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.
COURTS AND POLITICAL INSTITUTIONS

A Comparative View

TIM KOOPMANS
CONTENTS

Preface page viii
Table of cases x
List of abbreviations xix

1. Introduction 1
  1.1. Terminology 1
  1.2. Comparative approaches 4
  1.3. Comparative methods 6
  1.4. Legal approaches 9
  1.5. Outline of the study 11

2. The Sovereignty of Parliament 15
  2.1. The parliamentary model 15
  2.2. The impact of the British model 20
  2.3. British practice 23
  2.4. Subordinate and colonial legislation 26
  2.5. Weaknesses of the theory 30

3. Judicial review of legislation 35
  3.1. The constitutional model 35
  3.2. The impact of the American model 40
  3.3. American practice 44
  3.4. Judicial restraint and activism 51
  3.5. Collisions with politics 57

4. The growth of judicial power 63
  4.1. Constitutional courts: Germany 63
  4.2. Semi-review: France 69
  4.3. Human rights protection: the Netherlands 76
4.4. The influence of the European courts 84
4.5. Courts and parliaments 91

5. The limits of judicial review 98
5.1. The political question 98
5.2. The counter-majoritarian difficulty 104
5.3. The area of discretion 108
5.4. Methods of interpretation 117
5.5. Preserving democracy 123

6. The legality of administrative action 129
6.1. The model of separation 129
6.2. The Conseil d’Etat 135
6.3. French practice 142
6.4. Semi-separation: Germany 147
6.5. The common law systems 153

7. Courts and governments 162
7.1. Separation of powers 162
7.2. Federalism 168
7.3. The imperial presidency 175
7.4. Cabinet government 180
7.5. Dualism in France 187

8. Courts and individual rights 192
8.1. Freedom of expression 192
8.2. Protection against police powers 199
8.3. Church and State 204
8.4. Methods of protection 210
8.5. The institutional framework 216

9. Techniques of judicial protection 223
9.1. Filling the gaps 223
9.2. General principles of law 228
9.3. Access to justice 233
9.4. Higher law 239
9.5. Modern constitutionalism 245

10. A glance at the future 252
10.1. The emergence of new problems 252
10.2. The end of ideologies 257
Contents

10.3. Globalization and regionalization 263
10.4. Judicialization 268
10.5. Law and politics 276

Select bibliography 285

Index 290
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
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.
## TABLE OF CASES

### I. American cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abbot Laboratories v. Gardner</td>
<td>159</td>
</tr>
<tr>
<td>Agostini v. Felton</td>
<td>206</td>
</tr>
<tr>
<td>Aptheker v. Secretary of State</td>
<td>120</td>
</tr>
<tr>
<td>Argersinger v. Hamlin</td>
<td>51</td>
</tr>
<tr>
<td>Arizonans for Official English v. Arizona</td>
<td>62</td>
</tr>
<tr>
<td>Ashwander v. TVA</td>
<td>118–19</td>
</tr>
<tr>
<td>Baker v. Carr</td>
<td>52, 98, 100</td>
</tr>
<tr>
<td>Barnes v. Glenn Theater Inc.</td>
<td>194</td>
</tr>
<tr>
<td>Boddie v. Connecticut</td>
<td>237</td>
</tr>
<tr>
<td>Bolling v. Sharpe</td>
<td>46</td>
</tr>
<tr>
<td>Bowsher v. Synar</td>
<td>167</td>
</tr>
<tr>
<td>Brown v. Board of Education of Topeka (1 and II)</td>
<td>46, 48–9, 54, 57, 278–9</td>
</tr>
<tr>
<td>Buckley v. Valeo</td>
<td>258</td>
</tr>
<tr>
<td>Bush v. Gore</td>
<td>280</td>
</tr>
<tr>
<td>Chandler v. Miller</td>
<td>200</td>
</tr>
<tr>
<td>Citizens to preserve Overton Park v. Volpe</td>
<td>114</td>
</tr>
<tr>
<td>City of Cleburne v. Cleburne Living Center</td>
<td>48</td>
</tr>
<tr>
<td>City of Eastlake v. Forest City Enterprises Inc.</td>
<td>126</td>
</tr>
<tr>
<td>Clinton v. Jones</td>
<td>180</td>
</tr>
<tr>
<td>Colegrove v. Green</td>
<td>52</td>
</tr>
<tr>
<td>Coleman v. Miller</td>
<td>100</td>
</tr>
<tr>
<td>Colorado Republican Campaign Commission v. Federal Election Commission</td>
<td>259</td>
</tr>
<tr>
<td>Cooper v. Aaron</td>
<td>47, 239</td>
</tr>
<tr>
<td>County of Allegheny v. American Civil Liberties Union</td>
<td>205</td>
</tr>
<tr>
<td>Cox v. Louisiana (Cox I)</td>
<td>49</td>
</tr>
</tbody>
</table>
Daniel v. Paul 170
Dred Scott case 41
Eisenstadt v. Baird 48, 279
Employment Division of Oregon v. Smith 207
Everson v. Board of Education of New Jersey 205
Ferguson v. City of Charleston 200
Fiore v. White 213
Furman v. Georgia 54
Garcia v. San Antonio Metropolitan Transit Authority 212
Gertz v. Robert Welch 50
Goldwater v. Carter 100
Gooding v. Wilson 119
Griffin v. Prince Edward County School Board 47
Griswold v. Connecticut 213, 225–6
Heart of Atlanta Motel v. United States 60, 170
Humphrey’s Executor v. United States 160
Immigration and Naturalization Service v. Chadha 166
Jones v. Opelika (1 and 11) 193
Katzenbach v. McClung 170
Kent v. Dulles 120
Lee v. Weisman 205
Lemon v. Kurtzman 206
Lochner v. New York 58
Locket v. Ohio 54
Luther v. Borden 98
McGowan v. Maryland 207
Mapp v. Ohio 51, 171
Marbury v. Madison 37–9, 47, 105, 239–40, 249
Marsh v. Chambers 128
Maryland v. Baltimore Radio Show Inc. 36
Massachusetts v. Sheppard 171
Metro Broadcasting Inc. v. FCC 56
Miranda v. Arizona 171
Missouri v. Holland 6
Mora v. McNamara 36
Morrison v. Olson 178
NAACP v. Button 93
NAACP v. Alabama 119
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Endowment for the Arts v. Finley</td>
<td>194</td>
</tr>
<tr>
<td>National Labor Relations Board v. Jones &amp; Laughlin Steel Corp.</td>
<td>60</td>
</tr>
<tr>
<td>National League of Cities v. Usury</td>
<td>211</td>
</tr>
<tr>
<td>New York v. United States</td>
<td>212</td>
</tr>
<tr>
<td>New York Times v. United States ('Pentagon papers')</td>
<td>195</td>
</tr>
<tr>
<td>Pacific States Tel. &amp; Tel. Co. v. Oregon</td>
<td>98</td>
</tr>
<tr>
<td>Planned Parenthood of Southeastern Pennsylvania v. Casey</td>
<td>9, 55</td>
</tr>
<tr>
<td>Plessy v. Ferguson</td>
<td>46</td>
</tr>
<tr>
<td>Powell v. McCormack</td>
<td>99</td>
</tr>
<tr>
<td>Regan v. Wald</td>
<td>120</td>
</tr>
<tr>
<td>Regents of the University of California v. Bakke</td>
<td>56</td>
</tr>
<tr>
<td>Reitman v. Mulkey</td>
<td>126</td>
</tr>
<tr>
<td>Reynolds v. Sims</td>
<td>53</td>
</tr>
<tr>
<td>Rhodes v. Chapman</td>
<td>121</td>
</tr>
<tr>
<td>Richmond v. J. A. Croson Co.</td>
<td>56</td>
</tr>
<tr>
<td>Rochin v. California</td>
<td>230</td>
</tr>
<tr>
<td>Roe v. Wade</td>
<td>9, 55, 61, 245</td>
</tr>
<tr>
<td>Schechter Poultry Corp. v. United States</td>
<td>59</td>
</tr>
<tr>
<td>Shaw v. Reno</td>
<td>53</td>
</tr>
<tr>
<td>Springer v. Philippine Islands</td>
<td>164</td>
</tr>
<tr>
<td>Texas v. Johnson</td>
<td>194</td>
</tr>
<tr>
<td>Texas v. White</td>
<td>126</td>
</tr>
<tr>
<td>Texas Monthly Inc. v. Bullock</td>
<td>206</td>
</tr>
<tr>
<td>Thompson v. Louisville</td>
<td>199</td>
</tr>
<tr>
<td>Trop v. Dulles</td>
<td>52, 106</td>
</tr>
<tr>
<td>United States v. Alvarez-Machain</td>
<td>244</td>
</tr>
<tr>
<td>United States v. Carolene Products Co.</td>
<td>54, 123–4</td>
</tr>
<tr>
<td>United States v. Darby</td>
<td>211</td>
</tr>
<tr>
<td>United States v. Kras</td>
<td>36</td>
</tr>
<tr>
<td>United States v. Lopez</td>
<td>171</td>
</tr>
<tr>
<td>United States v. Robel</td>
<td>193</td>
</tr>
<tr>
<td>US Term Limits v. Thornton</td>
<td>101</td>
</tr>
<tr>
<td>Virginia State Board of Pharmacy v. Virginia Consumer Council</td>
<td>194</td>
</tr>
<tr>
<td>Webster v. Reproductive Health Services</td>
<td>55</td>
</tr>
<tr>
<td>West Coast Hotel Co. v. Parrish</td>
<td>59</td>
</tr>
<tr>
<td>Whitney v. California</td>
<td>192</td>
</tr>
</tbody>
</table>
Wickard v. Filburn 169
Youngstown Sheet and Tube Co. v. Sawyer (‘steel seizure case’) 3, 121, 164

II. British and Commonwealth cases

AG v. Guardian Newspapers Ltd. (‘Spycatcher’) 195
AG v. Jonathan Cape Ltd 196
AG v. Ryan 116
Allen v. MacAlpine 93
Anisminic Ltd. v. Foreign Compensation Commission 157
Associated Provincial Picture Houses v. Wednesbury 114, 230
Avon County Council v. Buscott 156
Bedfordshire County Council (v. X) 158
Dr Bentley’s case 158
ex p Blackburn (R v. Metropolitan Police Commissioner) 202
Blackburn v. AG 25
Dr Bonham’s case 39
Bourgoin SA v. Ministry of Agriculture 158
Bribery Commissioner v. Ranasingh 26
ex p Brind (R v. Home Secretary) 116, 142, 229
Bromley Borough Council v. GLC 28
British Coal Corp. v. the King 29
Cambridge District Health Authority (ex p B.) 116
Chester v. Bateson 23
ex p Chetnic Developments Ltd (R v. Tower Hamlets LBC) 116
Conway v. Rimmer 154
Derbyshire County Council v. Times Newspapers 197
Factortame II 25
ex p Fayed (R v. Home Secretary) 27, 116
GCHQ case (Council of Civil Service Unions v. Minister for the Civil Service) 185
Gillick v. West Norfolk and Wisbech Area Health Authority 115
Gouriet v. Union of Post Office Workers 125, 185
Hoani Te Heuheu Tukino v. Aotea District Maori Land Board 24
Hipperson v. Newbury District Electoral Registration Officer 261
<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ex p International Traders Ferry Ltd (R v. Chief Constable of Sussex)</td>
<td>230</td>
</tr>
<tr>
<td>ex p Joint Council for the Welfare of Immigrants (R v. Secretary of State for Social Security)</td>
<td>185</td>
</tr>
<tr>
<td>ex p Kebeline (R v. Director of Public Prosecutions)</td>
<td>29</td>
</tr>
<tr>
<td>Kruse v. Johnston</td>
<td>27</td>
</tr>
<tr>
<td>Laker Airways Ltd. v. Department of Trade</td>
<td>116</td>
</tr>
<tr>
<td>McLaughlin v. O’Brien</td>
<td>271</td>
</tr>
<tr>
<td>O’Reilly v. Mackman</td>
<td>156</td>
</tr>
<tr>
<td>Padfield v. Minister of Agriculture, Fisheries and Food</td>
<td>116</td>
</tr>
<tr>
<td>ex p Page (R v. Hull University Visitor)</td>
<td>157</td>
</tr>
<tr>
<td>ex p Pierson (R v. Home Secretary)</td>
<td>243</td>
</tr>
<tr>
<td>Reynolds v. Times Newspapers</td>
<td>197</td>
</tr>
<tr>
<td>Ridge v. Baldwin</td>
<td>153</td>
</tr>
<tr>
<td>ex p Shaw (R v. Northumberland Compensation Appeal Tribunal)</td>
<td>157</td>
</tr>
<tr>
<td>Skapinker (Law Society of Canada)</td>
<td>248</td>
</tr>
<tr>
<td>Stovin v. Wise</td>
<td>238</td>
</tr>
<tr>
<td>Ward v. James</td>
<td>95, 282</td>
</tr>
<tr>
<td>Westminster CC v. Haywood</td>
<td>218</td>
</tr>
<tr>
<td>White and Collins v. Minister of Health</td>
<td>115</td>
</tr>
<tr>
<td>ex p Yaffé (Minister of Health v. R)</td>
<td>27</td>
</tr>
</tbody>
</table>

### III. French cases

- **Amendement-Séguin** 75
- **Aramu** 139
- **Assemblée européenne** 267
- **Association Greenpeace France** 102
- **Autoroute du Chablais** 141
- **Barel** 113
- **Benjamin** 140, 203
- **Blanco** 133
- **Blocage des prix et des revenus** 72
- **Canal, Robin et Godot** 138
- **Carlier** 134
- **Commune de Gavarnie** 144
- **Concerts du Conservatoire** 147
- **Conseil Supérieur de l’Audiovisuel** 198, 215
Consorts Leconte 204
Couitéas 143
Dame Lamotte 132
Dames Dol et Laurent 189
Découpage électoral 120
Demoiselle Mimeur 142
Entreprises de presse 120, 198
Etablissements Cruse 140
Garrigou 228
Gaz de Bordeaux 145
Heyriès 189
Interruption volontaire de la grossesse 92
La Fleurette 143
Les films Lutétia 203
Les fils de Henri Ramel 144
Liberté d’association 73
Liberté d’enseignement 74
Librairie François Maspero 113
Loi de nationalisation 75, 227
Loi référendaire 125
Lujna Gorostiola 112
Naud 140
Polynésie française 275
Quotas par sexe 75
Règlement du Sénat 75
Redevance radio-télévision 72
Rubin de Servens 102, 188
Sécurité et liberté 201
Sécurité sociale et santé 75
Société des Granits Porphyroïdes des Vosges 133
Société Toni 112
Statut de la Corse 108, 264
Syndicat agricole et viticole de Lalande-de-Pomerol 112
Syndicat Général des Ingénieurs-Conseils 147
Taxation d’office 73
Thibault 112
Tramways de Cherbourg 145
Validation 138
Veuve Trompier-Gravier 140
Ville de Dieppe 140

IV. German and Dutch cases

Antillean teachers 83
AOW-I 78
Brunner v. European Union (‘Maastricht Urteil’) 267–8
Deutsch–französisches Wirtschaftsabkommen 186
Feuerwehrbeitrag 275
Geertruidenberg II 80
Grunderwerbsteuergesetz Hamburg 66
Grundlagenvertrag 68
Harmonisatiewet 83, 93
Irakischer Ehemann 68
Kalkar 103
Kruzifix 68–9, 210
Leffers 144
Mittelstreckenraketen 68, 104
Mühlheim-Kärlich 234
Nachtarbeiterinnen 68
Parlementarische Geschäftsordnung 118
Parteienfinanzierung 260
Pershing II 261
Preisgesetz 150
Princess Soraya 65, 198
Prozesskosten im Ehescheidungsverfahren 107
Radikalenerlass Schleswig-Holstein 65
Rechtschreibreform 173
Saga vom Sturmbataillon 152
Schleyer 272
Schwangerschaftsabbruch (I and II) 68–9, 91
Soldatenmord von Lebach 226
Sperrklausel 67
Stadt Aschendorf 67
Startbahn West 127
Südweststaat 67
Unschuldsvermutung 86
Van den Biggelaar v. Dohmen 81, 86
Volksbefragung über Atomwaffen 127
Volkswagenwerkprivatisierung 249
Westdeutsche Rundfunk 109

V. European courts

Airey v. Ireland 236
Algera c.s. 89
AM&S 89
Bela-Mühle 117
Benthem v. the Netherlands 235
Cardot 86
Cassis de Dijon (Rewe) 90
Castells v. Spain 197
Cossey 249
Costa v. ENEL 85
Delacre 117
Deuka 111
Dumortier Frères 144
Engel v. the Netherlands 80
Francovich and Bonifaci 238
Funke v. France 88
Golder v. United Kingdom 234
Goodwin 81
Hauer 227
Heylens 234
International Chemical Corp. 85
Jenkins v. Kingsgate Clothing Productions 83, 221
Johnston v. Chief Constable of the Royal Ulster Constabulary 234
Kostowski v. the Netherlands 90
Kroon 91
Marckx v. Belgium 90, 122
Mellacher v. Austria 109
Mulder II 144
Orkem 227
Osman v. United Kingdom 203
Procola 96
Ratti 85
Reinheitsgebot (Commission v. Federal Republic of Germany; ‘purity of beer’) 90
Salesi v. Italy 273
Simmenthal 85, 87
Sotgiù v. Deutsche Bundespost 221
Van de Hurk v. the Netherlands 235
Van Gend en Loos 79, 85