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978-0-521-82662-4 - Courts and Political Institutions: A Comparative View

Tim Koopmans

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COURTS AND POLITICAL INSTITUTIONS

A Comparative View

The frontier between 'law' and 'politics' is not always clear-cut. A large area exists where courts operate, but governments and parliaments also make decisions. Tim Koopmans compares the way American, British, French and German law and politics deal with different issues: in many instances subjects which are highly 'political' in one country constitute legal issues in another. Is there, for example a 'sovereign Parliament' (as there is in Britain), or will courts control the compatibility of statutes with the Constitution (as in the United States and Germany)? How far can courts go in controlling the legality of administrative action? Are there general legal theories about the frontier between what courts and what politics can do? Koopmans considers case law on a range of issues, including human rights protection, federalism, separation of powers, equal protection and the impact of European and international law.

TIM KOOPMANS was formerly Professor of Constitutional Law at the University of Leiden as well as a judge of the Court of Justice of the European Communities. He was also Advocate General at the Dutch Supreme Court. He is a member of the Royal Netherlands Academy of Arts and Science and Honorary Bencher of Lincoln's Inn. His publications include many articles in Dutch, English and French on labour law, European law and constitutional law.

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PREFACE

Authors may not always be fully aware why they write their books. When composing this book, I felt that my reasons were simple and compelling. When I returned to teaching law at a somewhat advanced age, I happened to rediscover how much comparative methods help to develop students' ability to define legal problems and to collect materials for solving them. Moreover, there is something exciting for them in being exposed to ways of reasoning they are not familiar with. I wrote the book in the hope that any serious reader of it would have the same experience.

The reader I had in mind was the senior student of law, history or political science, not necessarily British or American, with a certain interest in general problems of law or politics, or with a cosmopolitan view of life in society. However, other readers, whatever their background or their vocation in life, may also benefit from the methods I have used for making foreign constitutional systems accessible by comparing them to others. Constitutional law, if well explained, is not all that difficult to understand.

The book could not have been written without the help of a number of persons and institutions. I am thinking, in particular, of the Cambridge law faculty, which provided me in 1999–2000, when I was Goodhart Professor of Law, with a tiny little office in the heart of the Squire Law Library, very close to the law reports. My Utrecht academic friend Tom Zwart helped me to collect materials; he also contributed to the evolution of my ideas by identifying new constitutional developments. Other friends and colleagues encouraged me to keep trying my hand at mastering some basic issues of comparative constitutional law. Finally, the Cambridge University Press assisted me in finding my style of writing.

The first two chapters of the book elaborate some ideas I had already developed in some of my earlier works, written in Dutch. Chapters 3 and 6 rely heavily, though not exclusively, on (respectively) the American and the French literature. Chapter 4 is mainly based on earlier publications of

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mine in English, French and Dutch, in particular on methods of human rights protection. Chapters 5, 9 and 10 are entirely original with regard to anything known to me in existing literature. The other chapters chiefly serve for giving cohesion to the book and transforming its text into a real *exposé*.

I owe the reader one final remark: it has been a great pleasure to compose this book.

T. K.

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ABBREVIATIONS

AC	Law Reports, Appeal Cases
Adm. Besl.	Rechtspraak Bestuursrecht (cases on administrative law, Netherlands)
AG	Attorney General
<i>AJIL</i>	<i>American Journal of International Law</i>
All E R	All England Reports
<i>AmJCompL</i>	<i>The American Journal of Comparative Law</i>
Art.	Article
Bell	John Bell, <i>French Constitutional Law</i>
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (decisions of the Federal Constitutional Court, Germany)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (decisions of the Federal Administrative Court, Germany)
CC	Conseil Constitutionnel (Constitutional Council, France)
CE	Conseil d'Etat (Council of State, France)
ch.	chapter
Ch	Law Reports, Chancery Division
cl.	clause
<i>CLJ</i>	<i>Cambridge Law Journal</i>
CMLR	Common Market Law Reports
Cmnd.	Command Papers (studies submitted to the British Parliament)
C of E	Church of England
<i>CollRev</i>	<i>Columbia Law Review</i>

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ABBREVIATIONS

Cranch	Cranch, ed., <i>Reports of Cases of the US Supreme Court 1804–1816</i>
DC	District of Columbia
DLR	Dominion Law Reports (Canada)
EC	European Community (or: Communities)
ECHR	European Court of Human Rights
ECR	European Court Reports
EHRH	European Human Rights Reports
ESC	European Social Charter
EU	European Union
<i>FLR</i>	Law Reports, Family Division
GLC	Greater London Council
<i>HarvLRev</i>	<i>Harvard Law Review</i>
ICC	Interstate Commerce Commission (USA)
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
IRA	Irish Republican Army
KB	Law Reports, King's Bench Division
Kommers	Donald P. Kommers, <i>The Constitutional Jurisprudence of the Federal Republic of Germany</i>
<i>LQR</i>	<i>Law Quarterly Review</i>
MR	Master of the Rolls
<i>NedJur</i>	<i>Nederlandse Jurisprudentie</i> (Dutch Law Reports)
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i> (New Legal Weekly, Germany)
NO	Nationale Ombudsman (Netherlands)
PM	Prime Minister
QB	Law Reports, Queen's Bench Division
<i>Rabelszeitschr.</i>	<i>Zeitschrift für ausländisches und internationales Privatrecht</i>
<i>RDP</i>	<i>Revue du Droit Public</i> (Public Law Review, France)
<i>Rec.</i>	<i>Recueil des décisions du Conseil Constitutionnel</i> (or, as the case may be: <i>du Conseil d'Etat</i>)
<i>RFDA</i>	<i>Revue Française de Droit Administratif</i>
<i>RFDC</i>	<i>Revue Française de Droit Constitutionnel</i>
<i>RIDC</i>	<i>Revue Internationale de Droit Comparé</i>
s.	section

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Series	European Court of Human Rights. Judgments and Decisions
<i>TuLRev</i>	<i>Tulane Law Review</i>
UCLA	University of California, Los Angeles
US	United States Supreme Court Reports
WLR	Weekly Law Reports