Het wetgevingsbevel: Over constitutionele verhoudingen en manieren om een wetgever tot regelgeving aan te zetten
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Summary

This thesis is a study of a relatively new phenomenon in Dutch case law: the need for mandatory orders (or ‘orders’) from the courts to the legislature and the admissibility of such orders under Dutch constitutional law. In the Waterpakt case (2003), the Dutch Supreme Court (Hoge Raad) ruled the idea of a court issuing an order to the legislature to act (i.e. to use its legislative powers) to be fundamentally at odds with the constitutional role of the judiciary. Dutch courts may not intervene in procedures of political decision making like legislative initiative, the Supreme Court argued, even when it is clear that the legislature is legally bound to act. This judgment, which cited the constitutional division of powers among the various state organs, set a clear precedent. The Supreme Court confirmed its reasoning in 2004 in the Faunabeheer case, adding that legislative bodies other than the national legislature (the government and the Houses of Parliament acting together), such as provincial councils, are also immune to binding interventions from the judiciary in their legislative activities. The Supreme Court furthermore stipulated that it was not relevant whether the legislatures in question were ordered to enact a new regulation or to repeal an existing one.

Somewhat in contrast to this clear position, the Supreme Court does allow itself and lower courts to put several other kinds of pressure on the legislature to act if legislative action is legally required. In the so-called Arbeidskostenforfait case (1999), the Supreme Court found a fiscal provision to be discriminatory and therefore inconsistent with international law. Normally, Dutch courts are constitutionally obliged to set aside national provisions that violate international law. In this case, however, that would not have been a solution for the applicant. Setting aside the national provisions would merely leave a legal vacuum. Dutch courts sometimes fill this gap with judicial lawmaking, but the Supreme Court refrained from doing so in this case, because of the policy questions involved. That is to say: it refrained from doing so at that moment. The Supreme Court stated that it was up to the legislature to fix the identified problem and that it had to do so ‘with all deliberate speed’. At the same time, the Supreme Court announced that it would fix the problem with its own judicial lawmaking powers if the legislature should not live up to its obligations. This kind of threat to use judicial lawmaking powers is clearly meant to urge the legislature to act, which is, at the end of the day, an intervention in the same kind of political questions as were at stake in the Waterpakt case.

The same goes for the SGP case (2010). In that case, the Supreme Court concluded that the State violated the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by not acting against a political party which on religious grounds systematically excluded women from the membership of representative bodies. As in the Arbeidskostenforfait case, the Supreme Court
found itself unsuited to fix the problem, because there was not just one solution that was in line with the Convention’s obligation for States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country. It should therefore be left up to the legislature to make a (political) choice. However, in the SGP case, the Supreme Court could not announce any future remedial lawmaking, because unlike the 1999 case, at that moment no legal provision was in force and there would still be none in case of continued failure to legislate. Even from that more vulnerable position, the Supreme Court tried to exert pressure on the national legislature. The Supreme Court upheld and confirmed a declaration by a lower court that it was unlawful for the legislature not to act. This declaration was clearly meant as an order and it was perceived as such by many politicians.

This thesis is built on two research questions. First, this thesis aims to analyze the different results of these cases and the different lines of reasoning, in order to develop a concept that catches both the differences and the similarities between the Waterpakt case on the one hand and the Arbeidskostenforfait case and SGP on the other. The second question elaborates these differences and similarities in a more normative manner. Taking the role of the judiciary under the rule of law as the starting point, is the Supreme Court correct in fundamentally rejecting the possibility of issuing official orders to the legislature while at the same time allowing itself to put the kind of pressure on the legislature that effectively functions as an order? In its basic structure, this thesis is divided into six chapters. Chapters II en III develop a theoretical framework for the research questions. Chapters IV, V, and VI contain case studies based on the three cases. These case studies serve to apply and refine the theoretical framework laid out before. Chapter VII summarizes the discussions as a difference between two perspectives: a material perspective in which only results count and an institutional perspective in which relationships matter. In this chapter I also take a personal stand.

The main line of reasoning in this thesis is as follows. It is first of all argued that the fundamental difference between, on the one hand, formal mandatory orders or classic injunctions, and, on the other, mere declarations or threatening to use judicial lawmaking powers, lies in the consequences of mandatory orders: injunctions create an executorial relationship between the judiciary and the legislature, while declarations do not. Nevertheless, there are in fact many similarities between formally ordering the legislature to act and simply issuing a declaration that tacitly implies that it should. This is especially the case when it comes to the political character of the initiative to legislate. Declarations are also a way of intervening in the affairs of the legislature. The SGP judgment was perceived as functioning as and did in effect function as an order to legislate. To capture both the differences and the similarities, this thesis develops two concepts: the formal order and the informal order. A court issues a formal order when it creates an executorial relationship, all the way down to the non-compliance penalties, if necessary. An informal order to legislate is concerned when a court, somewhere in its reasoning, declares that the legislature has
to act. For an informal order, it is necessary that the declaration is not the result of a mere application of the law but that it also to some degree involves judicial lawmaking. Judicial lawmaking is a part of the definition of the informal order, because otherwise the similarities with the formal order would be too few to justify the use of the word ‘order’. However, I propose a very broad definition of judicial lawmaking. The moment courts engage in more than pure, heteronomous application of the law, the judgment starts to be the product of judicial lawmaking.

The judicial lawmaking must also be of a binding nature, because otherwise the declarations of the courts would only be statements in a dialogue and in no sense orders. There are several ways to construct the binding force of judicial lawmaking vis-à-vis the legislature. The binding force can, in the first place, stem from the Constitution itself. The Constitution of Albania, for example, stipulates that the interpretations of the Constitutional Court have general binding force and are final. It is also possible to construct an obligation to follow judicial lawmaking through case law itself. In its famous Cooper v. Aaron judgment, the American Supreme Court held that its own interpretations of the Constitution are as binding as the Constitution itself, thus claiming the position known as judicial supremacy. In addition to these two constructions there is a third one: a political practice of acknowledging judicial interpretations as the final word on the matter. This is the kind of binding force that was argued by the government of the United Kingdom before the European Court of Human Rights (ECHR) in the Burden case. According to the British government, the so-called declaration of incompatibility under article 4 of the Human Rights Act was a domestic remedy within the meaning of article 35 of the Convention. Although such declarations are not binding in themselves (the Human Rights Act explicitly states they are not), the British Parliament normally follows the declarations. The ECHR, sitting in Grand Chamber, accepted the argument but ruled that it was too early for the conclusion.

This definition of an informal order is tested in two case studies: one of the Arbeidskostenforfait case and one of the SGP case. It can be concluded that the concept of the informal order is helpful. The conclusion of the Dutch Supreme Court that it was unlawful for the legislature not to act was in both cases the result of judicial lawmaking. Although it is not entirely clear to what extent Dutch politicians take the words of their Supreme Court as gospel, they clearly did so in the SGP case.

The concept of an informal order to legislate can also be used to characterize statements of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) directed at national legislatures. Articles 32 and 46 of the European Convention on Human Rights, in combination with the repeatedly stated declaratory nature of judgments, create some kind of judicial supremacy for the ECHR. When it is clear from the reasoning in a judgment that the ECHR addresses the national legislature, as it did in the question concerning the British blanket ban on prisoners’ voting rights (the
Hirst case), the intervention can amount to an informal order to the national legislature. In the context of the EU infringement procedure, Article 260 of the Treaty on the functioning of the European Union (TFEU) creates an obligation for member states to comply with a judgment of the CJEU. In addition, the CJEU has the possibility to threaten member states with large lump sums or penalty payments in cases of non-compliance. Sometimes the infringement is of a legislative nature and occasionally this is pointed out by the CJEU. In those cases, the judgments can become informal orders. In fact, they most strongly resemble the formal orders because of the possibility of penalty payments. However, the judgments of the CJEU remain informal orders because of their fundamentally declaratory nature. The obligation to comply stems from Article 260 TFEU, not from the judgments.

The second main question of this thesis is why the Supreme Court should, on the one hand, refuse to issue formal orders and, on the other, give informal ones. To answer that question, several kinds of arguments are collected and developed in favor of and against intervening in the activities of the legislature. From the role of the judiciary under the rule of law, several arguments can be derived. First, the doctrine of the separation of powers can be used to argue against formal orders. That doctrine claims the powers to be equal, and they are not when one can order the other to act. It is also possible to portray formal orders as a distortion of the constitutional balance of powers, while one could at the same time praise the possibility of issuing them as a check on the legislature’s powers. The concept of a democracy, which is in my definition part of the rule of law itself, is mainly an argument against judicial orders towards the legislature: the electorate should hold the democratic bodies accountable. Strong arguments in favor of the formal orders flow from the concept of the effective remedy, especially when it comes to the protection of fundamental socioeconomic rights.

In order to enrich the theoretical background for the evaluation of the judicial orders, this research adds other concepts to the role of the judiciary under the rule of law. First, the question of judicial orders to the legislature is assessed in the light of Kelsen’s idea of a constitutional court as a ‘negative legislator’. That position resembles the position of Dutch courts in case of a conflict between national law and international law. It turns out that neither Kelsen’s concept nor the Dutch constitution was intended to hold courts back from more positive interventions, e.g. orders to the legislature. The concept of a constitutional court as a ‘negative legislator’ is connected with a mostly negative legal background, as proposed by classic liberalism. The concept simply leaves the question of positive judicial interventions for the era of the enforcement of socioeconomic rights.

Second, judicial orders are related to the concept of public law litigation, as that term is used in the American literature following the ‘Herculean effort’ of the American federal judiciary to racially integrate public schools. It is claimed
that public law litigation in itself is likely to promote the need for orders to the legislature. The Brown II judgment, in which the American Supreme Court held that it was an obligation for all regulatory bodies to change rules obstructing integration ‘with all deliberate speed’, is an informal order itself, since it was the product of judicial lawmaking and the American Supreme Court’s claims, as stated above, to a position of judicial supremacy. To a certain extent, the SGP case can also be qualified as public law litigation or perhaps even as the Dutch Brown case. To answer the question whether the judiciary should embark on this type of litigation, Fuller’s criticism of a judiciary performing polycentric tasks is elaborated upon.

The increasingly popular idea of a constitutional dialogue between the branches of government is the third concept to be connected with the admissibility of judicial orders to the legislature. By definition, informal orders cannot exist where the relationship between the judiciary and the legislature is of a dialogical nature. Informal injunctions presuppose binding, and not merely persuasive or advisory judicial lawmaking. In the fourth and final place, something close to the concept of the prudential political question doctrine is used to point out that the question of ordering the legislature to legislate is, at the end of the day, also a strategic one. There are some specific risks attached to it: a massive loss of authority when the legislature openly defies the order, and still a great loss of authority when the order drowns in good intentions. In addition to this normative theoretical framework, one case study is devoted to collecting all the arguments actually used in Dutch case law, either to support the idea of a formal order or to reject it.

In a final analysis, it is argued that the Dutch Supreme Court was right when it refused to order the national legislature to act. Having looked into all the arguments, the conclusion must be that the objections against formal orders prevail. A healthy separation of powers cannot accept the judicial branch ordering the legislative branch to make use of its powers: these branches ought to be, in the words of Jefferson, co-sovereign and co-equal. It is not wise for the courts to put their authority at risk. Much of the harsh doctrinal criticism on the Waterpakt judgment is based on the perspective of an effective remedy, but it overlooks the institutional dimension of the question. Although it is evidently true that the legislature may not refuse to do what it is legally obliged to do, the question still remains whether it is up to the judiciary to police the democratic bodies. The border between the government of laws and not of men and the gouvernement des juges is a thin and subtle one. From this institutional perspective, the difference between formal and informal injunctions proves to be an essential one. The formal orders create an executorial relationship, the informal ones do not; especially not in the Dutch context, where the binding nature of judicial lawmaking rests upon the political practice of accepting judicial interpretations as the final word on a specific question. Informal injunctions rest on cooperation, formal ones on obedience. The first are therefore admissible, the second are not.
This being said, this thesis does not propose to put an end to all the formal orders wherever acts of a regulatory nature are involved. It only claims that courts should not order the legislature to act at the national level, the level on which there should be real equality between the legislative and judicial branch. At the subnational level, towards municipal legislatures for example, judicial orders are acceptable.