ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT IN THE DUTCH LEGAL ORDER

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1 Introduction: the Dutch debate on access to justice

'Access to justice' has long been neglected as a potential subject for discussion in the Netherlands. With regard to criminal law and civil law, the independent and impartial administration of justice was provided for by virtue of the Constitution and 'organic' laws (laws which are required by the Constitution and which govern the organization of the State), amongst other things. The guarantees provided by Article 6 of the European Convention on Human Rights(hereinafter ECHR) were considered to be amply available in the Dutch legal order. With regard to administrative law, for reasons of principle no choice had been specifically made at the end of the last century for the administration of justice. For a long time there were several different forms of independent administration of justice (mostly special administrative courts) and of appeal to a higher administrative body (*administratief beroep*), such as the Council of State and the provincial executive on a decentralized level, and the Crown on the central level.[1] Influenced by the case-law of the European Court of Human Rights, in the mid-eighties a debate developed in the Netherlands concerning the realization of access to justice. This debate

1. See J. van der Hoeven, De drie dimensies van het bestuursrecht; ontstaan en vorming van het Nederlands algemeen bestuursrecht [Three Dimensions of Administrative Law; the Origins and Development of General Administrative Law in the Netherlands], VAR Series 100, Alphen a/d Rijn, 1989; E.M.H. Hirsch Ballin, Het grondrecht op behoorlijke rechtspraak in het Nederlandse administratieve recht [The fundamental right to the proper administration of justice in Dutch Administrative Law], Handelingen NJV 1983, Zwolle, 1983.

started as a result of the *Benthem* case.[2] Although discussion about the desirability of *administratief beroep* in administrative cases had already commenced shortly before this decision, it made clear that the Dutch approach to the administration of justice in administrative cases was at odds with the right of access to justice as laid down in Article 6 ECHR.[3]

Ultimately these developments led to the introduction of a general procedure for the administration of justice in relation to administrative cases by means of the General Administrative Law Act (hereinafter GALA) in 1994; the abolition of the *administratief beroep* as an alternative to the administration of justice by administrative courts became a fact. With this, the debate on the realization of legal protection against administrative bodies came to an end, after well over a century of discussion.

The right of access to justice has not been laid down as a constitutional right as such. The Dutch legal order also does not provide for constitutional review. Both factors contribute to the absence from case-law of the right of access to justice. During the course of this century the ordinary courts assumed jurisdiction in cases against the administration on the ground of tort law and claims such as undue payment. This case-law finally laid the foundations for a system on the basis of which everyone has access to the ordinary courts in order to resolve a dispute involving the administration and/or administrative action, unless an equally effective special judicial process supported by sufficient safeguards exists.[4] The relationship between the civil courts' jurisdiction and the competence of the administrative courts still needs to be decided upon by the Supreme Court.

In recent years the debate about access to justice has also led to discussions on the accessibility of justice and the administration of justice having regard to the costs involved. During the 1960s the issue of the costs of legal assistance by lawyers was a subject of heated discussion. This resulted in the creation of law polyclinics,[5] as an extension of which the so-called *sociale-*

2. European Court of Human Rights, 23 October 1985, Benthem v. The Netherlands, Series A, vol. 97, NJ 1986, 102.
3. G.J. Wiarda, De betekenis van art. 6, lid 1 van het Europees Verdrag tot bescherming van de Rechten van de Mens, voor de Nederlandse administratieve rechtsgangen [The Significance of Article 6 (1) of the European Convention on Human Rights to the Administration of Justice in Dutch Administrative Law in: Non sine causa, Opstellen aangeboden aan Prof. mr. G.J. Scholten, Zwolle, 1979, p. 459-474.
4. Supreme Court, 28 February 1992, AB 1992, 301, (Changoe/Staat).
5. Legal advice centre for the indigent and people of limited means, run by students under the supervision of university staff.

advocatuur (literally, the 'social bar', i.e., legal-aid lawyers) developed.[6] In the 1990s the government cut the legal-aid budget, resulting in the disappearance of the *sociale advocatuur*. In addition, the length and costs of proceedings have increasingly become the subject of debate. In criminal procedural law, the case-law of the European Court of Human Rights on 'undue delay' has led to the acceleration of proceedings. In civil procedure, experiments are being conducted with more expeditious proceedings, and the case-law of the Supreme Court is characterized by a tendency to deformalize. Alternative Dispute Resolution is also receiving increasing interest.[7]

In legal practice, interim injunction proceedings play a significant part in civil proceedings and pre-trial remedies in administrative cases. With respect to time, subject matter and available remedies, civil courts have given a wide interpretation to their jurisdiction in interim injunction proceedings. The result is that the collection of debts often takes place by means of interim injunction proceedings and fundamental points of law can be brought before the courts within a relatively short time.

This has been a comparatively short introduction to the Dutch debate on access to justice. In this article there will be a further examination of the following subjects: the formal basis of the right of access to justice in the Dutch legal order (§ 2) and the substantial difficulties in its realization (§ 3). The article will end with a conclusion (§ 4).

2 Formal protection of the right of access to justice

2.1 Protection by the Dutch Constitution

Article 15 (2) of the Dutch Constitution reads:

> 'Anyone who has been deprived of his liberty other than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down by Act of Parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful'.

6. J.C. Houtappel, Access to justice in Holland, A summary, in: M. Cappelletti & B. Garth (eds), Access to justice, Vol. I, A world survey, Book II, Leiden 1978, p. 581-594; P.J. Verberne, Leemte in de rechtshulp blijft nog even [The lacuna in Legal Aid Advice will remain in the near future], Proces 1975, p. 122-125.
7. See N.J.H. Huls, M.A. Kleiboer & H.J. de Kluiver (eds), Alternatieve wegen naar het recht [Alternative Ways to Justice], Nijmegen, 1997.

This provision, the principle of *habeas corpus*, finds its counterpart in Article 5 (4) of the European Convention on Human Rights (ECHR) and Article 9 (4) of the International Covenant on Civil and Political Rights (ICCPR).

Article 17 of the Dutch Constitution reads:

> 'No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law'.

This so-called *ius de non evocando* was adopted in 1983 in Chapter 1 of the Constitution, which deals with fundamental rights. Before 1983 this provision had been placed in the Chapter on the judiciary. Article 17 contains a negatively formulated guarantee of access to justice.[8]

Some authors have argued for a restrictive interpretation of Article 17,[9] but a stand against this narrow approach can be found in the recognition of this right as a fundamental right by the constitutional legislator in 1983, when it was placed in Chapter 1 of the Constitution.[10]

The meaning of Article 17 was discussed on the occasion of the approval by Parliament of the Eems-Dollard Treaty between the Netherlands and Germany. The result of this treaty was that in certain circumstances interested parties could no longer rely on access to relevant procedures, partly because German administrative law does not provide for access to the courts for interested Dutch parties. The outcome of these parliamentary debates appears to be that Article 17, unlike Article 6 ECHR, does not contain the right of access to a court. Article 17 requires that existing access to the courts must not be frustrated.[11]

Article 17 provides a guarantee against the executive power and the ordinary legislator, not against the formal legislator (the Government and Parliament introducing Acts of Parliament). Restricting access to the courts by the formal legislator is not forbidden by Article 17.[12]

8. See A.F.M. Brenninkmeijer, De toegang tot de rechter [Access to court], dissertation Tilburg, Zwolle 1987, p. 71. See also Hirsch Ballin 1983, p. 18.
9. See Van der Pot/Donner/Prakke, Handboek van het Nederlandse staatsrecht [Guide to Dutch Constitutional Law], Zwolle, 1995, p. 315.
10. See Brenninkmeijer 1987, p. 73.
11. See A.W. Heringa and T. Zwart, De Nederlandse Grondwet [The Dutch Constitution], Zwolle 1991, p. 77.
12. See Tj. Gerbranda & M. Kroes, Grondrechten-Evaluatie-Onderzoek [Evaluational Research into the Application in Practice of the Constitutional Rights in the 1983 Constitution], Documentatierapport (4), 1991, aant. 17-15.

Article 18 of the Constitution reads:

> '1. Everyone may be legally represented in legal and administrative proceedings.
> 2. Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament'.

The right to legal aid is a fundamental right with classical (see paragraph 1) and social elements (see paragraph 2). Article 18 (1) is only applicable in court proceedings.

The guarantee provided by Article 18 (2) has been elaborated in the Legal Aid Act 1993 (*Wet op de Rechtsbijstand*). Persons under a certain income have the right to legal aid according to this act. Depending on their income, they must pay a so-called *eigen bijdrage* (personal contribution) for the legal aid. The legal aid is free when the court, according to a legal provision (mainly in the field of criminal law), assigns a lawyer to the person concerned.

Article 112 of the Constitution reads:

> '1. The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.
> 2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament'.

This Article has been placed in Chapter 6 of the Constitution, which deals with the judiciary. It does not contain a subjective right of access to a court.

Article 113 (1) and (3) of the Constitution read:

> '1. The trial of offences shall also be the responsibility of the judiciary. (...)
> 3. A sentence entailing deprivation of liberty may be imposed only by the judiciary'.

The conclusion must be that the Dutch Constitution does not provide for a subjective right of access to a court, except for the person who has been deprived of his liberty other than by court order.

2.2 Protection by treaty provisions

The subjective right of access to a court is protected by international treaties to which the Netherlands is a party. It is protected in particular by Articles

5 (4), 6 (1) and 13 ECHR and Article 14 ICCPR. On the basis of Articles 93 and 94 of the Constitution these provisions form part of Dutch law, and they can be invoked by citizens before the courts as far as these provisions are 'self-executing'. Article 6 ECHR especially has proved to be very important for access to justice in the Netherlands. However, Article 6 is not self-executing in as far as the creation of a *new* competence of the judiciary is concerned.[13] Article 6 (1) provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

In its early case-law the European Court of Human Rights decided that the right of access to a court is contained in Article 6, although the text of this provision is not explicit on this point.[14] According to the Court, restrictions can be imposed on access to a court but these restrictions may not impair the *essence* of the right of access to a court.[15] This right must also be *effective* according to the judgment in *Airey v. Ireland*. Ms. Airey wanted to divorce her violent husband. However, she was factually not able to commence court proceedings because of the fact that she did not have enough legal knowledge to litigate. As she did not have sufficient means to pay for a lawyer and there was no legal aid available, she did not have *effective* access to justice. The European Court found that a violation of Article 6 (1) had occurred.[16]

The Strasbourg case-law on Article 6 ECHR has largely influenced the access to justice in Dutch law. The Dutch legal system had, apart from particular courts dealing with administrative disputes, a long tradition of appeal to a higher administrative body instead of the judiciary. This appeal concerned environmental permits, local plans, compulsory military service

13. Supreme Court, 18 February 1986, NJ 1987, 62 and Supreme Court, 30 January 1996, NJ 1996, 288.
14. European Court of Human Rights, 21 February 1975, Golder v. United Kingdom, Series A, vol. 18, NJ 1975, 462.
15. European Court of Human Rights, 24 October 1979, Winterwerp v. The Netherlands, Series A, vol. 33, NJ 1980, 114.
16. European Court of Human Rights, 9 October 1979, Airey v. Ireland, Series A, vol. 32, NJ 1980, 376.

matters and social security. In the Netherlands, unlike Germany, for reasons of principle no choice had been specifically made in favour of the judiciary. During the course of this century, the legal protection of citizens against the government was formed partly on the basis of tradition and partly on the basis of pragmatic considerations. Appeal to a higher administrative body was considered an alternative of full value for the independent judiciary. The European Court's *Benthem* judgment in 1985 shook this Dutch conception of legal protection against the government. After a temporary provision in order to adhere to this Strasbourg judgment, in 1994 the Netherlands finally adopted a system of general protection by the courts against the administration.

Also relevant for access to the courts is the fact that the Netherlands is a member of the European Union. In the field covered by Community law, the European Court of Justice (hereinafter ECJ) requires an 'effective judicial control' or an 'effective appeal to a competent court' at the national level. This so-called principle of 'effective legal protection' is, in the opinion of the ECJ, the foundation of the common constitutional heritage of the Member States, and is also based on Articles 6 and 13 ECHR.[17] The ECJ even gives, under certain circumstances, precedence to the principle of effective legal protection at the expense of national constitutional principles, such as the separation of powers and the sovereignty of parliament. As more and more fields are covered by Community law, the significance of this ECJ case-law is also increasing for the Netherlands.[18]

An interesting consequence of Community law is the application of this law by the courts *ex officio*. This question has been partly clarified by the

17. ECJ, 15 May 1986, Johnston (222/84), ECR 1986 (1651), § 18. See also the ECJ case, 15 October 1987, Heylens e.a. (222/86), ECR 1987 (4097), § 11. Compare, for the role of national judges in the implementation of community law, S. Prechal, Directives in European Community law, A study on EC directives and their enforcement by national courts, dissertation University of Amsterdam, Amsterdam 1995, mainly p. 145-187.

18. Compare the reports for the Vereniging voor Administratief Recht [Association for Administrative Law] of E. Steyger, R.J.G.M. Widdershoven and A.W.H. Meij, Europees recht en het Nederlands bestuursrecht [European Law and Dutch Administrative Law], VAR Series 116, Alphen aan den Rijn, 1996. See also W. van Gerven, Bridging the gap between community and national laws: towards a principle of homogeneity in the field of legal remedies?, Common Market Law Review 1995, p. 679-702; R. Caranta, Judicial protection against member states: a new jus commune takes shape, Common Market Law Review 1995, p. 703-726. See also R. de Lange & R. Widdershoven, Niederlande [The Netherlands], in: J. Schwarze (Hrsgb.), Das Verwaltungsrecht unter europäischem Einfluss, Baden-Baden, 1996.

judgments in the cases of *Van Schijndel,*[19] *Peterbroeck*[20] and *Kraaijeveld.*[21]

2.3 Protection by statute

The right of access to a court has been elaborated in so-called 'organic laws'. This mainly concerns the Code of Civil Procedure, the Code of Criminal Procedure and the GALA. With regard to legal protection against the government, a very important fact is that the courts in civil matters have a very broad perspective of competence, dating from a judgment of 1915: whenever the applicant requests protection as regards a civil right against the government, the civil courts are deemed competent to deal with the case.[22]

Thanks to this wide competence of the civil courts, the right of access to a court in disputes with the government is formally not a problem. Since 1994, with the entry into force of the GALA, the practical significance of this wide competence of the civil courts has diminished. The conclusion must be that the general administrative law and the civil courts together provide general access to justice in disputes with the government.

In administrative disputes the scope of judicial control is restricted to 'orders'. According to Article 1:3 GALA, an order means a written ruling of an administrative authority constituting a judicial act under public law. The majority of these orders are decisions, which are orders not of a general nature, directed against individual persons. The GALA is not applicable to Acts of Parliament. The general administrative court is competent vis-à-vis decisions, with the exception of an order containing a generally binding regulation or a policy rule. In 1994, upon the entry into force of the GALA, there was provision for an extension of appeal against these rules in 1999. However, it is likely that this extension will be delayed.[23] The effect of this delay is restricted. Firstly, indirect appeal against generally binding regulations or policy rules is always possible. Secondly, the civil courts deal with direct appeals against these rules. The civil courts are deemed competent

19. ECJ, 14 February 1995, ECR 1995 I-4705, joint cases C-430/93 and C-431/93.
20. ECJ, 14 February 1995, ECR 1995 I-4599, case C-312/93.
21. ECJ, 24 October 1996, ECR 1996 I-5403, zaak C-72/95.
22. Supreme Court, 31 December 1915, NJ 1916, 407 (Guldemond/Noordwijkerhout).
23. See the note by the Minister of Justice, offered to Parliament by letter of 13 May 1997, TK 1996-1997, 25 383, no. 1. See for criticism of this delay, J.E.M. Polak, Rechtstreeks beroep tegen algemeen verbindende voorschriften en beleidsregels bij de bestuursrechter: voorlopig van de baan? [Direct appeal to the administrative courts against generally binding regulations and policy rules: provisionally cancelled?], Trema 1997, p. 269-272.

to consider these disputes with the government within the bounds of an unlawful act by the government according to Article 6:162 of the Civil Code (*onrechtmatige overheidsdaad*).

3 Substantial difficulties in the realization of the right of access to justice

3.1 Scope of judicial review

In deciding a dispute at hand, Dutch courts can review a case for conformity with basically all legal norms. Treaties and resolutions of international institutions are at the top of the Dutch hierarchy of legislation. These are followed by the Charter for the Kingdom of the Netherlands,[24] the Constitution, Acts of Parliament, Orders in Council, ministerial regulations, provincial bye-laws and municipal bye-laws. The fundamental legal principles which are partly codified as general principles of proper administration in the GALA form a separate category of norms in the light of which Dutch courts can review a case.

A limitation of the scope of judicial review concerns Acts of Parliament. Article 120 of the Constitution denies a court the authority to review the contents and the method of the coming into being of Acts of Parliament for conformity with the Constitution (which lists, among other things, a catalogue of fundamental rights and freedoms) and the fundamental legal principles. Dutch courts are also precluded from reviewing Acts of Parliament by reference to the Charter of the Kingdom.[25] Review of this kind has been exclusively reserved for the formal legislator (joint exercise of legislative power by the government and Parliament). This prohibition of judicial review has been dictated by the separation of powers doctrine. The elected legislator's will should prevail over the will of the non-democratically legitimized courts.[26] The judiciary should be prevented from occupying the legislator's chair. An exception to the prohibition of judicial review to test conformity with fundamental legal principles will only be likely to occur if strict application of the Act would have (legal) consequences which have not been taken into account when drafting the Act and which are contrary to

24. Constitution for the Kingdom of the Netherlands (the Netherlands, the Netherlands Antilles and Aruba).
25. See Supreme Court, 14 April 1989, NJ 1989, 469 (Harmonisatiewet); Supreme Court, 27 January 1961, NJ 1963, 248 (Van den Bergh/Staat; prohibition of procedural review).
26. See Article 11 Act on General Provisions concerning Legislation.

these principles.[27] Dutch courts do have jurisdiction to review laws of a lower order for conformity with the Constitution and fundamental legal principles.[28] The prohibition of judicial review is controversial. Several attempts have been made to strike out Article 120 of the Constitution so as to make possible the judicial review of Acts of Parliament to test their conformity with the Constitution and fundamental legal principles.[29]

In practice, however, the effects of the prohibition of judicial review as laid down in Article 120 of the Constitution are limited. Acts of Parliament are not unassailable for the courts. The reason for this is that according to Articles 93 and 94 of the Constitution the Dutch courts are competent to review Acts of Parliament in the light of self-executing provisions of treaties and of binding resolutions of international organizations. If a court discovers that such a provision has been violated it is even under a duty to deny application to national law. In particular, judicial review to test conformity with provisions of treaties on human rights, such as the ECHR and the ICCPR, has evolved considerably, following a slow start, since 1980.[30] As a result of this review, Dutch courts have actively set aside national law in many cases.[31] In some cases, however, courts have left unanswered the question whether there actually has been a violation of ECHR or ICCPR provisions and have concluded that the legislator and not the courts should come up with a solution, as this would go far beyond the latter's traditional role in the development of law. As a consequence, the parties involved were sent home empty-handed. One could wonder whether such cases do not

27. Supreme Court, 14 April 1989, NJ 1989, 469 (Harmonisatiewet).

28. See Supreme Court, 16 May 1986, NJ 1987, 251 (Landbouwvliegers); Supreme Court, 17 October 1993, NJ 1994, 44 (Legesverordening Beerta).

29. See e.g. L. Prakke, T. Koopmans, J.M. Barendrecht, Toetsing [Judicial Review], Handelingen NJV 1992, Zwolle, 1992; Op weg naar constitutionele toetsing [Towards Constitutional Review], Special issue NJCM-Bulletin, April 1992; M.L.P. van Houten, Meer zicht op wetgeving [A better View on Legislation], dissertation Tilburg, Zwolle, 1997.

30. See e.g. E.A. Alkema, The effects of the European Convention on Human Rights and other international human rights instruments on the Netherlands legal order, in: R. Lawson & M. de Blois (eds), The dynamics of the European protection of human rights, Essays in honour of Henry G. Schermers, Dordrecht/Boston/London, 1994, p. 1-14.

31. See e.g. Supreme Court, 17 September 1993, NJ 1994, 373 and Judicial Division of the Council of State, 16 June 1994, NJCM-Bulletin 1994, p. 981-988.

constitute an instance of denial of justice[32] and whether one can still speak of effective access to justice.[33]

EC law also heavily influences the limitation of the scope of the constitutional prohibition of judicial review. On the basis of the case-law of the ECJ, national courts are under a duty to apply directly applicable provisions of EC Law in their national legal order and to give priority to these Community law provisions. This obligation implies that Article 120 of the Constitution has lost its importance in relation to Community law.[34]

A limitation of the scope of judicial review is also basically to be seen with regard to the relationship between (administrative) courts and the administration. The legislator may award the administration discretionary freedom when applying administrative powers. In such a case it is up to the administration to decide whether and how to use its powers on the basis of balancing interests. The basic assumption is that a court needs to respect such an administrative balancing act, and that it should not replace the administrative body's decision with its own. This reserved attitude of the judiciary has been advocated (also) by appealing to the Trias Politica: the administration should not be 'taken over' by the courts when it has explicitly been granted discretionary freedom by the legislator. However, the administration does not enjoy an absolute freedom in such cases, for the Dutch courts quite soon developed the so-called arbitrariness test. In 1949 the Supreme Court decided that:

> '...there could be reason to intervene, if the requisition [of living accommodation; tb/afmb/mlve] was to be viewed as an arbitrary act; that there is such an act as must be assumed that the requisitioning authority could not have reasonably decided to requisition considering the interests that had to be taken into account, and therefore a weighing of these interests must be assumed not to have taken place...'[35]

32. By virtue of Article 13 Act on General Provisions concerning Legislation, the Dutch courts are under a duty to decide cases once they are brought before them.
33. See e.g. Supreme Court, 23 September 1988, NJ 1989, 740 and Supreme Court, 4 November 1994, NJ 1995, 249 and Supreme Court, 5 September 1997, RvdW 1997, nr. 159C (Adoption by lesbian mothers).
34. ECJ, 5 February 1963, Van Gend en Loos (26/62), ECR 1963 (3); ECJ, 15 July 1964, Costa/ENEL (6/64), ECR 1964 (1199).
35. Supreme Court, 25 February 1949, NJ 1949, 558 (Doetinchem). On this subject see F. Stroink, Judicial control of the administration's discretionary powers (le bilan executif – juge administratif), in: A.W. Heringa et al. (eds), Judicial control, Comparative essays on judicial review, Antwerpen/Apeldoorn, 1995, p. 81-99 on p. 82.

It follows that the arbitrariness test is concerned with a marginal judicial review. This so-called prohibition of arbitrariness, among other things with respect to the use of discretionary freedom, was later laid down in Article 8 (1) (c) of the Administrative Jurisdiction Administrative Decisions Act as a 'ground for appeal and judicial review'. In practice also, the impact of this marginal review has been considerable, as it has been intensified over the course of time in the interest of the legal protection of the civilian against the authorities. This finds expression in Article 3:4 (2) GALA, which replaces the aforementioned Article 8 (1)(c) Administrative Jurisdiction Administrative Decisions Act. Article 3:4 (2) GALA incorporates the principle of proportionality: 'The disadvantages for one or more interested parties must not be disproportionate to the ends which are to be served by the decision'. This principle appears to offer the courts better prospects for reviewing administrative action than the criterion of arbitrariness. The Judicial Division of the Council of State, however, has stated that the scope of Article 3:4 GALA will not be wider than the scope of the prohibition of arbitrariness as developed in case-law in relation to the review of discretionary powers.[36] The review to test for conformity with the principle of proportionality will only be of more significance when a review of (punitive) sanctions is concerned.[37] Yet in practice the courts have in recent years taken over more and more administrative responsibilities.[38] Criticism has not been lacking. In particular, the legitimacy of such a judicial attitude has been identified as problematic. Only recently the Dutch judiciary had to endure an attack from members of the administration. The courts were said to be interfering too much with the administration and thereby frustrating efficient government.[39]

In view of the available instruments, it is not surprising that the Dutch courts have managed to acquire a strong position compared with the legislator and the administration. In this respect a part has also been played by the judiciary's point of view that in order to protect civilians a counterbalance needs to be made against the legislator and the administration, as the latter two powers have started to intervene in more and more fields of society, owing to the rise of the welfare state.[40]

36. Judicial Division Council of State, 9 May 1996, AB 1997, 93 (Maxis/Praxis).
37. Judicial Division Council of State, 4 June 1996, JB 1996, 172.
38. See Stroink 1995, p. 83-89.
39. See e.g. the special issue of the NTB 1997, no. 1 and of Justitiële Verkenningen 1997, no. 5 with contributions from both 'sides'.
40. See e.g. T. Koopmans, De rol van de wetgever [The Role of the Legislator], in: Honderd jaar rechtsleven, De Nederlandse Juristenvereniging 1870-1970, Zwolle, 1970.

3.2 Right to appeal

The right of appeal, in the sense of proceedings in two instances, has not been embedded in the Dutch Constitution.

However, the Seventh Protocol to the ECHR incorporates a right to appeal in Article 2. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher court, although the second paragraph of Article 2 Seventh Protocol does allow for exceptions to be laid down by law in relation to offences of a minor character and with respect to cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. The Seventh Protocol entered into force in 1989, but has not been ratified by the Netherlands. Precisely the fact that the Protocol incorporates a right to appeal in criminal cases appears to be one of the factors behind the withholding of ratification. Given the vagueness of the concepts implied by 'tribunal' and 'criminal' and the dynamic Strasbourg case-law on the subject, which has not yet fully taken shape, opponents of ratification fear an undesired extension of the right to appeal, to include a number of extrajudicial impositions of sanctions (social security law, disciplinary law). With regard to the judicial imposition of sanctions in respect of the more serious offences, no problems appear to arise in the Netherlands: in such cases a right to appeal is always provided for in accordance with Article 2 Seventh Protocol.[41]

The Netherlands is, however, bound by Article 14 (5) ICCPR, in which a similar right to appeal in criminal cases is laid down: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.' The words 'tribunal' and 'criminal' appear to be unambiguous in the context of the treaty: they refer to the judicial imposition of sanctions.[42]

Thus outside the field of judicial imposition of sanctions, no fundamental right to appeal has been recognized in the Dutch legal order.

Nevertheless, generally speaking the possibility of appeal (hearings at two instances) is allowed not only by criminal procedural law but also by civil procedure and administrative procedural law.[43]

41. See C.W. Dubbink's recommendations to the Dutch government regarding the ratification of the Seventh Protocol, NJCM-Bulletin 1995, p. 439-461.
42. See the aforementioned recommendations by C.W. Dubbink.
43. With respect to criminal procedure, see Articles 404-455 Code of Criminal Procedure; on civil procedure, see Articles 332-358 Code of Civil Procedure; on administrative procedure, Article 37 Council of State Act and Article 18 Appeals Act.

The legislator is, however, at liberty to deviate from this basic rule or to attach conditions to the right to appeal. This has happened, for example, in tax law. After the proceedings at first instance in the Tax Division of the Court of Appeal, the only procedure remaining in such cases is often the cassation procedure at the Supreme Court.[44] However, this court does not examine the factual circumstances of the case. The review of the Supreme Court is confined to a review to test conformity with legal norms.[45] A similar system is now employed in relation to the hearing of less serious traffic offences. In order to promote efficiency, the hearings of these cases has been diverted from the criminal justice system to the administrative justice system by the so-called *Wet Mulder*, simultaneously ruling out the possibility of appeal.[46] Article 56 (5) of the Judicial Organization Act has also precluded appeal against the decisions of the District Court in relation to a number of (less serious) offences. The cases have to concern persons who at the time of the commencement of the prosecution have reached the age of 18 years. In disputes concerning the dissolution of a contract of employment, both appeal and cassation are basically excluded by virtue of Article 7:685 (11) of the Civil Code.[47] An exception to this rule will only be accepted when the article has been wrongly applied, has unjustly not been applied[48] or in the case of such a violation of fundamental legal principles that the proceedings can no longer be qualified as fair and impartial.[49] Furthermore, no appeal can be lodged in disputes in which the Subdistrict Court has jurisdiction (civil cases, claims up to Dfl. 5,000) and when the claim amounts to less than Dfl. 2,500.[50] Partly due to the absence of a general right of appeal, when amending the Aliens Act in 1993 the Dutch legislator was also able to abolish the right to appeal in cases governed by this Act. Litigation in this field of law was said to take up too much time and the possibility of abusing the right of appeal in order to prolong the stay was

44. See Article 71 Judicial Organization Act in connection with Article 26 General Tax Act and the Administrative Jurisdiction in Tax Cases Act.
45. Article 99 Judicial Organization Act.
46. See Act on the Administrative Enforcement of Traffic Regulations; for criticisms see M. Viering & J. Fleuren, Onschuldpresumptie en recht op hoger beroep: twee grenzen aan vereenvoudigde afdoening [The Presumption of Innocence and the Right to Appeal: Two Limits to Simplified Settlement], NJB 1986, p. 416-464.
47. However, recent developments point towards the introduction of the right to appeal in these cases (De Volkskrant, 24 October 1997).
48. Supreme Court, 12 March 1982, NJ 1983, 181.
49. For example, Supreme Court, 4 March 1988, NJ 1989, 4.
50. Article 38 Judicial Organization Act.

also taken into account.[51] This decision led to a great deal of criticism. Why should aliens be denied the right to appeal in cases involving questions of vital importance while in other cases, in which much lesser interests are at stake, the right to appeal has been given as standard practice? As a result of the aforementioned criticism, the Cabinet has now introduced a Bill which proposes the partial reintroduction of appeal in cases concerning aliens. Whether Parliament will eventually accept the Bill has to be awaited.[52]

3.3 Procedural elements relevant to the effectiveness of the right of access to justice

3.3.1 Court registry fees

In the Netherlands, court registry fees differ enormously depending on the kind of court proceedings in question. They can range from about Dfl. 50 to several thousands of guilders.[53] The government is free to restrict access to justice by charging registry fees, provided that this does not impair the essence of the right of access to a court.

The charging of registry fees with the aim of slowing down ill-considered and malevolent appeals to the court satisfies the requirements of Article 6 ECHR. It is doubtful whether the charging of registry fees solely out of budgetary motives is justified.[54] A court registry fee which is too high can form an impediment to access to justice in a concrete case.

In Article 8:41 GALA certain registry fees are fixed for groups of cases. In some cases, like social security, the registry fee is Dfl. 50, while in other cases a fee of Dfl. 200 is required. In practice, this fee of Dfl. 200 is found to be too high by many people. Article 8:41 GALA does not provide for the possibility of mitigating the registry fee if the individual concerned is not able to pay the total amount of the fee because of personal circumstances.[55]

However, in a judgment by the President of a District Court the petitioner, a legal person with environmental objectives, was not able to pay the court registry fees (according to Article 8:41 GALA legal persons have to pay a registry fee of Dfl. 400). The President was of the opinion that the payment

51. Article 33e Aliens Act in connection with Article 37 Council of State Act; Recommendations by the Supreme Court with respect to migration cases of 14 March 1995, NJCM-Bulletin 1995, pp. 606-615, annotation by A. Woltjer.
52. Stcrt. 171, Monday 8 September 1997; NJB 1997, p. 1575.
53. See C.C.W. Lange, De toegang tot de rechter in het geding [Access to the Courts under discussion], NJB 1996, p. 1009-1016, on p. 1010.
54. Lange 1996, p.1012.
55. Lange 1996, p. 1009 and 1013.

of this amount could not be required from this legal person, particularly in view of Article 6 ECHR; otherwise rapid access to the courts would be impossible. According to the President the petitioner had to pay only Dfl. 200.[56]

Furthermore, an additional impediment to the access to justice can arise because of a cumulation of registry fees, if separate appeals must be made against different parts of the same order.[57] In this way the access to justice can be hindered in an unacceptable way and the registry fees required can violate Article 6 ECHR.

3.3.2 The requirement of a procurator (litis)

Civil proceedings can be commenced by petition or by writ of summons. In the procedure before the Subdistrict Courts these counts are competent to deal with claims under Dfl. 5,000) a form was introduced by way of experiment, in order to give a party the opportunity to commence civil proceedings without the assistance of a lawyer. However, this form was not found to be a success, because the execution of judgments was often problematic.

In civil proceedings before the Subdistrict Courts no procurator (*litis*) is required. At the moment the system of requiring a procurator (*litis*) is under review. One very important proposal is to raise the limit of the courts' competence to Dfl. 25,000 guilders. The idea is that 90% of all claims involve a smaller amount than this. Another proposal is to simplify civil proceedings, so that the institution of proceedings without procedural representation is possible.[58]

In criminal proceedings there is a system of legal aid by counsel. In administrative proceedings there is, in principle, no obligatory procedural representation.

3.3.3 Personal contribution and lawyers' fees

Only some lawyers charge relatively low tariffs for their services, ranging from Dfl. 150 to Dfl. 175 per hour. These lawyers mainly originate from the 'social bar'. Much of the primary legal aid is now provided by Legal Assistance Centres (*Buro's voor Rechtshulp*). Here the first 30 minutes of consultation are free of charge and the next two hours cost Dfl. 30.

56. See President of the District Court of Assen, 21 March 1994, NJCM-Bulletin 1995, pp. 28-34. See also District Court of Groningen, 13 February 1996, JB 1996, 179.

57. P. Nicolaï, Het nieuwe bestuursprocesrecht [The new procedural administrative law], VAR Series 112, Alphen aan den Rijn, 1994, p. 131.

58. Gericht verplicht [Report on the necessity of procedural representation], July 1997.

Thereafter a so-called 'personal contribution' is required. Free legal aid is given by several law polyclinics, mainly financed by private funds.

The possibility cannot be excluded that the so-called personal contribution (*eigen bijdrage*) on the basis of the Legal Aid Act 1993 can form an impediment to access to justice, especially if the case is one in which legal aid is required.

Research has shown that since the entry into force of the Legal Aid Act in 1994 the use of legal aid financed by the government has declined dramatically. The conclusion is that people with the least financial capacity generally do not encounter problems in receiving financed legal aid. The greatest problems are encountered by people with a modal income. On the basis of the Legal Aid Act they often do not have (or have lost) the right to financed legal aid. One must fear that in a substantial number of cases many people from this middle-income group will refrain from lodging an appeal to the court purely on the ground of financial motives.[59]

3.3.4 Compulsory representation

Persons who lack legal capacity according to national law (minors and persons subject guardianship) cannot institute *civil* proceedings themselves; their legal representative must do this for them.

In Dutch law a minor does not have the possibility of going to court independently. This restriction is not explicitly stated in the Civil Code, but can be concluded from Article 1:245, which states that the parents represent their child in civil matters. If a minor wishes to commence proceedings he or she is dependent on the goodwill and cooperation of his/her legal representatives. In case of conflicting interests between a minor and his/her parents, the child can request the Subdistrict Court to appoint a special guardian (*bijzonder curator*), who will then represent the minor: a disguised, but not autonomous access to the courts. Furthermore, the minor cannot appeal against a decision of the Subdistrict Court not to appoint a special guardian.

There are some exceptions to this procedural incapacity of minors. Minors have sometimes been declared admissible in their claims in summary proceedings, when the urgency of the case meant that there was not enough time to wait for the appointment of a special guardian. These cases generally involved older minors (16, 17 years). In cases of access, children of 12 years and older have a so-called informal access to the court. The court is not obliged to do anything as regards such a request and the minor cannot

59. A. Klijn, G. Paulides & J. van der Schaaf, Rechtsbijstand: krimpende markten [Report on Legal Aid: Shrinking Markets], WODC-report, 1996, see inter alia NJB 1996, p. 1652-1653.

independently appeal against the decision of the court. Children aged under 12 years only have access to the court in so far as they are able to make a reasonable evaluation of their interests, in the opinion of the court.

In *administrative* law minors are in a better procedural position. Article 8:21 GALA provides in paragraph one that natural persons who are not competent to be a party to litigation shall be represented in the action by their representatives under civil law. According to paragraph two these persons may represent themselves in the action if they can be deemed to have a reasonable understanding of their interests.

It is possible that in the case of a conflict with his/her legal representatives a minor does not have access to a court. It is questionable if this is in accordance with Article 6 ECHR and the case-law of the European Court of Human Rights, from which it is clear that restrictions on the right to access to a court are permitted as long as the essence of this right is not impaired.

The foregoing also holds true for non-minors who have been placed under guardianship. The Supreme Court delivered an interesting judgment on the procedural capacity of a person subject to wardship in summary proceedings against his guardian. The Supreme Court was of the opinion that a person placed under guardianship can institute proceedings autonomously when an immediate decision in summary proceedings is necessary in a conflict with his guardian about his place of residence. This competence encompasses, in principle, the right to the necessary legal assistance, in particular immediate, undisturbed and sufficient contacts with a lawyer. The Supreme Court considered, *inter alia*, that the legal provisions on guardianship must be interpreted in the light of Articles 6 (1) ECHR, 14 (1) ICCPR and 17 and 18 of the Dutch Constitution, in order to provide persons placed under guardianship with effective access to the court. According to commentator De Boer, it is also logical to apply this judgment in a conflict between a minor and his/her parents.[60]

3.3.5 'Pre-trial' proceedings

In cases concerning administrative action, the basic rule is that disputes can only be brought before the court after use has been made of the possibility of lodging a notice of objection with the same body which took the original decision. This objection procedure has a dual function. Firstly, it offers an extension to the decision-making process, in the sense that the administrative body involved is given the opportunity to correct mistakes made in the original decision-making process and to reconsider the decision in the light

60. Supreme Court, 28 January 1994, NJ 1994 687, annotation by J. de Boer.

of the objections made. Secondly, it forms the first phase of the process of legal protection against the administration. The lodging of a notice of objection does not stand in the way of bringing a case before the courts, as applications for pre-trial remedies can be made pending the objection procedure. Furthermore, a notice of objection can be directed against decisions which are still forthcoming (fictitious refusal), and an administrative appeal can be lodged when a decision in respect of the notice of objection is still forthcoming.

The notices of objection and of appeal are not very formal in administrative cases: the name and address of the person lodging the objection or appeal, date, description of the administrative decision concerned and the grounds for objection or appeal are sufficient. Mistakes may also be corrected (Articles 6:5 and 6:6 GALA).

Three years after its entry into force the GALA was subjected to a detailed evaluation. The results were satisfactory in many respects. The new procedural law functions well in the sense that the bodies exercising administrative jurisdiction are not hampered in fulfilling their task. The objection procedure was also found to live up to expectations. It effectively results in the limitation of the number of disputes brought before the courts. Nevertheless, the compulsory character of the objection procedure was the subject of discussion. In particular with regard to decisions in respect of which very extensive preparation is imperative, doubts have arisen as to the significance of the objection procedure, in which every aspect involved is again weighed. This will often only lead to repetitive action.[61]

3.3.6 Time limits as regards the appeal procedure

In administrative law the period for lodging a notice of objection or appeal is six weeks. Under certain circumstances the exceeding of this period may be excused.[62] In relation to particular subjects, there are provisions for special administrative procedures, which lay down a time schedule that binds both the party concerned and the courts. Examples can be found in the legislation which paved the way for the accelerated reinforcement of dikes along the major rivers.[63] Similar legislation is also being considered in relation to the expansion of Schiphol national airport.[64]

61. Toepassing en effecten van de Algemene wet bestuursrecht 1994-1996 [Implementation and Effects of the GALA 1994-1996], Verslag van de commissie Evaluatie Algemene wet bestuursrecht (Commissie Polak), Den Haag, 1996.
62. Articles 6:7-6:12 GALA.
63. The Deltawet Grote Rivieren [Major Rivers Delta Act], 13 April 1995.
64. Nieuwsbrief Ruimtelijke Ordening 1997, nr. 18, p. 2-3.

Periods for appeal and cassation are also laid down in civil litigation and criminal proceedings. These periods do not constitute any real limitation to the right of access to justice.

3.3.7 Funding the judiciary

Funding the judiciary requires attention in relation to the right of access to justice. The funding of the judiciary forms part of the budget of the Ministry of Justice. The administration of the judiciary is also in the hands of the Minister of Justice. No separate organization of the judiciary exists, and neither does a Magistrates' Council. The funding of the judiciary has become problematic in recent years, as the increase in the number and complexity of cases has led to difficulties concerning the capacity of the judiciary which cannot be solved simply by increasing available funds.[65] This has given rise to further inquiry into the management of the judiciary.[66]

The judicial organization consists of a collection of courts which cannot be considered as one single organization. The ordinary courts, which are competent to decide both criminal and civil disputes, comprise about 60 Subdistrict Courts (individually competent courts), 19 District Courts, 5 Courts of Appeal and the Supreme Court situated in The Hague. The administration of justice in administrative disputes is basically assigned to the District Courts, while several courts can hear appeals. No hierarchical order exists among all these tribunals. Neither do they form a single unit from an administrative point of view. At present the judiciary is discussing its future functioning within the framework of a consultation process entitled 'ZM2000'.[67]

3.4 Renunciation of the right of access to justice

3.4.1 Arbitration

Under Dutch law parties can contractually provide for the possibility of having existing or future disputes arising out of a legal relationship between them decided by arbitrators (Article 1020 (1) Code of Civil Procedure, hereinafter CCP). This arbitration agreement may not, however, lead to the

65. Recently, the Minister of Justice announced an increase in the budget for the judiciary, inter alia, with the aim of appointing 100 new judges; see De Volkskrant, 6 November 1997.

66. H. Franken, Onafhankelijk en verantwoordelijk [Independent and Responsible], Deventer, 1997. See also M.F.J.M. de Werd, Rechterlijke organisatie nieuwe stijl [Restyling the Judicial Organization], NJB 1997, pp. 325-332.

67. Trema 1996, pp. 21-24.

determination of legal effects which are not subject to the free disposition of the parties (Article 1020 (3) CCP). The court which is confronted with a dispute in relation to which an arbitration agreement has been agreed upon basically has to declare that it has no jurisdiction when the main defence relates to the existence of the arbitration agreement, unless the agreement is held to be invalid (Article 1022 (1) CCP).

Nevertheless, an arbitral award can only be enforced by virtue of an order issued by the President of the District Court at the request of one of the parties (Article 1062 (1) CCP). The President is competent to refuse the grant of an *exequatur* (enforcement order) when the arbitral award itself or the way in which it has been attained have to be considered as being evidently contrary to good morals or public order (Article 1063 (1) CCP). In case of such refusal the petitioner can lodge an appeal or commence cassation proceedings (Article 1063 (3), (4) CCP). When the President does grant an *exequatur* the only means of redress open to the petitioner's opponent are nullification and a petition for (extraordinary) redress[68] (Article 1062 (4) CCP). Nullification of the arbitral award will take place when the decision or the way in which it has been attained represents a violation of public order or good morals (Article 1065 (1)(e) CCP). This will, for example, be the case when facts or circumstances have come to light which mean that it has to be assumed that an arbitrator has factually not been independent or impartial, or when doubts about his independence or impartiality are such that the prejudiced party cannot reasonably be expected to accept the arbitral award. The appearance of dependence or partiality does not constitute a sufficient ground for nullification.[69] Before delivering of his judgement an arbitrator can be challenged when there are justified doubts as to his independence and impartiality (Article 1033 CCP).

Arbitration can also be applied in administrative law, although as yet little use has been made of it.[70]

Generally speaking, parties can renounce their right of access to a court according to Article 6 (1) ECHR. One of the conditions is that this has been

68. Extraordinary means of redress for reviewing/quashing a judgment in a civil case against which ordinary means of redress are no longer available.

69. Supreme Court, 18 February 1994, NJ 1994, 765.

70. S. Pront-Van Bommel, Bemiddeling, de Vaststellingsovereenkomst en Arbitrage in Bestuursrechtelijke geschillen [Mediation, Determination Agreements and Arbitration in Administrative Disputes], in: I.C. van der Vlies & S. Pront-Van Bommel (red.), Van Toetsing naar Bemiddeling, Deventer, 1997.

done voluntarily, i.e. without the use of pressure.[71] According to the European Commission of Human Rights, arbitration has to be governed by law, and there must also be provision for a certain degree of supervision of the arbitration procedure by the courts, which will be executed in a particular case. Arbitration procedures do not, however, need to fulfil all the conditions of Article 6 ECHR.[72] The outline of the Dutch arbitration procedure as set out above has been judged to be in accordance with Article 6 (1) ECHR.[73]

3.4.2 Disciplinary law

A distinction can be made between the disciplinary law of various associations and bodies and the disciplinary law which is regulated by Act of Parliament.

Any association or foundation is free to adopt in its statutes or regulations disciplinary measures in order to have the possibility of controlling the actions of its members. Examples are the Royal Netherlands Medical Society (*Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst*), the Royal Fraternity of Public Notaries (*Koninklijke Notariële Broederschap*) and the National Dutch Football Association (*Koninklijke Nederlandse Voetbal Bond, KNVB*). According to the statutes of the *KNVB*, a professional footballer cannot institute proceedings before a civil court, but he is subject to the jurisdiction of the of the *KNVB* disciplinary tribunal.

According to Leijten it is questionable whether Article 6 ECHR is applicable to the disciplinary law of associations, because the ECHR imposes obligations primarily on states and not on associations. The Dutch courts consider a disciplinary decision to be a binding third party ruling, against which appeal is possible to an independent court, namely the court in civil matters.[74]

Disciplinary law regulated by Act of Parliament finds its basis in Article 113 (2) of the Constitution, which reads: 'Disciplinary proceedings established by government bodies shall be regulated by Act of Parliament'. Examples are military and medical disciplinary law. According to the European Court of Human Rights, disciplinary proceedings do not in

71. European Court of Human Rights, 27 February 1980, Deweer v. Belgium, Series A, vol. 35, § 49.

72. European Commission of Human Rights, 27 November 1996, Nordström v. The Netherlands, (report), NJ 1997, 505; Strasbourg sequel to Supreme Court, 18 February 1994, NJ 1994, 765.

73. European Commission of Human Rights, 27 November 1996, Nordström v. The Netherlands, (report), NJ 1997, 505.

74. M.J.C. Leijten, Tuchtrecht getoetst [Disciplinary Law put to the test], dissertation Tilburg, 1991, pp. 32-33.

principle concern the 'contestation of civil rights or obligations' or a 'criminal charge' in the sense of Article 6 ECHR. However, the Court examines on a case-by-case basis whether Article 6 is applicable in the relevant disciplinary proceedings. The Court has applied the guarantees of Article 6 in military and medical disciplinary proceedings.[75]

It can be concluded that disciplinary proceedings regulated by Act of Parliament must fulfil the conditions of Article 6 ECHR. If this is not the case, an appeal must be possible to an independent court, that is the court in civil matters. The Supreme Court has ruled in some judgments that the Medical Disciplinary Tribunal had not respected all the guarantees of Article 6 ECHR.[76]

3.5 Criminal law

In criminal law, access to justice on the part of an accused is primarily guaranteed in a *negative* manner: his position is mainly passive. Persons who lack legal capacity according to civil law can be subjected to criminal proceedings. However, the subjects of criminal proceedings do not only have a passive role, namely when there is a possibility of objecting against a default judgment, an appeal or cassation.[77] For accused minors a restriction applies: if they are under 16 years of age, only their lawyer can resort to means of redress (Article 503 of the Code of Criminal Procedure).

Apart from this regular administration of justice, more and more forms of 'consensual settlement' are developing. An important form of consensual settlement is the out-of-court settlement by the Public Prosecutor. In this case the suspect gives up his right of access to a court. There are also experiments with effecting a compromise (*dading*) in which compensation of the victim is the primary goal. The victim's access to criminal justice is restrictively regulated. The victim can be enjoined in the criminal proceedings as a civil party, but it is not at all certain whether he will be compensated for his (entire) damage. The victim will often be compelled to seek redress in the civil court with an action arising out of tort (Article 6:162 of the Civil Code) in order to have his damage fully compensated. However, there are the above-mentioned experiments with effecting a compromise based on the idea of concluding an agreement between the offender and the victim in order to expeditiously compensate the victim for his damage.

75. Leijten 1991, p. 164.

76. See Supreme Court, 3 March 1995, NJ 1995.

77. Brenninkmeijer 1987, p. 103.

When the Public Prosecutor decides not to prosecute the suspect, for example because the reasonable time required by Article 6 ECHR has elapsed, the victim can file a complaint to the Court of Appeal on the basis of Article 12 of the Code of Criminal Procedure, in order to effect the prosecution of the suspect. However, the victim cannot appeal against a rejection of the request by the Court of Appeal. There are some recent cases in which the Supreme Court has considered the procedure based on Article 12 of the Code of Criminal Procedure to be surrounded by sufficient safeguards. As a consequence, an appeal to the civil courts on the ground that the government has committed a tort (Article 6:162 Civil Code) by not prosecuting the persons who have committed a crime against it, is not admissible.[78]

3.6 Length of proceedings

In the Netherlands the length of proceedings has received a great deal of attention. In criminal cases this attention results from the guarantees formulated by the European Court of Human Rights. In civil and administrative proceedings the applicable time-limits do not often lead to a finding that Article 6 ECHR has been violated. However, in the Netherlands it is not self-evident that proceedings should be conducted within a reasonable period of time. In administrative law, an influential factor is that the length of the proceedings directly affects the legal security of the acts of the administration. Extremely lengthy proceedings can have negative effects on society. In civil cases the length of proceedings largely affects one or both of the parties and will increase legal costs for example.

No systematic inventory has up to now been made of the length of proceedings in civil and administrative matters. In the first instance, proceedings generally last for one year; on appeal, periods of one or two years are not uncommon. In practice, summary proceedings based on Article 289 of the Code Civil Procedure and Article 8:81 GALA play a very important part in reducing the length of the proceedings. Summary proceedings in administrative law are only possible when the procedure on the merits has been initiated. This so-called 'connexity' does not form an impediment for parties to obtain a provisional decision or order from the administrative courts within a few weeks or, if necessary, within one week.

Summary proceedings in civil matters form an autonomous procedural possibility and in many disputes only summary proceedings are conducted.

78. See the judgments of the Supreme Court of 10 October 1997, RvdW 1997, 194C and 195C.

The President of the District Court gives his provisional opinion on the merits of the case or grants a provisional order. The length of summary proceedings can be very short: one week is not exceptional. Summary proceedings aimed at the collection of debts, together with the possibility of default in proceedings in which the other party does not appear, constitute an effective answer to the need for more rapid administration of justice in cases of financial claims.

In civil proceedings lawyers and judges are at present working together on experiments designed to accelerate proceedings. Alternatives are also being developed for the administration of justice by the state. Some forms of binding third party advice have been introduced in consumer disputes. Certain branches can offer a standard procedure for the settlement of disputes, upon condition that their general standards have been examined as to their reasonableness. This examination provides an important preventive effect.

In certain areas of society, arbitration plays an important part. Furthermore, increasing attention is being given to mediation as an alternative for the administration of justice by the state. In the field of divorce, it has been proposed that divorce should be made possible without the intervention of a court.

4 Conclusion

Since the right of access to justice has not as such been embedded in the Dutch Constitution, Article 6 ECHR and case-law on this matter have a key role to play in ensuring the right of access to justice in the Dutch legal order. This provision has binding force in the Dutch legal order. Several decisions of the European Court of Human Rights have led to changes in the judicial organization and in procedural law and its application. In 1992 a process of revising the judicial organization was set in motion, partly as a result of Strasbourg case-law on Article 6 ECHR. The case-law of the Court of Justice of the European Communities on the right to effective legal protection is also of increasing significance to the Dutch legal order.

The Constitution provides the basis for the judicial organization and the attribution of jurisdiction to impartial courts, as it incorporates a number of basic assumptions, such as the appointment for life of the individual judges and the jurisdiction of the criminal and civil courts. However, 'organic' laws and procedural laws are the most significant in ensuring the right of access to justice in the Dutch legal order.

Current issues being discussed with regard to the administration of justice concern, among other things, the funding and management of the judicial

organization, the speed and costs of proceedings and the possible alternatives to the administration of justice in the ordinary courts. A considerable number of people are precluded from bringing a dispute before the courts, particularly because of the contribution they have to pay by virtue of the Legal Aid Act.

Broadly speaking, it can be concluded that, from a formal point of view, the right of access to justice is sufficiently ensured in the Dutch legal order. In legal practice, however, difficulties in gaining access to justice are nevertheless encountered in the Netherlands.

List of abbreviations

AB	Administratiefrechtelijke Beslissingen
CCP	Code of Civil Procedure
Dfl.	Dutch Guilder
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
GALA	General Administrative Law Act
ICCPR	International Covenant on Civil and Political Rights
JB	Jurisprudentie Bestuursrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJCM	Nederlands Juristen Comité voor de Mensenrechten (-Bulletin/Nederlands Tijdschrift voor de Mensenrechten)
NJV	Nederlandse Juristen-Vereniging
NTB	Nederlands Tijdschrift voor Bestuursrecht
RvdW	Rechtspraak van de Week
Stcrt.	Staatscourant
Trema	Tijdschrift voor de Rechterlijke Macht
TK	Handelingen Tweede Kamer
VAR	Vereniging voor Administratief Recht