Michigan Journal of International Law

Volume 10 | Issue 1

1989

Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law

Henry G. Schermers
Queen Mary College

SOME RECENT CASES DELAYING THE DIRECT EFFECT OF INTERNATIONAL TREATIES IN DUTCH LAW

*Henry G. Schermers**

I. INTRODUCTION

This article is meant as a comment on some recent Dutch cases concerning the effect within the domestic law of the Netherlands of the prohibition of discrimination laid down in Article 7a(i) of the International Covenant on Economic, Social and Cultural Rights[1] and of Article 26 of the International Covenant on Civil and Political Rights.[2] The cases were decided by the *Centrale Raad van Beroep*, which is the Dutch supreme court in some fields of administrative law, such as the law on civil servants and several laws on social security. The cases are particularly interesting with respect to the notion of direct effect.

Article 7a(i) of the International Covenant on Economic, Social, and Cultural Rights and Article 26 of the International Covenant on Civil and Political Rights laid down prohibitions on discrimination. Recently, the *Centrale Raad van Beroep* has decided cases interpreting the effect of these prohibitions on the internal law of the Netherlands.

The cases are particularly interesting because of their impact on both international and Dutch law. For the first time, a State accepted that restrictions on internal implementation, which arise out of considerations not inherent in the treaty itself, will delay the law of the treaty from having immediate direct effect, or prevent it from retroactive application, in the internal law of that State. As an example of the impact of such a practice, the local impact of these cases on the Netherlands is great. Using factors external to the treaty to assess the scope of direct effect has caused an ironic situation: Though the pur-

* Professor of Law, Leyden University. Leverhulme Professor of Law, Queen Mary College, London 1988. Visiting Professor, University of Michigan Law School, 1968-69.

1. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 INT'L LEG. MAT. 360 (1967); also at Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, at 490 (1966) (entered into force March 23, 1976). INTERNATIONAL ORGANIZATION AND INTEGRATION § I.A. 12.2.b. (Kapteyn, et al., eds. 1981-84) [hereinafter I.O.I.].

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 INT'L LEG. MAT. 368 (1967); also at G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, at 52 (1966)(entered into force Jan. 3, 1976); I.O.I., *supra* note 1, at § I.A. 12.2.c.

pose of the Dutch court's use of external factors was to mitigate the constitutional mandate of direct effect and thus assuage the domestic cost-impact of Article 26, the court's ultimate decision to apply the treaty directly with limited retroactive effect to social security cases could nevertheless cost the Dutch government an enormous sum of money.

First, this article will make some necessary introductory comment on judicial control in general, the priority of treaty law in the Netherlands, and the need for Dutch courts to interpret treaties and to assess their direct effect within the domestic legal order. Second, the article will explore the recent cases. Upon analysis, these cases reveal that legal certainty — the predictability of the law — will suffer greatly if the direct effect of a treaty article is made to depend upon the circumstances of each case. Had the court simply offered a particular interpretation of the treaty concerned, based only on the treaty's language, the cost-impact would have been no less and the value of legal certainty would have been preserved.

II. JUDICIAL CONTROL

In some States, the judiciary controls the constitutionality of legislation. In the Federal Republic of Germany, for example, the Constitutional Court (*Bundesverfassungsgericht*) may declare a law void whenever it violates the Constitution.[3] The underlying theory is that the Constitution is supreme. No authority, not even the elected Parliament, should have the power to deviate from the Constitution. After the experience that even a democratically elected parliament can become undemocratic, the framers of the German Constitution wanted to make sure that no deviation of the fundamental guarantees of the Constitution would ever be possible. They considered that a constitutional court of independent judges would be the safest guardian of the Constitution.

In other States, such as the United Kingdom of Great Britain and Northern Ireland, the courts have no power to leave aside or overrule statutes adopted by Parliament. Parliament, as representative of the People, is sovereign. It can autonomously decide what its powers are. No other authority is entitled to challenge the constitutionality of the legislation it has adopted. Any power of appointed courts to overrule the elected Parliament would be considered undemocratic.

3. *Gesetz über das Bundesverfassungsgericht*, § 78, *juncto Grundgesetz*, Art. 93; English translation in VI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Franz, eds., 1988) [hereinafter CONSTITUTIONS OF THE COUNTRIES OF THE WORLD].

Traditionally, the Netherlands follow the same line of thinking as the United Kingdom. The democratic machinery has always worked well and there has never been any fear that Parliament would adopt legislation contrary to the principles of the Dutch Constitution. Accordingly, Article 120 of the Dutch Constitution provides: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

In the Netherlands, however, there has been another trend. As a small country with large overseas interests, the Netherlands, more than other countries, depend on a faithful application of international law throughout the world. Dutch lawyers have always been in the forefront in advocating that national courts ought to apply the rules of international law with priority over any domestic rules. Finally, in 1953, it was expressly laid down in the Dutch Constitution that laws shall not be applicable if their application would be in conflict with provisions of treaties or decisions of international organizations that are binding on all persons.[4] At the same time, the Constitution provided that all treaties need parliamentary approval before they may be ratified.[5]

Thus, the Dutch courts obtained the power to overrule Parliament, not on the ground that the laws adopted by Parliament might infringe the Constitution, but on the ground that they might infringe provisions of treaties or resolutions of international organizations. When, on August 31, 1954, the Netherlands adopted the European Convention on Human Rights,[6] many traditionally constitutional provisions, such as freedom of religion, freedom of speech, and freedom of assembly, became treaty obligations. In fact, the courts now have the power not to apply legislation when in a specific case they consider it a violation of human rights, provided these human rights are codified in an international treaty. The human rights codified in the Dutch Constitution cannot be taken into account.

III. The Priority of Dutch Treaty Law

Since the Dutch judiciary is not obligated to apply laws when to do so would conflict with treaty provisions that bind all persons, international treaties are more effective in the Netherlands than in most other states. Article 7a(i) of the International Covenant on Economic, Social and Cultural Rights and Article 26 of the International Covenant

4. Now Netherlands Constitution, Art. 94; English translation in X CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 3.

5. *Id.*, at Art. 91.

6. I.O.I., *supra* note 1, at § II.B.3.c; European Treaty Series No. 5; 213 U.N.T.S. 222.

on Civil and Political Rights may serve as examples. Article 7a(i) of the Economic, Social and Cultural Rights covenant provides:

> The States Parties to the present Convention recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> a. Remuneration which provides all workers, as a minimum, with:
>
> i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

Article 26 of the Civil and Political Rights Covenant reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

For many States, these articles serve as a kind of general instruction for the legislator. One has to take account of them in order to prevent international criticism, but the provisions play no important role in the national legal order. By contrast, in the Netherlands, recent case law, discussed below, demonstrates the decisive role of the articles, and in particular of Article 26. Virtually all Dutch legislation can be checked against it; no discriminating legal provision may be applied by the courts.

IV. DIRECT EFFECT

The Dutch Constitution grants priority to international law only in so far as it is incorporated in provisions of treaties that are binding on all persons. The Dutch courts and most Dutch authors have interpreted the words "binding on all persons" as meaning provisions having "direct effect."[7]

The notion of "direct effect" is not entirely clear, and many authors interpret it differently. The Court of Justice of the European Communities uses the concept in the sense that national courts must apply international provisions whenever these are so clear and detailed that they can be applied without any need for further legislation.[8] This article uses the notion in the same sense mainly for practical reasons. The concept of the Court of Justice can be used in practice with-

7. For a list of cases and for further details, see Schermers, *The Effect of Treaties on Domestic Law*, 7 UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW 112-16 (F.G. Jacobs & S. Roberts, eds., 1987).

8. For the case law concerned, see H.G. SCHERMERS & D. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES, §§ 124-33 (4th ed. 1987).

out great difficulty, and it leads to good results. The words "binding on all persons" should not be read as meaning applicable to everybody, but rather as *potentially* applicable to anybody, or to anybody of a particular category of persons — in the same way as laws are binding on all persons, even though many laws are not applicable to everybody. The restriction to provisions that are binding on all persons obligates a Dutch court to rule upon the direct effect of international treaty provisions before it can apply them.

In European Community law and usually also in general treaty law, direct effect is seen as an absolute notion. A particular provision has direct effect or it has not. At the request of members of the European Parliament, the Commission of the European Communities even published a list of which articles of the EEC Treaty have direct effect and which do not.[9] In the European Community, it is the Court of Justice that decides whether a particular provision has direct effect or not. There is a considerable amount of case law on this question.[10]

Under general international law, the Permanent Court of International Justice decided in 1928 that treaties do not create rights or duties for individuals unless the treaty-making powers clearly decide otherwise.[11] Usually, treaty-making powers are reluctant to do so.

The Supreme Court of the Netherlands (*Hoge Raad*) decided in 1962 "that the question whether the provisions of a treaty are directly binding upon the subjects of the contracting States is — at any rate in Dutch law — a question that can only be answered on the basis of interpretation of the provisions of the Treaty.[12]

In the *Second Defrenne Case*,[13] the Court of Justice of the European Communities was faced with a conflict between direct effect and legal certainty. Article 119 of the EEC Treaty provides that during the first four years after the entry into force of the Treaty, the Member States must ensure and subsequently maintain that men and women shall receive equal pay for equal work. The Member States did not succeed in meeting this time limit and the Commission and the Council of the European Communities took several decisions to extend the period of four years. When Mrs. Defrenne complained of her lower pay, the Court of Justice ruled that the extensions of the time limit

9. *See* 25 O.J. EUR. COMM. (No. C 312/23) (1982).

10. *See* H.G. SCHERMERS & D. WAELBROEK, *supra* note 8, at §§ 243-63.

11. 1928 P.C.I.J. (Ser. B) No. 15, at 17, Jurisdiciton of the Court of Danzig, 3 March 1928.

12. *Netherlands Bosch Case*, Hoge Raad 18 May 1962, 1965 NJ 115. 12 NTIR 1965, at 318-22. Translation from BRINKHORST & H.G. SCHERMERS, JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES 225 (2d ed. 1977).

13. *Second Defrenne Case* (43/75), 8 Apr. 1976, 1976 ECR 455.

were contrary to the Treaty and therefore void, and that after four years Article 119 had direct effect. However, until the date of the Court's decision, the industries concerned could reasonably consider that there was no direct effect, because of the decisions of the Commission and the Council. The Court of Justice then found the solution in deciding that Article 119 had direct effect only from the date of the judgment. It based this solution on the prevailing principle of legal certainty.[14]

The following cases demonstrate that another Dutch supreme court (the *Centrale Raad van Beroep*) recently gave a different interpretation to the notion of direct effect. In its view, the question whether a treaty provision has direct effect or not does not only depend on the treaty, nor on the intention of the parties to the treaty, but also on factual circumstances and on provisions of national law. Furthermore, it does not consider "direct effect" to be absolute. It ruled that treaty provisions may have direct effect under some circumstances and no direct effect under others.

V. THE CASES[15]

A. *The Boesjes Case*[16]

In 1982, the Dutch Parliament adopted a law according to which all salaries of university staff were to be reduced by 1.85 percent. This law applied also to the staffs of the academic hospitals. Salaries were not reduced at other hospitals. The applicant claimed that the law could not be applied, as it was in conflict with Article 7a(i) of the International Covenant on Economic, Social and Cultural Rights[17]. The question arose whether Article 7a(i) had direct effect. Only then could it be invoked by individuals.

The *Centrale Raad van Beroep* reasoned, *inter alia*, as follows: in general, the substantive rights laid down in the Covenant have no direct effect, but it goes too far to assume that Article 7a(i) of the Covenant could never have any direct effect. Rather, in particular circumstances, the Article could be suitable for direct application and therefore subject the law to judicial control. Still, there is no general answer to the question of when that might be the case. Suitability depends, *inter alia*, on the character of the treaty provision and of its

14. *Id.* at 460.

15. I have tried to offer an accurate survey of the gist of the cases. The line of thought and the arguments used are reproduced, but the translations are not literal.

16. *Centrale Raad van Beroep*, 3 July 1986, 1987 AB 229.

17. *See supra* note 1.

infringement, as well as on the circumstances of the case. Also important is whether the legislation may violate the essential elements of the treaty-article or whether the violation is merely marginal.

A further consideration is that the case does not concern the continuation of an existing discrimination but the creation of a new one in a field where previous equality existed. The creation of a new violation that is contrary to the provisions of the treaty will be more easily covered by the direct effect of Article 7a(i), and therefore also by judicial control, than a delay in the termination of a violation.

The social and legal context in which the treaty provision is to operate should also be taken into account. It would be unacceptable for Article 7a(i) to apply directly to the government as a whole. Yet, the Article may have direct effect with respect to functions under one and the same government authority, where the functions are covered by the same labor conditions. Furthermore, it would go too far to accept a direct effect of Article 7a(i) when the legislation concerns only work of the same value and different functions are covered by the same scale of salary. But the Article can be directly applied when, as in the present case, for identical functions, the same remuneration was paid in academic and in other hospitals before January 1, 1983, and this equality is upset by the new law. Such a new law cannot be applied as being contrary to Article 7a(i) of the Covenant. As the *Centrale Raad van Beroep* had insufficient information about the facts, it ordered further investigation about the effects of the new legislation.

B. *The X in A Case*

Article 7(4) of the law on damages payments to those who were prosecuted during the Second World War provides that payments to women are normally terminated when they get married, while payments to men who marry are continued. Mrs. X in A claimed that this provision was contrary to Article 26 of the Covenant on Civil and Political Rights.[18]

For the interpretation in this case of a worldwide covenant, the *Centrale Raad van Beroep* took account not only of the specific situation in the Netherlands, but also of rules adopted by the European Community. It held that Article 26 of the Covenant was applicable in the present case.[19] However, the Court held, this does not necessarily mean that the Article has direct effect. The *Centrale Raad van Beroep* confirmed its position, exhibited before in the *Boesjes Case*, that in sev-

18. Centrale Raad van Beroep, 14 May 1987, 1987 AB 543; *see supra* note 2.

19. For its reasoning, see the *Six Women's Cases*, *infra* notes 21-24.

eral cases discrimination can be abolished only gradually. For the abolishment of discrimination of the present kind, it considered relevant that the European Community had adopted a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which provided that for a number of social security issues, all discrimination had to be abolished on December 23, 1984.[20] According to the *Centrale Raad van Beroep*, the date of December 23, 1984 should be seen as the most appropriate moment from which Article 26 of the Covenant should be considered directly effective. As the decision terminating the payments to Mrs. X was dated prior to December 23, 1984, it could not be set aside as being contrary to Article 26.

C. *The Six Women's Cases*

On January 5, 1988, the *Centrale Raad van Beroep* reviewed six almost identical decisions[21] involving cases brought by women whose social security benefits had been reduced, although similar benefits of men under the same conditions had remained unaffected. The women invoked Article 26 of the International Covenant on Civil and Political Rights.[22] In the *X in A Case*,[23] the *Centrale Raad van Beroep* had found December 23, 1984 as the date from which Article 26 should have direct effect. In the present case, it did not set aside that decision, but it ruled that special circumstances (*i.e.*, the purpose of the Dutch law involved) justified another, earlier date.

The *Centrale Raad van Beroep* first had to decide whether Article 26 applied to cases such as the present ones. In previous case law, it had consistently held that the Article did not apply to social security legislation. In the present cases it overruled that view. It reasoned that discrimination with respect to the civil and political rights contained in the Covenant was prohibited by Article 2 of the Covenant. Therefore, the prohibition of discrimination provided for in Article 26 must have a wider, general scope. Article 26 contains an independent substantive right for everybody to be granted equal protection of the law. That right also covers social security legislation. The *Centrale Raad van Beroep* went on to say that this does not mean that all inequalities in social security rules are of a discriminatory nature. Rather, unequal treatment based on reasonable and objective grounds

20. Directive of 19 Dec. 1978, 22 O.J. EUR. COMM. (No. L6/24) (1979).

21. *Centrale Raad van Beroep*, 5 Jan. 1988, 1981 AAW B126; 1982 AAW S122; 1982 AAW S1141; 1983 AAW S22; 1983 AAW S90; and 1985 AAW S168.

22. *See supra* note 2.

23. *See supra* notes 18-19 and accompanying text.

can be justified. In the present case, however, no such justification could be found.

With respect to the direct effect of Article 26 of the Covenant, the *Centrale Raad van Beroep* referred to its prior considerations, that in several situations discrimination can only gradually be abolished and that the EEC directive of December 19, 1978[24] was important. After the entry into force of this directive on December 23, 1984, direct effect could no longer be withheld to Article 26. The Court reasoned further that in the present cases, it is of special importance that the applicable rules are part of legislation which was introduced with the purpose, *inter alia*, to terminate discrimination between men and women. As this legislation entered into force on January 1, 1980, the Court decided that with respect to the substance covered by that legislation, direct effect should be granted to Article 26 from January 1, 1980 forward.

VI. ANALYSIS

First, we are faced with the question of whether the interpretation of the Covenants by the Dutch *Centrale Raad van Beroep* is purely a matter of Dutch law or whether it may have any effect outside the Netherlands. Of course, decisions of Dutch courts cannot be binding upon any other States. Still, the effect of the interpretation is not limited to the Netherlands. As there is usually no possibility to obtain an authentic interpretation of international treaties from an international court, international treaty provisions are normally interpreted by the national judiciaries whenever they apply them. In the opinion of the *Hoge Raad*, such interpretation is a matter of international law and should therefore be made according to the rules of international law.[25] One may submit that in the above mentioned cases, the *Centrale Raad van Beroep* gave an interpretation of the Covenants, which, in its opinion, should be seen as the proper interpretation applicable when Dutch courts have to decide on the application with respect to the citizens of other States. When the supreme court of a participating State interprets a treaty provision in a particular way, that interpretation provides the manner in which that State applies the treaty. Other parties to the treaty should object if they do not agree. In principle, the interpretation by the supreme court must be generally applied by all organs of the State concerned, without distinction as to whether it concerns application within the domestic legal order or within other participat-

24. *See supra* note 20.

25. *Bosch Case*, 18 May 1962, NJ 1965, 115; 12 NTIR (1965) at 318-22.

ing States. It would be unacceptable that the authorities of a State would follow a particular interpretation for the application of treaty provisions in their own country and a different interpretation for application elsewhere.

Nonetheless, in the present cases the particular role of the Dutch constitution should also be taken into account. In theory, it may be correct that the direct effect of a treaty provision depends on the interpretation of the treaty and is a question of international law. In practice, each State decides for itself whether or not it will apply a particular treaty in its national legal order and whether, therefore, the question of direct effect will arise at all. In many States, treaty provisions such as those in the present cases cannot be invoked in court; in the Netherlands they can be, if they are binding on all persons.

It seems justified to conclude that the *Centrale Raad van Beroep* wanted mainly to mitigate the effect of the Dutch constitution rather than to offer a particular interpretation of the Covenants. In a situation where some States directly apply the treaty provisions and others do not, it decided to take a particular inbetween position — an in-between position close to a full application, but with some restrictions in time.

The idea that these restrictions could depend on factors other than those inherent in the treaties themselves is a new one in international law as well as in Dutch constitutional law, and seems worth mentioning in this special volume dedicated to a great international lawyer. Whether the idea is a fortunate one is another matter. The direct effect of international treaties becomes very complicated if it also depends on all kinds of circumstances outside the treaty itself. Legal certainty — the predictability of the law — is an important value. It will greatly suffer if one cannot be sure that treaty articles which have been accepted as directly applicable in some cases will be so in other cases.

As to the substance of the cases, the *Six Women's Cases* are of particular importance to the Netherlands. So far, it was generally understood in the Netherlands that the Covenants did not directly apply to social security. The holding of the *Centrale Raad van Beroep* that Article 26 may be invoked in social security cases may lead to a large number of claims and could obligate the Government to pay an amount equivalent to several billions of U.S. dollars to women whose social security rights have been restricted. One of the Dutch cabinet ministers considered the decisions so damaging that he proposed to withdraw from the Covenant and to re-enter with a reservation as to Article 26. This suggestion, however, met with general opposition.

The Netherlands will remain a party to the Covenants and Article 26 will continue to have an enormous impact in Dutch society.