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Legitimacy of the ruling: a formal approach

1. Introduction

The Dutch legal system is part of the legal systems of "civil law" employed in Continental Europe, which are all indebted to the French judicial system. The Dutch judicial system, therefore, exhibits some of the characteristics of the French model. If we confine the comparison to the highest courts in the country, as Lasser does in his book *Judicial Deliberations*,¹ the similarities revolve around, among other things, the Court's duties and procedures. With regard to the Court's duty: like the *Court de cassation*, the Dutch Supreme Court judges whether the law has been violated by lower courts by determining the proper meaning and mode of application of legal rules. In this respect, the Supreme Court acts, as it were, as *bouche de la loi*, mouthpiece of the law, for the Court determines how the law – that is: how statutes and treaties – are to be read and applied. This famous quote of Montesquieu – the judge as mouthpiece of the law – is, by the way, not to be understood as the expression of legalism, that is, the idea of mechanical jurisprudence, but refers to the independence of the judge with regard to the executive power:² it says that the judge has to administer justice *according to law*, not according to the will or whims of the king, that is, the executive power.

When an appeal has been lodged with the Dutch Supreme Court, the procedure also resembles the *Court de cassation*. The Court does not decide until it has been informed by the Conclusion of the Advocate-General. The Conclusion consists of a full analysis of the issue at stake and an extensively motivated advice on how to decide the case. In this respect, the Dutch judicial argument is, like its French example, characterized by bifurcation.

Despite these similarities, Dutch legal praxis differs significantly from the French model. Until a few decades ago, the mode of argumentation of the Dutch Supreme Court resembled the *Court de cassation*, in that the reasoning of the Court suggested that the final decision stemmed logically from the law. But from the seventies onwards, the Court started to justify the chosen solution. Nevertheless, the Court's reasoning rarely reflects the choices and considerations for or against the decision. The reasoning is often one-sided, discussing extensively the arguments supporting the decision, whereas the counter arguments are only considered to the extent that they contribute to the elucidation of the Court's own choice.³ Only in exceptional cases does the Court expatiate upon the pro's and cons of the decision. These cases occur only occasionally and do not affect the overall picture that the judicial argument does not provide full insight into the Court's deliberations.

Some authors regard this lack of transparency as a deficiency. They regard the law as discursive, that is, the law is seen as the always provisional outcome of developing opinions and beliefs.⁴ By not giving full

¹ Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press: Oxford 2004.

² K.M. Schönfeld, *Montesquieu en 'La bouche de la loi'*, Leiden 1979.

³ Asser-Vranken, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Algemeen Deel*, W.E.J. Tjeenk Willink: Zwolle 1995, p. 161.

⁴ Asser-Vranken 1995, p. 69.

insight into the considerations, at the least in cases that demand a fresh judgment, the Dutch Supreme Court, they argue, falls short of the ideals of judicial control and accountability, democratic debate and deliberations. In my opinion, this critique ignores the bifurcation as it appears in Dutch judicial discourse. One of the differences between the French and Dutch courts of cassation concerns the role of the Conclusion of the Advocate-General. Contrary to French legal praxis, the Dutch Supreme Court publishes both of its discourses simultaneously in every case. In the majority of cases, the Conclusion of the Advocate-General can therefore be considered as part of the Court's judicial argument. In so doing, the scope of the Dutch Supreme Court's judicial argument is extended, now that the Court's concise judicial argument is supplemented or complemented by the extensive deliberations of the Advocate-General. In this paper I want to investigate to what extent the Conclusion of the Advocate-General contributes to the legitimacy of the Supreme Court's ruling. In so doing I hope to contribute to the comparative analysis of judicial transparency and legitimacy, a topic that has been thoroughly addressed by Lasser in his study "Judicial Deliberations".

2. The laconic style of the Dutch Supreme Court: an example

In order to demonstrate how the Conclusion contributes to the Dutch Supreme Court's judicial argument, I will discuss a relatively minor case: *Transvemij/Graphé*.⁵ The case revolves around the exact meaning of the word "finding" in the (legal) provision concerning the legal obligation to assign a finder's reward whenever abandoned property is restituted to the owner.

Here are the facts of the case: A stolen car had been found by a company, called Graphé, that professionally tracks down missing cars. As such, Graphé claimed a finder's reward according to section 10, paragraph 2 of Book 5 Civil Code, which states: "The finder who satisfies his liabilities is entitled to an equitable reward". The insurance company, to which the property of the stolen car had been transferred, contested this claim, arguing among others that the provision doesn't apply in this situation. According to the insurance company, the word "finder" in the provision has to be conceived as "finder by chance", as the purpose of the provision would be to reward only the true finder. Since Graphé was a company that professionally traces down missing cars, Graphé could not be qualified as "true finder" and shouldn't therefore be entitled to the finder's reward.

The Supreme Court threw the objection out in two steps. The Court first declared that, according to legal history, the provision aims to advance the recovery of lost property. The Court then states that a broad interpretation of the word "finding", corresponding to the linguistic meaning of "finding", squares with the provisional intention. Therefore, even when an object is not found by mere chance, but is traced down, this has to be qualified as "finding", and a company that professionally tracks down lost properties, should also be qualified for a finder's reward.

Here, the Supreme Court matches the French *Court de cassation* in succinctness. One can hardly speak of an explanation of the Court's legal reasoning. The Court simply states the alleged intent of the provision, notwithstanding that it is this intention that had been contested by the claimant. From this intent, the Court then infers that the word "finding" could well be understood according to common parlance, a reading that is the very interpretation the claimant seeks to contest. In its reasoning, the

⁵ HR 25 oktober 1996, *NJ* 1998, 16.

Court doesn't offer policy arguments of any kind and it makes no effort to present countervailing arguments or to address alternative points of view.⁶ This is even more remarkable, when we take into consideration that the Supreme Court had to determine the range of application of this provision for the first time after its enactment.⁷ Under these circumstances, one would have expected a comprehensive line of reasoning in order to foster judicial accountability and control, to encourage democratic debate and deliberation, and ultimately to establish judicial legitimacy.

3. Conclusion and ruling: bifurcation

How, then, should we assess the Court's argumentation in light of the ideal of judicial legitimacy? If we take the Supreme Court's argumentation in isolation, it obviously doesn't meet the requirement of rationality, that is, the demands of transparency of reasons and accountability. But the Supreme Court's ruling doesn't emerge out of the blue. Its ruling is given within a procedural framework, which both confines and widens the scope of the very reasons which, explicitly or implicitly, underpin the Court's decision. Firstly, and mentioned above, the Court's ruling is published together with the Conclusion of the Advocate-General, the latter serving as a repository of arguments that support or complement the Court's argumentation. Secondly, the Court's judgment is intimately connected to the claimant's grievances: the Court settles a restricted dispute in appeal, but doesn't examine all legal facets of the case as such. I will return to this point later. Finally, the majority of the rulings of the Supreme Court, published in *Nederlandse Jurisprudentie (NJ)*, the Dutch version of the West Case Reports or *Recueil Dalloz*, are supplemented by academic *notes*: a short or comprehensive doctrinal comment on the ruling. These *notes* offer an appreciation of the Court's ruling by the country's most distinguished legal scholars, who not only hold high academic offices, but oftentimes act as deputy judge as well. As in France, the *notes* are part of the institutional framework of the Dutch judicial system, addressing the subtleties of the ruling and its legal underpinning. In this article, for reasons of space, I will nevertheless disregard the rôle of the *notes* in the Dutch judiciary system.

Firstly, I would like to examine to what extent the Conclusion of the Advocate-General contributes to the legitimacy of the Court's ruling of this case. After discussing thoroughly the treatment of the case in the previous courts and the claimant's grievances, Advocate-General Hartkamp considers, first of all, the grievance that interest us here: that professionally tracing down missing cars can never be qualified as "finding" in the context of the provision. This complaint is dismissed by Hartkamp on several grounds. He primarily rejects the complaint with an appeal to legal history, and combines this argument drawing on the ordinary meaning of the word "finding" (linguistic argument) and adding a consequentialist argument. He argues that the original enactment holds a definition of "finder" that doesn't comprise any clues to the intentions of the finder whatsoever. This viewpoint squares with the ordinary meaning of the word "finding", which also denotes the act of deliberately searching for an object. This viewpoint also corresponds with legislative intent. The provision aims, among others, to promote that the person who lost his property, will recover it as much as possible. To withdraw professional findings from the

⁶ These are some of the characteristics of form and discourse of the official French appellate decision. See Lasser 2004, 30-31.

⁷ See H.J. Snijders in his academic *note* of the decision.

provision would be at variance with the provision's purpose. Therefore, the provision is in need of a range of application as large as possible.

Hartkamp also appeals to a systematic argument. Legal history reveals that this provision can be conceived of as a particularization of caretaking: the finder serves, as it were, as caretaker manager. If the legal provision concerning finding wouldn't have existed, the finder would have been entitled for a reward in his quality as caretaker manager. In order to be qualified as caretaker manager, the law requires that the caretaker manager has acted professionally. Therefore, to exclude the professional finder from the provision, as the claimant contended, would be contrary to the more generic provision of caretaking.

Hartkamp ends his treatment with a linguistic argument. The claimant argued that decisive element in the concept of finding is the element of chance; therefore, only the true finder, not the professional one, can be qualified as finder. The grievance has been rejected by Hartkamp, because the professional finder is also subject to chance: even when an object is deliberately looked for, one cannot be certain where it will be found.

Both Supreme Court and Advocate-General arrive, then, at the same conclusion: "finding" in the context of the provision comprises also the act of professionally finding; and therefore, Graphé, the company that professionally traced down the stolen car, is entitled to the finder's reward, at least in principle. Both decisions are primarily justified by an appeal to legislative intent and a linguistic argument: the ordinary meaning of the word "finding". But whereas the Advocate-General took pains to argue for the alleged purpose of the provision, the Supreme Court only *stated* its purpose. It is theoretically possible, but not very likely, that the Court reached its judgment along different lines of reasoning than the Advocate-General. By not mentioning the grounds on which the Court determined the purpose of the provision, the Court seems to suggest that it agrees with the Advocate-General's explanation, all the more so since both discourses were published simultaneously. In this respect, the Conclusion of the Advocate-General supplements, as it were, the Court's own judicial reasoning. In so doing, the scope of the Court's own argumentation has expanded, resulting in a more transparent reasoning that contributes to ideals such as judicial control and accountability.

The assumption that the Advocate-General's reasoning supplements the Supreme Court's reasoning isn't as bold as one might expect. Sometimes, the Court doesn't justify its decision at all, but simply refers to the grounds stated in the Conclusion. In its ruling of January 15th 1999 (NJ 1999/574) the Court's ruling consisted of just one sentence, stating: 'The grievance fails on the grounds set out at numbers 8 till 17 of the Conclusion of the Public Prosecutor.' Here, it is plain that both opinion and grounds of the Court and Advocate-General concur. But in the vast majority of cases, the Court doesn't refer to the Conclusion at all. With regard to these cases, one might object, we can never *prove* whether or not the Court really agrees with the arguments, adduced in the Conclusion. But this objection does not seriously affect the thesis. The same holds for the argumentation of the Supreme Court itself, a body that consists of several members, but that is supposed to speak unanimously. Even when the judges of the Court agree upon the final ruling, they might differ in opinion which reasons best justify the ruling. They have to deal with these differences and have got to arrive at an argumentation that is acceptable for the majority of the judges. The judicial reasoning is, therefore, less the expression of the personal convictions of the judges, but a reasoning that, according to the judges, sufficiently justifies the ruling. It is this compromise that serves as justification for the ruling. The same holds for the Conclusion of the

Advocate-General. It is hardly relevant whether or not the Court would have framed a line of reasoning, similar to the Advocate-General's one. What matters is that the argumentation is considered to be sufficient.

4. The Court's argumentation from a procedural point of view

In order to assess the legitimacy of the Supreme Court's ruling properly, we not only have to take into consideration the bifurcation of the Court's judicial discourse, as we just did, but we must also consider what is contested, that is, one has to consider the Supreme Court's ruling in connection to the grievances that are raised against the sentence on appeal. Legal practice is, to quote Ronald Dworkin, an argumentative practice.⁸ Both the Court's decision and its justification are intimately connected to the argumentation that underpins the claimant's grievances. Seen from this angle, the Court's ruling in "Transvemij/Graphé" is less unsatisfactory than it seems to be at first. For if the point at issue is the proper meaning of a word, given the alleged purpose of the provision, the Court's judicial reasoning seems to go without a genuine justification: it just states a different provisional purpose, as would be evident from legal history, and it sustains this judgment with a single argument: the ordinary meaning of the word. But in many cases, the Supreme Court rejects the so called linguistic reading of a statute, appealing instead to systematic or historical arguments, legal principles or other substantial arguments.⁹ Why does the linguistic argument suffice in this case?

The answer is: it suffices given the procedural setting with regard to the particular grievances. Starting point of the claimant's grievance is the Court of Appeal's judgment that "finding" includes "professionally finding". This judgment had been justified drawing on legal history. The Court of Appeal thoroughly discussed the reasons why the provision had to be understood as a provision that aims to foster the recovery of lost property. The claimant objected to this judgment with just a single argument: the denotation of the word "finding" excludes "deliberatively searching". But given the ordinary meaning of "finding", which also comprises the situation of "deliberatively searching", and given the provisional purpose as determined by the Court of Appeal, it is not only obvious that the grievance had to fail, but also that a plain refutation suffices. As the Conclusion of the Advocate-General showed up, the provisional intent could also be justified with a systematic and a consequentialist argument. But the grievance, on the one hand, didn't oblige the Court to pursue its argumentation, while the bifurcation of the Supreme Court's discourse, on the other, justifies the Court's succinct argumentation, being supplemented by the comprehensive reasoning of the Advocate-General.

5. The Court's reasoning from a constitutional point of view

All this not only justifies, but also accounts for the succinct style of the judicial reasoning of the Dutch Supreme Court in this case. But there might be another cause that has influenced the Court's reasoning. This cause is connected with the constitutional position of the judiciary. Although we no longer speak of the judge as *bouche de la loi*, mouthpiece of the law, connected as this term is with the obsolete idea of mechanical

⁸ R. Dworkin, *Law's Empire*, London: Fontana Press 1986, p. 13.

⁹ See, among others, N. MacCormick & R.S. Summers, *Interpreting Statutes. A Comparative Study*, Aldershot etc.: Dartmouth 1991.

jurisprudence, it is still part of our political ideals, i.e. the ideal of the separation of powers, to demand that the judges have to administer justice *according to law*. The Dutch judicial system may be less rigid than the French model, but it deals with the same challenge: to maintain legislative supremacy while simultaneously encouraging and yet controlling judicial interpretive authority.¹⁰ One technique to uphold the judge's binding to the law while interpreting the law, is to settle the dispute according to what MacCormick and Summers have labeled 'legislative intention', that is, the intention, ascribed to the legislator as a supposedly ideally rational agent, uttering this statutory text with legislative intent in that historical, legal and political setting.¹¹ The more the judge made use of data which are independent of personal appreciation, the less the interpretation of a statutory text is supposed to be motivated by personal preferences. The hierarchy of types of arguments, as proposed by MacCormick and Summers, is based on this assumption. The words of a statutory rule belong to the alleged 'objective data', as well as legislative intent as appears from *travaux préparatoires*. Politico-moral values and principles of law, on the other hand, are supposed to be less objective, for the determination of these data demands judgment.

Regarded from this perspective, it is understandable that the Supreme Court was inclined to confine its reasoning to these two arguments: the ordinary meaning of the word 'finding' and legislative intent as appears from the *travaux préparatoires*. The Supreme Court could have made use of more substantive arguments, but in so doing the decision would have seemed to be less objective.

6. Conclusion

The style of the Dutch Supreme Court both resembles and differs from the French *Court de cassation*. It resembles the *Court de cassation* in style (collegial), and in some cases also in tone (magisterial) and form (syllogistic). The main difference between both Courts concerns the publicity of the Conclusion of the Advocate-General. In the Dutch judicial system, the often extensively motivated Conclusion and the Court's ruling are published simultaneously. As the Conclusion advises the Supreme Court how to decide the case, both discourses should be read in connection. As such, the Conclusion serves as a repository of arguments that supplements or complements the Court's ruling.

The analysis of the above discussed case also suggests that the concise reasoning of the Dutch Supreme Court could be prompted by procedural considerations, rather than the urge to uphold the official portrait of formalist judicial application of codified law.

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¹⁰ Lasser 2004, p. 300.

¹¹ MacCormick & Summers 1991, p. 515, 522.

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