

Summary

The multi-layered structure of Dutch alien legislation: An historical and comparative analysis

Background and research design

Alien legislation in the Netherlands has a multi-layered structure. Rulers are laid down in the Aliens Act [Vreemdelingenwet], which contains many delegating and optional provisions; the Aliens Decree [Vreemdelingenbesluit, which is a General Administrative Order; the Aliens Regulation, which is a Ministerial regulation; and the Aliens Circular, which contains policy rules. The present report examines this multi-layered structure in historical and comparative legal contexts. The research was initiated after a debate in the Senate on regulatory pressure in alien legislation. The intention was to provide an insight into the reasons for, and the pros and cons of this structure. The research comprised a legal-historical inquiry, an international comparison, and an internal legal comparison.

The principal issue in the historical inquiry was: What does the history of Dutch aliens legislation teach us about the present multi-layered structure and its pros and cons for the institutions and officials that have to do with the regulations (implementing, upholding, applying, or interpreting them)? This was examined by analysing five parliamentary debates, examining in detail more than 1200 amendments to aliens legislation between 1966 and 2012, and interviewing 20 key informants.

The principal question in the international comparison was: How are multi-layered systems of aliens legislation used in other EU member states, especially in view of new European legislation on migration and asylum? This was examined by looking at five migration and asylum directives (Reception conditions for asylum seekers, Family reunification, Long-term residents, Free movement, Qualification) to see how the 27 EU member states have incorporated them into their own national legislation, and then looking more closely at aliens legislation in three member states (Germany, France, United Kingdom).

The main question in the internal comparison was: How are multi-layered systems of legislation used in other areas of administrative law, more especially in the implementation of European regulations? This was examined in two areas of fiscal legislation (income tax and VAT) and environmental law (air quality requirements). A literature study was also undertaken to discover general considerations leading to the use of multi-layered legislative systems.

Historical analysis of aliens regulation

The present structure of the regulations, with its four layers (formal act, general administrative order, ministerial regulation and policy rules) came into existence with the Aliens Act of 1965 and has changed little since then. One important change was that the policy rules were made public around 1980. Other areas of administrative law also commonly make use of a multi-layered structure. The general reasons for delegating regulatory authority are a need for flexibility and decisiveness, and to relieve the legislative burden on parliament. It is reasonable to suppose that similar considerations also played a part in the choice of a four-layered structure when the 1965 Aliens Act was being drafted.

The layered structure of aliens legislation has not changed materially since then, but a development can be discerned towards more substantive provisions in the two upper regulatory tiers, the Aliens Act and the Aliens Decree. More substantive provisions were adopted when the 1965 Aliens Act was revised in 1994, and a large number of policy rules on family unification and family formation were transferred to the Aliens Decree when the Aliens Act 2000 was enacted. In part thanks to the influence of European law, some of the rules in the Aliens Circular were 'promoted' to the Aliens Decree. Many of the respondents, however, were of the opinion that important, abiding standards should be laid down in the Aliens Act, but that this has not yet been done to a sufficient degree. Several respondents named as examples that the rights of EU citizens and the right to a family life have not been adequately laid down in the Aliens Act.

A second development can be seen, which is that the volume of regulation has increased and that amendments have become more frequent. The explanations offered by the interviewees included increasing European legislation; an increase in the number of officials involved and the need for uniformity in implementation; attempts to restrict the officials' room for manoeuvre; and the desire to pursue a restrictive policy. The increase during the past dozen years is remarkable. Since the Aliens Act 2000 went into effect, the Aliens Decree, the Aliens Regulation and the Aliens Circular have been amended far more frequently than in previous periods. A considerable number of the amendments to the Aliens Circular relate to country-specific asylum policies. The increase in the number of amendments in the three tiers with generally binding regulations (Act, General Administrative Order and Ministerial regulation) can in large part be ascribed to European legislation and cabinet policy. Besides an increase in the frequency of amendments since 2001, one can also see an increase in the amount of legislation, most notably in the Aliens Regulation and the Aliens Circular.

There was a visible influence of European and international legislation throughout the period examined, but during the last 12 years it was the incorporation of European directives that formed the most significant reason for amendments to the Aliens Act and the Aliens Decree, while it was the second most important driver of amendments to the Aliens Regulation and the third most important for amendments to the Aliens Circular. Be that as it may, an even larger number of amendments in the same period derived from cabinet policy. The general conclusion is that this dynamic can be only partially ascribed to European developments. It is true that European legislation relatively often gives occasion for amendments in the top legislative tiers (the Aliens Act and especially the Aliens Decree), which imposes a greater legislative burden than amendments to the Aliens Regulation and the Aliens Circular.

The administration has demonstrated a clear preference for laying down substantive standards in the Aliens Decree and the Aliens Circular, the most important reasons for doing so being flexibility and speed. Respondents outside government, however, believe that the preference for delegated legislation and policy rules was also, perhaps even mainly, inspired by cabinet ministers' desire to lay down rules in a politically sensitive area, without unwieldy procedures and parliamentary meddling. The legislative and policy officials we interviewed mentioned that the multi-layered structure had a number of advantages: it facilitates decisive administrative action, which can implement amendments rapidly. The structure also means that the legislative system remains intact, even in the face of amendments. Respondents in the executive organizations stated that the most important advantage of the multi-

layered structure is that the lower regulatory tiers (the Aliens Circular and the Aliens Regulation) can be amended quickly and easily, should questions or problems crop up in their implementation.

Disadvantages of the multi-layered structure were more often named by NGOs, attorneys, judges and academics. The decisiveness and speed that the administration counts as the advantage of delegation, implies that aliens lose their certainty under the law. Delegated legislation and policy rules are subject to less democratic control. According to some respondents, the delegation of regulatory authority leads to poorer quality regulation, partly because there is less advance public debate. The NGOs see it as a disadvantage that, in contrast to amendments to the Act, they have less opportunity to use their influence on amendments to lower tiers of regulation. The rules in lower regulatory tiers are also less well known. Developments in information technology have certainly made it easier to stay abreast of amendments and the most recent versions of regulations. In practice, however, officials, judges, attorneys and other jurists who have to implement the rules, or uphold, apply or explain them, have learned to cope with the multi-layered structure, but nevertheless they find it troublesome. The combination of four layers, with EU regulation as an extra layer on top, coupled with the many amendments, leads to a great deal of searching, with associated uncertainty.

Most respondents view the multi-layered structure of aliens legislation as a *fait accompli*, but many of them are critical of the way the regulations are distributed between the layers, which they do not regard as entirely clear and logical. They also believe that too little has been regulated in the formal Act, while too much is delegated to regulations and policy rules. Many respondents were also critical of the Aliens Circular. The most frequent criticism was that the Aliens Circular not only contains policy rules, it also repeats and explains regulations stemming from higher tiers in the regulatory hierarchy. For this reason, many executive officials and legal aid workers are tempted to consult only the Aliens Circular, while remaining relatively ignorant of the distinction between generally binding regulations and policy rules. It should be noted, however, that the Aliens Circular is currently being revised.

International comparison

Similar to the Dutch system, aliens legislation in Germany, France and Britain also has a multi-layered structure, but there are differences in the way the regulations are distributed between the layers. Just as in the Netherlands, an appeal to delegation is accompanied by arguments related to flexibility and decisiveness, but such arguments seem to carry far less weight in Germany and France than in the UK and the Netherlands.

Location of the most important regulations relating to admission and residence.

	Asylum	Family reunification	Work	Study	Permanent status
NL	A	L	L	L	A
D	A	A	L	A	A
F	A	A	A	A	A
UK	L	L	L	L	L

A = formal Act (Parliament as co-legislator); L = lower regulatory tiers

In Germany and France, the most important substantive regulations are to be found in the relevant Acts, far more than in the Netherlands and the UK. A comparison with Germany is

particularly interesting as a new Aliens Act was passed there in 1965, which has the character of framework legislation, just as in the Netherlands. However, from the 1980s on, German legislation moved towards the inclusion of more substantive norms in the Act. In response to similar developments in the Netherlands, such as a growth in the numbers of second-generation aliens, Germany introduced comparable regulations to those in the Netherlands but – in contrast to the Netherlands – in Germany the regulations were laid down in formal legislation. This development was guided in part by pressure from the German constitutional court. No such pressure occurred in the Netherlands. This may well be a major reason for the present difference between German and Dutch regulation.

In the Netherlands, European directives are often not implemented in the Aliens Act, but rather in the Aliens Decree or the Aliens Regulation. Speed is once again advanced as a major argument for doing so; incorporation into subsidiary legislation makes it easier to meet the deadline for implementation. A second argument is that the systematics of existing national regulations are thereby preserved.

Our analysis of the implementation of five directives dealing with migration and asylum has revealed that most member states, including Germany and France, have incorporated all five directives at the level of formal legislation, passed by parliament. A minority of member states, including the Netherlands and the UK, incorporated most of the five directives into subsidiary legislation. Parliament's involvement in the creation of subsidiary legislation differs from country to country, but it appears to be marginal in most cases. Most member states fail to meet the implementation deadline. The level at which the directives are incorporated does not seem to be decisive for a timely implementation.

Germany and France implemented all five directives via formal legislation, while the UK and the Netherlands more often used subsidiary legislation. This difference can in large part be traced back to the already existing distribution of the regulations between the Act and subsidiary legislation. Since quite a lot of substantive regulation is set down in formal legislation in Germany and France, it is apparent that incorporation of a new European directive will require an amendment to the appropriate Act. In the UK, just as in the Netherlands, many substantive standards are not laid down in the Act itself, but in subsidiary legislation. In formal legal terms, therefore, incorporation of a new directive will not require an amendment to the Act. In the Netherlands and the UK, the government or the appropriate minister often opt to use subsidiary legislation, since the procedure involved is shorter and easier. Nevertheless, the implementation deadline is frequently exceeded. Another solution has been found in Germany. According to the German experts we interviewed, Germany too has a poor record on implementation deadlines. In order to avoid conflict with a directive, provisional instructions are often issued to executive agencies in expectation of the transposition into legislation, telling them how the directive is to be applied. Comparison with Germany also shows that other solutions are conceivable for the problem that the systematics of national regulation are sometimes difficult to combine with European legislation. Germany, for example, has a separate Act legislating the free movement of EU citizens, while in the Netherlands this topic is largely covered in the Aliens Decree.

Internal comparison

One thing that fiscal legislation and aliens legislation have in common is that they both require a unified implementation. Similar to aliens law, environmental law is also a dynamic area of the law, which has to respond to strong pressure from European legislation. In both

fiscal and environmental law, the multi-layered nature of the regulations is in a sense more complex than that in alien legislation. After all, subsidiary to the Aliens Act there is only one general administrative measure, one ministerial regulation and one set of policy rules. Things are different in the other two areas.

The hierarchy in fiscal legislation seems very similar to that in aliens legislation, and the most important arguments in favour of a multi-layered legislative approach (flexibility and decisiveness) and detailed policy rules (uniformity of implementation) correspond closely with aliens legislation. An unusual aspect of fiscal legislation, however, is that the Constitution sets bounds on delegation. This therefore affords a greater degree of consensus about the essentials as compared to aliens legislation. Incidentally, legislative procedures in fiscal law are far quicker than in aliens legislation and other areas.

The regulation of air quality is strongly multi-layered, with its major emphasis lying in the subsidiary tiers. This has to do with the need for flexibility, as well as with the often very technical nature of the standards, coupled with a need for custom-tailored standards for specific locations.

There is little pressure from Brussels in the fiscal area, which is a significant difference from aliens legislation, where recent years have seen the need to incorporate many new European directives. Another difference is that European taxation directives are mainly implemented in formal legislation. The material provisions in the directives are regarded as too important to implement them in subsidiary legislation, and provisions for delegation in fiscal legislation are commonly not so broadly formulated that they can be used to implement European directives dealing with new subjects. At its core, national Value Added Tax legislation involves the implementation of a number of European directives. Significant amendments to those directives have led to a situation where some parts of the legislative system no longer harmonize with the directives.

Dutch air quality standards are based directly on European directives. When the European air quality requirements were being discussed in parliament, part of the debate focused on the legal level at which they were to be implemented. This led to their implementation in a formal Act (the Environmental Management Act: *Wet milieubeheer*). In order to provide nevertheless for the need for flexibility, the Act was subsequently amended to take full advantage offered by the European framework directive to allow member states to fix air quality standards. For that reason – in any case, as far as practical execution is concerned – implementation is largely concentrated in subsidiary legislation. The formal enactment of European air quality requirements has also resulted in a certain amount of violence being done to the legislative system. Some informants speak of a collision between the integral Environmental Management Act and sector-specific European legislation. In aliens law, too, the system of national aliens legislation differs from that of European legislation. Partly for that reason, incorporation into subsidiary legislation is often chosen in order to avoid the need for radical revision of the Act.

General conclusions

Tensions between certainty under the law and democratic legitimacy on the one hand, and administrative flexibility and decisiveness on the other, are inherent to all multi-layered legislative systems. Internal and external comparisons, however, clearly show that the importance attached to such values or interests varies quite a lot. In some other areas and other member states, more weight is afforded to such considerations as certainty under the law

and democratic legitimacy, also when implementing European directives. This leads to a different way of distributing the regulations between the formal Act and subsidiary legislative tiers, but this does not seem to cause insuperable problems for decisiveness and flexibility.

Problems lie not so much in the multi-layered nature of aliens legislation per se, but rather in the size and complexity of the entire complex of regulations, a lack of transparency in the way regulations are distributed between the legislative tiers, and the frequent amendments. The influence of European legislation is increasing, leading to greater complexity, partly because when the directives are incorporated, the systematics of the aliens legislation are maintained. If a legislative system is to be both flexible and transparent, then the following steps can be recommended: (1) a structural reflection on what constitute the 'essentials' of aliens law, which should find their home in formal legislation; (2) a revision of the system of formal legislation, so that it can tolerate amendments, which will always be needed, partly thanks to new European legislation; (3) periodically questioning whether the system is still fit for purpose, or if policy rules should be transformed into general binding regulations.