

The Netherlands

Reorganising the Dutch Judiciary

by Leny E de Groot-van Leeuwen

In this first letter from The Netherlands, it is my pleasure to take you on a small excursion into our country of Permanent Reorganisation.

At the end of the 1960s, there appeared to be a crisis of confidence between the Dutch judiciary and the general public. A commission was established to examine the possible reorganisation of the judiciary. Its report in 1972 triggered an avalanche of other commissions, lengthy public deliberations, extensive planning procedures and so on.

In the meantime, the crisis of confidence disappeared (mainly due to a number of simple measures taken by the judiciary itself); but the process of reorganisation had taken on a life of its own. Another problem was found: the judiciary, it was felt, was inefficient, due to the plurality of types and levels of courts.

A plan of reorganisation was endorsed by Parliament in 1989. Its core objective was:

'full integration of the judiciary on the levels of personnel, organisation and jurisdiction'.

Three stages were planned. First, the lower administrative courts were to be integrated into the regular district courts. Secondly, the 62 county courts were to be dissolved and their jurisdiction to be taken over by the district courts. The last stage was to integrate the higher administrative law courts with the higher regular courts. 'Big is beautiful' was the overriding idea.

Controversy arose over the second phase. The county courts have consistently been our most efficient: why then integrate them into the over-loaded district courts?

In June this year, the Minister of Justice wrote to Parliament saying that the second and third stage were to be reconsidered. It was felt that the small-scale and accessible county court would be lost in the new centralised courts, at the expense of the citizen who needs a low geographical and psychological threshold into the legal system. The 'small is beautiful' adage is embraced with such enthusiasm that, in a number of cities, there are to be experiments with judges holding court at a sub-county level.

What can be learned? Political ideas are cyclical; but the cycle moves on rapidly in comparison with the inertia encountered in the implementation of those ideas. In reality, there is little change. Those ideas which will actually be implemented will be found somewhere halfway between the ups and downs of the political ideas – and they will vary far less often. All the reports, research and commissions necessary to effect this inertia are a small price to pay compared with the damage that would ensue if the rapidly changing political agenda was put into practice. 本

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Italy

Italian law and the unification of contract law in Europe

by Professor Maria Gandolfi

Italian law embraces a range of types of contract borrowed from the common law as well as those covered by Book IV of the Civil Code which came into force in 1942. The basic framework of Book IV needs no revision. Italian contract law is relatively modern because many of the rules and legal institutions of traditional private law were developed and incorporated into the Code, which unified civil and commercial law.

This relative modernity has induced a number of private lawyers from common law and civil law countries to form themselves into a working group in Pavia University and to choose Book IV of the Italian Civil Code as a template on which to base a draft of a uniform contract code for the European Union. This choice was also influenced by the observation that, as far as contract law is concerned, the Italian Code can have a mediating function between French law – from which the Italian Code derives its general framework – and German law – from which it has drawn numerous innovations. In addition, it was considered that Italian contract law, in its most recent

developments, is closer to English law than French, Spanish or German law. The Italian Code takes into account the demands of a developed industrial society. Despite the period in which it was drawn up, it was not influenced by the prevailing authoritarian ideology; indeed Book IV has never been censured by the Italian Constitutional Court.

Because of the basic differences of English contract law with respect to other European systems, the Pavia working group is also basing its work upon a draft drawn up in England. This draft of a code of contract law is now published and distributed in European continental countries, as well as in Latin America. It was drawn up about 20 years ago by Harvey McGregor on behalf of the English Law Commission with the aim of trying to unify English and Scottish contract law.

So far, the Pavia working group has made many important changes to the Italian Civil Code so as to make this law more readily transferable into different legal systems, particularly into the system of common law. For example, the members of the

Pavia group have decided to not introduce the technical concept of obligation, unknown in the area of common law. They propose to solve the problems relative to the effects of contract, performance and non-performance without this dogmatic superstructure. For their part, the common lawyers of this working group have considered that it is possible to forgo not only the concept of privity of contract but also the rule that

consideration is a necessary element of contract. This means that contract law can include the Roman law idea of *pactum*, familiar in many parts of the European Union. 

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United States

The US smoking settlement – James I’s vindication?

by Wilmer ‘Buddy’ Parker

In the evening hours of Friday 20 June 1997, the Associated Press reported highlights of the tobacco settlement just announced by the Attorney General of the State of Mississippi, Mike Moore, spokesperson on behalf of 39 attorneys general seeking to recover Medicaid funds spent by the states treating individuals whose illnesses allegedly resulted from smoking.

The settlement resulted from intensive negotiation caused by civil litigation brought by 40 states, each a sovereign government, against such tobacco industry giants as Phillip Morris, R J Reynolds Tobacco and others. Associated Press stated that the tobacco companies agreed for the next 25 years to pay \$360 billion health care for uninsured children. Funds from the settlement will also finance free smoking cessation programmes for all smokers, anti-smoking education and advertisement and enforcement of the settlement. The companies agreed that the US Food and Drug Administration (FDA) could regulate nicotine as a drug but the agreement stipulated that the FDA could not ban nicotine until 2009. The FDA must also, according to the agreement, approve as safe any new ingredients added to tobacco products. Any individual smoker would still be able to bring a private cause of action against the industry, but punitive damages would be disallowed. Any compensatory damages for medical bills or lost wages would come out of an annual fund.

The agreement also called for prohibitions of ‘commercial speech’, bans on all billboard and other outdoor advertising of tobacco products, use of human and cartoon characters in tobacco advertisements, internet advertising, product placement in movies and TV, brand name sponsorship of sporting events and brand name promotional merchandise. It further outlawed sales of cigarettes through vending machines and required a nationwide licensing system for tobacco retailers. Other provisions included prohibitions on smoking in public areas and work places without separately ventilated smoking areas. Excepted from such prohibitions were bars and restaurants.

As this commentary is being written, the focus of attention has shifted from the states’ attorneys general and their litigation against the tobacco companies, to whether or not Congress and the President will enact laws to implement the terms of the agreement. Minnesota’s Attorney General, Hubert H Humphrey III, has been highly critical of the agreement and recently urged Congress to thoroughly review documents discovered by Minnesota in its litigation against the tobacco

companies but which remain under seal pursuant to court order. Allegedly, the documents detail:

‘evidence of a decades-long conspiracy by cigarette makers and their lawyers to suppress evidence and deceive the public about the dangers of smoking.’

Lawyers representing the State of Minnesota have reportedly reviewed over 30 million pages of documents collectively produced by the major tobacco companies in response to court ordered discovery requests. In fact, many records are maintained in a repository in England which is used to house those records collected from throughout Europe. The tobacco companies were so anxious to avoid discovery, it is reported, that Minnesota authorities:

‘uncovered evidence that tobacco companies shifted records to operations abroad or destroyed potentially incriminating documents’.

At least one US senator is reported to have said that he would not vote to grant the tobacco companies immunity from punitive damages unless they engaged in full disclosure of all evidence.

While much remains to be learned by the general public as to the existence, if any, of a conspiracy to conceal from the public the health problems of smoking cigarettes, there can be no question but that the largest factor in the proposed agreement is its cost. Concerns have been raised about the tax deductibility of the tobacco industry’s payments, which would result reportedly in a drain of roughly \$100 billion on the federal treasury over the next 25 years. Most of the money in the settlement proposal would go to the states that have sued the industry and to plaintiffs seeking individual damage payments. It has been reported that the President is not only concerned about the cost the federal government may bear, but also about the proposed limitations on FDA’s authority, i.e. FDA cannot ban nicotine until 2009. The President has directed that a White House panel examine the tobacco settlement proposal from a totally different perspective from that of those who crafted the agreement.

How did the tobacco industry get to this position? Jim Yardly of *The Atlanta Journal* has written that, in May of 1993, a Mississippi trial lawyer, Michael T Lewis, after visiting the dying mother of his secretary:

‘stepped off an elevator with an idea that would alter the landscape of tobacco litigation.’