that had been driven out so successfully in the last century. Bureaucracy took over the place abandoned by the king. Unfortunately, it is very difficult for the democratically-legitimized branches of government to control bureaucracy. Not because "reality is so complex" (as we nowadays hear ad nauseam), but because of our own ideas. Many people consider it a gross violation of the rights of civil servants that they have to *serve*. This picture appears quite clearly from several debates in the Netherlands on the relation between politics and bureaucracy since the sixties. Let us review three events representing the fundamental change in the position of civil servants.

## 7 FREEDOM OF SPEECH FOR CIVIL SERVANTS

A case concerning the supposed right to free speech for civil servants arose in the Netherlands in 1998. One of the top civil servants, Secretary-general Van Wijnbergen of Economic Affairs, criticized government policy in the newspapers.<sup>39</sup> To the question whether a civil servant is allowed to criticise his minister, this civil servant gave the following answer: "I am not the messenger of the minister."<sup>40</sup> According to another civil servant, a scholar, working in the department of Justice, a civil servant may "say whatever he wishes."<sup>41</sup>

38 Cf. Dalberg-Acton, *Essays in Religion, Politics, and Morality*, 519.

39 Jannetje Koelewijn, "Sweder van Wijnbergen een excellent lastpak. Secretaris-generaal op EZ hecht aan recht op kritiek," *NRC Handelsblad*, 9 November 1998; "Economische groei kan tegenvallen," *NRC Handelsblad*, 7 September 1998. Cf. also: R. van Wissen, "Tegenstanders van ambtelijke uitingsvrijheid moeten niet de ambtenaren bekritisieren, maar de wet. Interview met S. van Wijnbergen," *Liberaal Reveil* 40 (October 1999): 194-197.

40 In *NRC Handelsblad*, 9 November 1998.

41 J.J. Stam, "Ambtenaar mag zeggen wat hij wil," *NRC Handelsblad*, 21 October 1998. Many other scholars took the same stance: Bauco van der Wal, "De bizarre woede van een wetenschapper," *Management & Bestuur* (april 1999): 23; Paul Bordewijk, "Openbare uitspraken ambtenaren geen gevaar voor de democratie," *Binnenlands Bestuur* (30 oktober 1998): 6018; E. van Thijn, "De ambtenaar en de politiek II," *RM Themis* 5 (1999): 165-167;

From a sound democratic perspective, these may seem ridiculous and probably eccentric ideas, but the Dutch government and the Dutch legislator are partly responsible for the dissemination of these ideas. When the Dutch constitution was revised in 1983 constitutional or civil rights became very popular. So far, so good, but many people had a feeling that a positive attitude towards civil rights (or human rights, there is no need to distinguish between these in the context of our problem) would mean to extend them to officials as well as to citizens. So civil servants, too, were entitled to freedom of speech.

It is crystal-clear that in a parliamentary democracy civil servants cannot have a right to free speech with any meaningful content. By that last qualification we mean that having a right to free speech should at least give one the right to say controversial things – things that are not pleasing to the ear of the more powerful – , in particular those higher in the ranks of government. To say that you have a right to free speech and at the same time proclaim that you are not allowed to ventilate *controversial* ideas or ideas that contradict your superior, is *no* free speech.

Now, does a civil servant have the right to say controversial things, to contradict his superior (i.e. the minister)? This is the central question we have to address. To answer it affirmatively would make the position of the minister an impossible one: he is held responsible for expressions that he has no legal right to proscribe. Therefore, the choice is clear: Either we abandon ministerial responsibility for the acts and speech of bureaucracy or we deny civil servants the freedom of speech.

The first option would set back the clock to a time before 1866/1868. Ministers would only be required to provide information on the opinions of bureaucrats, as in former times they could provide information on ideas of the king. But they would be unable (because legally forbidden) to hold bureaucracy in restraint, as in former times they were unable to control the king. In short: democracy would become a charade. We believe, one should choose the second alternative: deny freedom of speech to civil servants. Free speech is a great thing. Nobody will deny this.<sup>42</sup> But the very reasons why freedom of speech for citizens is important are those that lead us to deny it to civil

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J. de Vries, "Ambtenaar zit klem tussen regels en resultaat," *EZ-journaal* 35 (14 November 1998): 8. A minority of scholars spoke out in favor of the classical doctrine that civil servants have no freedom of speech: C.A.J.M. Kortmann, "De ambtenaar en de politiek I," *RM Themis* 5 (1999): 163-165 and Frits Bolkestein, "Ambtenaar is boodschapper van de minister," *De Volkskrant*, 6 March 1999; P.B. Cliteur, "Het einde van de democratie?" in Marcel Barnard and Abe van der Werff, eds., *Dit is het einde niet: Profetie met het oog op het jaar 2000*. Onderbreking vol. 2 (Kampen: Uitgeverij Kok, 1998), 23-41; P.B. Cliteur, "De euthanasie van democratie," in S.W. Couwenberg, *De strijd gaat voort! Liberalisme als heersende ideologie en bron van nieuwe strijd* (Baarn: Agora, 1999), 40-57.

42 Cf. on the history of free speech the classic study by Bury, *A History of the Freedom of Thought* (1913; reprint, London: Thornton Butterworth, 1932) and the defense of J.S. Mill, *On Liberty* (1859; reprint, Harmondsworth: Penguin Books, 1977).

servants and to the king. Freedom of speech is irreconcilable with the foundations of parliamentary democracy.

In 1986, however, the Dutch legislators made a rather ambivalent law, proclaiming what might be interpreted as a certain kind of free speech for civil servants.<sup>43</sup> The question was discussed in parliament. There appeared to be an overwhelming majority in favor of free speech for civil servants.<sup>44</sup> Only some marginal conservative parties, such as the SGP (an orthodox protestant party), proved capable of posing the correct constitutional questions. The government had presented the bill as a "balance" between the interests of the government and those of the civil servants. But the crucial question is (according to the SGP): Should we try "to keep the balance" *in the relation between government and civil servant*? Is it not more in accordance with sound democratic principles to say that the interests of the government *have priority over those of the civil servants*?<sup>45</sup> A good question, indeed, but not in harmony with the dominant climate of opinion of that time.

The same party made another critical remark: "Civil rights protect interference by the government in a free domain of the citizen. Whoever enters the civil service cannot on that same basis claim a free domain against his employer."<sup>46</sup>

The majority of the parliamentarians, however, did not address those questions. The "people drunk" was at the helm of state, not the "people sober."

## 8 QUANGOS

Another undemocratic strain in Dutch political culture since the sixties has been the proliferation of quangos: organizations that are financed by the government but act independently of it.<sup>47</sup> From the perspective of a properly functioning democracy this sounds problematic, if not downright undesirable. Why should "We The People" pay for organizations that we do not control?

In 1974, one of the first commentators (and advocates) of quangos in the Netherlands gave the following answer. The main argument in favor of quangos appeared to be a kind of autonomous development, that was considered

43 Cf. *Ambtenarenwet* (Act of 20 April 1988, Stb. 229, i.w.tr. 2 November 1988), art. 125a.

44 Cf. *Wijziging van de Ambtenarenwet 1929 ter zake van de uitoefening van grondrechten*, Voorlopig verslag, vastgesteld op 5 December 1986, Tweede Kamer, vergaderjaar 1986-1987, 19 495, nr. 4, 1-9.

45 Posed by the SGP. Cf. *Bijl. Hand. II 1986-1987*, 19 495, nr. 4, 3.

46 Posed by the SGP. Cf. *Bijl. Hand. II 1986-1987*, 19 495, nr. 4, 4. Similar considerations can be found in the work of the great Dutch constitutional scholar Buys. Cf. J.T. Buijs, "Art. 8," in *De grondwet. Toelichting en kritiek* (Arnhem: P. Gouda Quint, 1883), 1:56-62.

47 Short for quasi (or quasi-autonomous) non-government(al) organization. Cf. *Concise Oxford Dictionary*: quango: a semi-public body with financial support from and senior appointments made by the government.

beneficial and inevitable at the same time. This sounds mysterious, but not for those who are initiated in Dutch political culture. The American historian (of Dutch descent) James Kennedy appropriately stressed the dominance of a kind of secular faith of the elites in the sixties. They all shared an implicit belief in progress: "The widespread belief in the inevitable realization of 'modern life' is one of the most fascinating aspects of the intellectual world of the elites of the sixties."<sup>48</sup> The main argument for the introduction of quangos was, indeed, that the ideal of ministerial responsibility "had not been adapted to the changing social circumstances."<sup>49</sup> These social circumstances were supposed to have changed in the sense that a minister cannot control everything. And if the minister *cannot* control everything, why proclaim that he *should* control everything? This is the crux of the argument in favour of quangos; how naive this may sound when simplified as bluntly as this.

Two arguments were added to this "implicit historicism" in favor of quangos: First, that a concentration of power in the hands of the government should be avoided;<sup>50</sup> and Second that the independence from the government of certain organizations can be justified on the basis of democratization.<sup>51</sup>

Both arguments need to be analyzed. The crucial question is: "Should concentration in the hands of government be avoided at all?" In Rousseau's conception of politics and reality that prevailed in the sixties this question should be answered affirmatively. "Power tends to corrupt and absolute power corrupts absolutely," the adherents of the ideology of the sixties say as did Lord Acton. But they forget another maxim of the Great British historian: "Argument for absolute power: You must put confidence somewhere. You can't escape the conditions of human nature. Put it where responsibility is concentrated."<sup>52</sup> What the ideologues of the sixties did not understand, is that power is always located *somewhere*. If you make it impossible for democratic government to govern, the power will shift to bureaucracy, monarchy, intermediary structures, etcetera. However, the blind spot of the ideologues of the sixties was that they were only concerned with making the government unable to govern (thinking thereby they had made a great contribution to the constitutionalist ideal).

48 Kennedy, *Nieuw Babylon*, 15.

49 M. Scheltema, *Zelfstandige bestuursorganen. Rede uitgesproken bij de aanvaarding van het ambt van gewoon hoogleraar in het administratief recht aan de Rijksuniversiteit te Groningen op 21 mei 1974* (Groningen, H.D. Tjeenk Willink, 1974), 5.

50 Cf. Scheltema, *Zelfstandige bestuursorganen*, 10: "Een belangrijk punt kan zijn het streven om een te grote machtsconcentratie te voorkomen. De regering beschikt op veel terreinen over grote bevoegdheden. Men kan er in het algemeen bezwaar tegen hebben dat op één plaats veel bevoegdheden samenkomen."

51 *Ibid.*, 11: "Een tweede argument om tot een zekere onafhankelijkheid van de regering te komen kan de wens zijn om gehoor te geven aan de behoefte tot inspraak en democratisering."

52 Fears, ed., *Essays in Religion*, 519.

This also explains the enormous popularity of Montesquieu and the theory of the separation of powers and checks and balances. Of course, separation of powers is an important element of the concept of constitutionalism or – in the European context – the *Rechtsstaat*.<sup>53</sup> But only in the interpretation of a separation of legitimate powers, namely: legislative, judiciary and executive. In the perverted interpretation of the separation of powers it became the battle cry for those intellectuals who wanted to realize countervailing powers *everywhere*. Seen from that perspective, concentration of power in the hands of government is wrong, and bureaucracy is presented as a countervailing power against government, as we see in the arguments in favor of the introduction of *quangos*.

## 9 THE DEPENDENCE OR INDEPENDENCE OF THE CROWN PROSECUTION OFFICE

A third development that took place during the sixties with devastating consequences for the democratic character of the Dutch state, is the move of the Public Prosecution Service away from the political branches to a sort of semi-autonomous state.<sup>54</sup>

The Dutch constitution – like every other constitution of liberal democracies – guarantees the independence of the judiciary.<sup>55</sup> Article 117 of the constitution states that “members of the judiciary responsible for the administration of justice ... shall be appointed for life by royal decree.” Their legal status, as the Article continues, “shall in other respects be regulated by act of parliament.” Appointment for life and the other provisions mentioned were introduced to guarantee the independence of the judiciary from the executive power of the state.

But what is the position of the public prosecutor? Is he part of the executive or part of the judicial branch? In the article of the Dutch constitution mentioned above, the public prosecutor is explicitly excluded from the judicial branch. In the Dutch text, this is appears more clearly than in translation: “Leden van

53 Cf. on the concepts of constitutionalism and *Rechtsstaat*: P.W.C. Akkermans, D.J. Elzinga, E. Pietermaat-Kros, *Constitutionalism in the Netherlands: The Dutch Contributions to the Fourth World Congress of the International Association of Constitutional Law in Tokyo* (Groningen, University Press, 1995); D.J. Elzinga, F. Goudappel, and H.R.B.M. Kummeling, eds., *Constitutionalism, Universalism and Democracy, The Dutch Contribution to the Fifth World Congress of the International Association of Constitutional Law in Rotterdam, July 1999* (Groningen, University Press, 1999); C.M. Zoethout, *Constitutionalisme. Een vergelijkend onderzoek naar het beperken van overheidsmacht door het recht* (Arnhem: Gouda Quint, 1995): 218-223.

54 Cf. for a comparative study of the situation in England, Scotland, the Netherlands and Germany: Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford and New York: Oxford University Press, 1995).

55 P.S. Atiyah, *Law & Modern Society* (1983; reprint, Oxford and New York: Oxford University Press, 1995), 13; J.P. Loof, ed., *Onafhankelijkheid en onpartijdigheid. De randvoorwaarden voor het bestuur en beheer van de rechterlijke macht* (Leiden: Stichting NJCM-Boekerij 36, 1999).

de rechterlijke macht met rechtspraak belast," which means: "Members of the judicial branch who are concerned with the administration of justice as judges do...."

Not only the Dutch constitution, but other legal provisions as well were clear about the position of the Dutch Public Prosecution Service. The "Wet op de Rechterlijke Organisatie" (an act on the organization of the judiciary) maintains that public prosecutors should follow the instructions of the minister of justice (article 5 in the old Act, 127 in the new).

But these articles were not taken seriously. Scholars quoting them were considered to be textual dogmatists. Doctrine showed the way and doctrine was affected by the spirit of progressive ideology. Power tends to corrupt and absolute power corrupts absolutely. Therefore, the minister of justice should not rule in an absolute way. The Crown Prosecution Office should be relatively autonomous.<sup>56</sup>

## 10 PARADISE REGAINED

In Francis Fukuyama's view, the period from the mid-1960s to the early 1990s was marked by seriously deteriorating social conditions in most of the industrialised world. Crime and disorder began to rise, making inner-city areas of the wealthiest societies on earth almost uninhabitable.<sup>57</sup> Trust and confidence in institutions went into a deep, forty-year decline. During the late 1950s a majority of people in the United States and Europe expressed confidence in their governments. But the sixties meant a period of change, and not for the better. Fukuyama speaks of a "Great Disruption" in social values. In this period certain bad things happened to our social and moral life. A culture of excessive individualism took hold over people with a corrosion of virtually all forms of authority. Fukuyama analyzes the causes of this period of decline. He demystifies the sixties as a period of critical thinking, as an

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56 At the end of the fifties the right dogmatic position (i.e. the Crown Prosecution Service is subjected to democratic control) was proclaimed by: A.A.L.F. van Dullemen, "Positie en taak van het Openbaar Ministerie in Nederland. Preadvies Vereniging voor de vergelijkende studie van het recht van België en Nederland," in *Jaarboek 1958-1959* (Zwolle: W.E.J. Tjeenk Willink, 1958/1959), 138-166, but ten years later the theory of a relatively independent Crown Prosecution Office was common ground among all penal lawyers. Cf. G. Duisterwinkel, "Vereisen de functies van het Openbaar Ministerie nieuwe wettelijke voorzieningen? Preadvies NJV," in *Handelingen der Nederlandse Juristen-Vereniging 1968* (Zwolle: Tjeenk Willink, 1968), 1:195-251. Cf. on the history of the Dutch discussion of the Public Prosecution Service: P.B. Cliteur, "De historische ontwikkeling van de doctrine over de constitutionele positie van het Openbaar Ministerie (1827-1997)," in C.J.H. Jansen en M. van der Vrugt, eds., *Recht en geschiedenis* (Nijmegen: Ars Aequi, 1999), 63-77.

57 Cf. Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstruction of Social Order* (London: Profile Books, 1999), 4.

upsurge of idealism instead of decline. His ideas on the "inevitability of hierarchy," in particular, are germane to our theme.

Fortunately, according to Fukuyama we are beyond the Great Disruption, and we can detect positive signs for the recovery of democracy as well. On 24 September 1999 the Secretary-general of the Ministry of Economic Affairs mentioned before, resigned after another conflict with his minister. This date is an important one. In the conflict between democracy and bureaucracy democracy prevailed.

In the field of quangos, too, improvement has been made. The initial plan of the government to change the written constitution in favor of quangos has been called off.<sup>58</sup> And with regard to the position of the Crown Prosecution Office, the period between 1994 and 1998 was marked by a stormy debate about the role of the public prosecutor. The minister of justice and the highest civil servant of the Crown Prosecution Office clashed with regard to their mutual responsibilities.<sup>59</sup> In 1996, the minister of Justice introduced the principle that one can only be responsible if one has legal power.<sup>60</sup> So if parliament wants to hold a minister responsible, parliament should give the minister power. Every party in parliament recognised this, and in a subsequent conflict between the minister and the highest officials of the Crown Prosecution Office the minister was backed by parliament. During two debates<sup>61</sup> on what came to be known as "the mutiny of the prosecutors," the principle that the minister of justice must "have faith" in the highest civil servants was affirmed. Needless to say, again democracy triumphed over bureaucracy. The Great Disruption of the ideology of the sixties seemed to be over. The advocates of its ideals in the government service were either fired or lost influence.

Of course, many people still disagree with this paradigm shift as many people will disagree with my interpretation of the recent political conflicts in the Netherlands. The ideology of the sixties has still many adherents. But it appears that with the breakthrough of a new millennium the restoration of democracy in the Netherlands will have a fair chance to succeed. Paradoxically, this resurgence of democracy means going back to before the revolution of the sixties to the principles on which our parliamentary democracy

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58 "Herstel van het primaat van de politiek bij de aansturing van zelfstandige bestuursorganen, Kabinetsstandpunt over het rapport van de Algemene Rekenkamer 'Zelfstandige bestuursorganen en ministeriële verantwoordelijkheid,'" Ministerie van Binnenlandse Zaken, Den Haag, 3 May 1995.

59 Cf. for an analysis of the crisis: J.L. de Reede, "Crisis in de Nederlandse Justitie. De ministeriële verantwoordelijkheid voor het openbaar ministerie," *Tijdschrift voor Bestuurswetenschappen & Publiekrecht*, 53 (1998): 699-706; M.C.B. Burkens, "De kwestie Docters van Leeuwen," *Liberaal Reveil* 29 (1988): 64-69; P.B. Cliteur, "Indien verantwoordelijk dan bevoegd?" 124-137.

60 In W. Sorgdrager, "Minister van justitie volledig bevoegd over openbaar ministerie," *Staatscourant*, 4 April 1996, 6, also in *NJB*, 19 April 1996, 620-621.

61 To wit: *Hand. II 1997-1998*, on Rapport-Dolman, 28 January 1998, 3647-3686; *Hand. II 1997-1998*, on dismissal of an attorney-general, 19 February 1998, 4297-4341.

was been built.<sup>62</sup> Those principles appeared to have enough resilience to withstand the onslaught made on them by the ideologues of the sixties.

Ironically, given the state of affairs in the Netherlands, in order to save the true democratic principles of Paine, our strategy had to be “Burkean”: we had to return, to the times before the sixties, to the true foundations of our political order. Conservatism appeared to be more revolutionary than the self-styled radicals who led the way in the sixties.

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62 A common conservative complaint. Cf. F.A. Hayek, *The Constitution of Liberty* (1960; reprint, London and Henley: Routledge and Kegan Paul, 1976), 1, who writes that “for almost a century the basic principles on which this civilization was built have been falling into increasing disregard and oblivion” and Judge Antonin Scalia who in a time of value-relativism and identity politics wants to return to Enlightenment beliefs. Cf. Richard A. Brisbin, *Justice Antonin Scalia and the Conservative Revival* (Baltimore: The Johns Hopkins University Press, 1997).