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Constitutionele remedies bij schending van grondrechten : over effectieve rechtsbescherming, rechterlijk abstineren en de dialoog tussen rechter en wetgever

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Summary

CONSTITUTIONAL REMEDIES OF HUMAN RIGHTS VIOLATIONS

On effective legal protection, judicial abstaining and court-legislature dialogues

1 INTRODUCTION

Most people who contemplate litigating expect to gain something from it. If an evil neighbour has accidentally forgotten to return one's book then litigation should lead to an injunction directing him to return it within six days. One would hardly settle for a court merely acknowledging that the book should indeed have been returned. The same is the case in public law, where the litigant is a citizen complaining of legislation that supposedly violates her human rights. Of course the courts may not agree with the litigant that there actually is a rights violation. But if they do, the question of the appropriate remedy arises. Again, a mere recognition of a violation may not satisfy the claimant.

And yet this is what frequently happens in courts both in the Netherlands and abroad. The reason for this judicial reluctance to issue a remedy is of a constitutional nature. Courts defer to the legislature because rectifying the human rights violation would involve major policy questions the courts consider themselves unable to decide upon.

This phenomenon has its roots in the evolution of human rights law and 'rights discourse'. The content of basic rights has changed over the years. It has moved well beyond classic notions of non-interference and protection against tyranny. Human rights are perhaps more aptly associated with concepts such as 'good governance'. They offer a framework for society and may have a positive, rather than just a negative story to tell. Traditional models of judicial review, in which courts are viewed as guarding the boundaries of legislative action, fit badly the reality of human rights offering a framework for the balancing of different social claims rather than clear limits. Moreover, while the same rights may be clear on what should *not have happened*, they seldom point courts to one right answer as to what should be the road to follow.

One strategy to deal with this is to boldly interpret rights and enforce them. U.S. constitutional law for instance, has a rich history of courts engaging in structural reform on the basis of the Constitution such as in the famous school segregation cases. Equally, the German Federal Constitutional Court issued

some notorious rulings on abortion. The Dutch Supreme Court used the ECHR to engage in rather drastic reforms of family law.

This strategy has led to criticisms of judicial supremacy. Courts in some countries responded by adopting a different strategy: one of remedial restraint. They would declare a right to be violated but leave it up to the legislature to remedy the situation. This practice has been hailed by a growing number of theorists as advancing dialogue and deliberation on human rights in the political institutions. The fact that a court leaves the matter for Parliament is not so much a denial of a remedy, it is submitted, but an expression of the fact that the task of interpreting and enforcing rights is a shared responsibility of both courts and legislatures. The practice has been coined a matter of 'weak' or 'open' remedies. Such remedies may enable courts to avoid difficult policy decisions, invite legislatures to participate in the protection of human rights and give the latter the possibility of responding to courts decisions that are considered too strained.

However 'weak' or 'open' remedies come at a cost. Litigants are denied instant redress. Indeed they may never see their complaints be remedied at all if the legislature decides not to act or if it does so only prospectively. This raises important questions of how to reconcile weak judicial review with the principle that rights violations should be remedied. In the famous Latin maxim, quoted by Blackstone, *ubi jus ibi remedium*. This principle has been incorporated in several national constitutions, the Universal Declaration of Human Rights and both in European and international law. Both article 2 (3) of the ICCPR and 13 of the ECHR state the right to an effective remedy at the national level. EU law has long been familiar with the case law of the Court of Justice on the principle of effective legal protection. It has been codified in article 47 of the Charter of Fundamental Rights of the Union. Do not provisions such as these, require the courts to ensure that the litigant somehow benefits from his successful litigation?

Basic rights are, moreover, usually included in some document that enjoys primacy over ordinary legislation. Often, this would be a judicially enforceable constitution. In other cases, such as the Netherlands, there may not be constitutional review *stricto sensu*, but courts are empowered to enforce international law over conflicting norms of national law. The member states of the European Union moreover, find themselves obliged to enforce the primacy of EU fundamental rights law. Open remedies usually imply that courts, for the time being, apply the norms they have found to be incompatible with a human right. Does this not undermine the primacy of constitutional, international or European law?

2 RESEARCH TOPIC

The purpose of this book is to analyse the 'Dutch version' of the weak remedy. By this I refer to the practice of courts in the Netherlands to declare a rights violation while at the same time refusing the applicant a remedy. The book basically consists of three parts.

The first part deals with the case law of Dutch courts. It starts off by charting the available remedies (ch. 2-3). To that end it introduces the concepts of constitutional and procedural remedies. It then proceeds to examine in what kinds of cases courts refuse to apply a remedy (ch. 4). The last chapter deals with the effects of such a decision (ch. 5).

The question how weak remedies should be assessed in the light of the principles of effective protection and primacy is dealt with in part II. In order to keep things manageable, its focus is reduced to European law. Chapter 6 discusses the right to a remedy in the case law of the Strasbourg Court, mainly on article 13 ECHR. Chapter 7 goes into the principles of primacy and effective legal protection in EU law.

The weak remedy is subjected to a comparative analysis in part III. Chapters 8-10 describe the relevant constitutional remedies in Germany, the UK and Canada respectively. For each jurisdiction it is examined whether a similar 'weak' or 'open' remedy operates and if so, in what kinds of cases and what would be the consequences.

3 CONSTITUTIONAL REMEDIES IN THE NETHERLANDS

Dutch courts enjoy a somewhat schizophrenic mandate to enforce fundamental rights. The Constitution does contain a set of basic rights but courts are not allowed to enforce them over statute law. However, they do have a mandate to enforce international law as far as it has direct effect. This is of particular importance because the Netherlands is a party to the major human rights treaties such as the ECHR and the ICCPR. As most of its substantive provisions do have direct effect in the case law of the Dutch courts, the ECHR in particular has developed into a *quasi* constitution for the Netherlands. Moreover, the courts derive a similar mandate from EU fundamental rights law.

The remedies to be applied by the courts are set out in chapter 3. To that end, a term is introduced which is familiar in Anglo-saxon scholarship but up to now relatively unknown in the Netherlands: *constitutional remedies*. A remedy is styled constitutional when its purpose is to end, prevent or rectify a multilevel conflict of norms. This could be a conflict between constitutional and statutory provisions, but also between statutory and municipal, or between statutory and international provisions. This book only deals with the review of statutory legislation against constitutional or international human rights.

This definition applies to so-called constitutional remedies in a wide sense. These may be divided into two categories: constitutional remedies *stricto sensu* and procedural remedies. The latter refers to the powers of courts regulated by criminal, administrative or civil procedure. A civil court, for example, may award damages or issue an injunction. Where such an injunction serves to mitigate a conflict of norms (for instance because the application of one norm is prohibited) it may be styled a constitutional remedy in the wide sense as well. The courts powers vary per jurisdiction. Criminal courts may discharge or acquit defendants, civil courts may award damages and issue injunctions, whereas administrative courts quash administrative decisions and award damages.

The success of invoking a procedural remedy usually depends on the outcome of the law-making process. An administrative court may, for instance, only quash an administrative decision if it is unlawful. Assuming that the law was followed correctly, the only way to prove this unlawfulness, is to demonstrate that the underlying statutory provision is itself invalid because it violates international law. This law is then set aside, thus clearing the way for the use of the procedural remedy of quashing the decision.

This 'clearing the way' is a kind of remedy in itself. Indeed in constitutional terms, it might be considered far more crucial than the procedural remedies whose application fully depend on what happens in the lawmaking process. These remedies may be called 'constitutional remedies *stricto sensu*'. They are termed constitutional because they are constituted and regulated by constitutional, rather than procedural law. They are specific methods of dealing with conflicts of multilevel norms. Dutch constitutional law operates two of these constitutional remedies: the consistent interpretation of national provisions that *prima facie* conflict with human rights norms and the practice of setting aside of such provisions. Courts in the Netherlands do not have a power to annul legislation.

4 THE LIMITS OF CONSTITUTIONAL REMEDIES

The refusal to provide a litigant with a direct remedy usually flows from the fact that there are limits to the available remedies. Chapters 3 and 4 discuss those limits, mainly focussing on the constitutional remedies in a narrow sense.

What strikes in that respect is that there is no qualitative difference in the limits of consistent interpretation and setting aside respectively. One might perhaps expect that the use of consistent interpretation wholly depends on the possibilities of the statutory text in question, like it is in Germany, but it is not. The courts do sometimes accept an interpretation which, in the light of the wording and its parliamentary history, appears to be rather 'strained'. Consistent interpretation in the Netherlands has thus been called *remedial interpretation*, which means that it is more of a remedy than it is a method of

interpretation. That is not to say that the wording of the provision does not play any role at all, or that there are no limits to the use of this kind of remedy. These limits, however, are of an institutional, rather than of a linguistic nature. The courts may accept a strained interpretation of the text but they only do so if this interpretation fits the statutory system. Moreover, they refuse to do so if it would involve deciding on complex matters of policy.

The duty to set aside statutory provisions that are incompatible with international law seems rather absolute. Article 94 of the Constitution, on its face, does not allow exceptions. However, the courts have frequently decided not to set aside. In some cases it simply would not benefit the claimant. In others the courts felt that setting aside would be disproportionate or that it would violate some other right or principle. In a third category of cases, setting aside would, in the view of the courts, be tantamount to unacceptable lawmaking. It would lead to one of several ECHR-consistent policy outcomes. A last category, which is quite rare, concerns cases in which the violation is not a matter of one single provision, but of a combination of several provisions that are ECHR-compatible in itself. The question then arises which of these provision should be set aside.

Does not article 94 prohibit these self-imposed exceptions? The answer is yes and no. The text clearly does not allow for exceptions. But it is equally clear that the requirement that the international provision should be self-executing was explicitly meant to keep the courts away from illegitimate lawmaking. It is submitted that that there can be *some* exceptions to the rule. What makes matters problematic however, is that there were times that refusing to set aside actually seemed customary rather than exceptional. The Supreme Court nowadays seems to underline that setting aside is still the norm. It is argued that article 94 is not to be interpreted literally but rather institutionally. It should be regarded as an expression of the need for a remedy which is not necessarily limited to setting aside. It does leave room for exceptions but these should be construed strictly. Only where the setting aside of national law would threaten a legal principle or the rights of others, or where it would be grossly disproportionate, is a refusal to disapply justified.

If setting aside is problematic, the consistent interpretation may once again be considered. Can the courts, by making extensive use of their interpretative powers, fashion a temporary rule? It is argued that the courts do have the formal power to so, but that its use is not always legitimate. That is the case where interpretation and lawmaking boils down to deciding on matters of public policy. However, the courts showed, at least in the past, a tendency to regard nearly every choice as a political one, regardless of whether the political actors saw it that way. It is important to note that this is a matter of judicial policy rather than one of legality. The mandate to enforce international human rights law empowers the courts to issue a remedy. They picture the decision whether or not to use this power as a balancing act, carefully weighing the interests of the injured party against the general interest.

However, it is submitted that this picture is misleading. In practice hardly any balancing takes place: where there are choices – and there nearly always are – a remedy is refused. That is not balancing. It is a bright-line rule.

Finally, it should be noted that this ‘balancing’ only takes place in the context of the human rights treaties. The situation appears to be different when courts enforce EU law. Their European mandate seems to dictate that they provide a remedy, usually in the form of setting aside the impugned legislation, even when setting aside might be considered disproportionate. So-called ‘open remedies’ hardly play a role in the context of EU law.

5 THE CONSEQUENCES OF ABSTAINING

What are the consequences of this practice of declaring a right to be violated but refusing to disapply the problematic provision or interpret it consistently? First of all it means that the litigant is, at least temporarily, denied a remedy. Courts are, usually, not able to issue a procedural remedy if the law remains applicable as it is. Claims by the applicant, grounded on the unlawfulness of legislation cannot be allowed. The task of rectifying the inconsistency between national and international law becomes a matter for Parliament. The distinction between power and policy becomes relevant here because the Supreme Court does underline that its refusal to engage in a remedy is only provisional. If the legislature decides not act, the supposed ‘balancing act’ might have a different outcome.

This raises several questions, which are addressed in chapter 5.

First of all, one may ask whether the legislature must actually change the law. Does judicial recognition of the fact that the law violates a right bind Parliament? The second question is what it is supposed to do and whether there is some kind of time-limit.

Is Parliament bound by the judicial finding of a violation? It should be noted at the outset that this ‘finding’ does (usually) take place in the process of lawmaking and not in the operative part of the judgment. Moreover, Parliament is never, and indeed the State seldom, a party to the proceedings concerned. As the judgments of Dutch courts formally have only *inter partes* effects, one might argue that the conclusions of courts regarding the lawfulness of legislation do not bind Parliament. It is argued however that procedural law is not, as such, decisive here. The rules of civil and administrative procedure are clearly not written for the relationship between courts and Parliament. It is constitutional law that determines this relationship. The question thus arises whether there may be found a rule under constitutional law, that Parliament should respect the courts findings. It is argued that such a rule indeed exists, although it is subject to qualifications. The rule is derived from, what is coined here as a principle of ‘constitutional courtesy’.

If, as was argued before, it is in the power of the courts to review legislation and to use their interpretative mandate to provide a remedy, then their decision to do so is a matter of constitutional courtesy prompted by their relative inability to decide *how* the violation should be resolved. It is not prompted by the desire to leave the legislature room for its own interpretation. The case law underlining the power of the courts to devise a remedy when Parliament remains silent, confirms this. It would be unacceptable, to say the least, when this courtesy is not, as a matter of principle, returned. However, the principle does allow for some narrow exceptions. There may for instance be factors that the courts did not or could not, take into account (such as a change in the case law of the European courts). In such a case constitutional courtesy merely assumes a duty to explain.

It appears that in practice Parliament does not contest the courts findings, at least not openly. A survey of legislative practice after judicial rulings declaring legislation incompatible with human rights shows that Parliament regularly enacts remedial legislation. It does however also show that this often takes some time. Moreover, the remedial legislation usually only has prospective effect. The courts have accepted this. The case law shows that they allow the legislature a considerable margin of appreciation in determining its own agenda. Retrospective effect is, moreover, not required.

That leaves a third question: what is the position of the applicant? Is there some possibility of obtaining redress, notably damages, for injuries resulting from impugned legislation? This is where procedural remedies come in again. Indeed not all procedural remedies require a prior constitutional remedy. Civil courts may rule on the lawfulness of legislation *as such* and, accordingly issue an injunction or damages without engaging in consistent interpretation or setting aside. If the injured party can establish that the impugned legislation is unlawful, damages may come within reach.

Can a piece of legislation that was found to be incompatible with human rights norms be considered 'unlawful'? Courts generally assume that if a provision is deemed invalid or inapplicable, it is automatically unlawful. However, the complication here is that the provision in question, although it is incompatible, is not declared invalid or inapplicable. Nevertheless it is argued that this requirement should be interpreted broadly: its function is to establish that there was a breach of international law. Declaring a law invalid or inapplicable presupposes after all that it was incompatible. The fact that such an incompatibility remains without legal consequences in a given case, does not however alter the fact that it should never have been enacted. This enactment and the continuous application of the norm are therefore unlawful *as such*.

The main complication is whether the applicant can be said to have actual damages and whether there is causality between those damages and the impugned legislation. If, after all, a court abstains because there are several ways of remedying a violation, it might well be that the same damages would

still have existed under a compatible provision. Both legal scholarship and legal practice remain divided over this issue. However, the claim that there can be no damages whatsoever must be rejected. At the very least, one may argue that the injured party did not have an equal chance in the legislative process. The doctrine of proportionate liability may offer possibilities here, but it is acknowledged that this too would entail some practical complications. In any case there might be powerful arguments in the Strasbourg case law for a more flexible approach to the question of damages and it is to that case law we turn in chapter 6.

6 THE RIGHT TO A REMEDY UNDER THE EUROPEAN CONVENTION

How should the practice of refusing a remedy on constitutional grounds be evaluated in the light of *ubi jus ibi remedium*? This question is addressed in chapters 6 and 7 for the ECHR and EU law respectively.

As far as the ECHR is concerned, the individual right to a remedy at the national level is to be found in article 13. It requires arguable claims concerning ECHR violations to be investigated by an independent and impartial body that is in a position to provide redress and to ensure that the violation does not continue. This need not be a court but a court does usually satisfy the requirements of article 13 ECHR.

The ECtHR has consistently interpreted article 13 as not requiring a system of judicial review of statutory legislation. This would have forced some member states to change their constitutional systems considerably. It means that article 13 cannot be construed as an argument for courts to stretch their constitutional mandate. It is submitted however, that this case law of the Court is due for revision. It stems from a time that the Convention was not incorporated in some of the member states. That is not the case anymore. Moreover, the Court itself has developed from a traditional international court into a *quasi* constitutional court for the Council of Europe. The fact of the matter is that the member states do operate a system of judicial review, the only question is whether it is review before a national court or only before the ECtHR itself. It is argued that the Strasbourg system's functioning requires proper judicial review at the national level.

If article 13 ECHR would be applicable to the judicial review of statutory legislation, would it then allow a remedial division of labour between the courts and Parliament? Would it, in other words, allow 'weak' remedies? This question is not to be answered easily. There is after all very little case law to go by. However, the case law on the admissibility under article 35 and the practice of the Court in awarding damages under article 41 ECHR do provide some clues. First of all the principle of effective legal protection does require that rights should be remedied, but it equally allows legal systems to divide this task between the courts and other institutions. This does mean however

that the finding of a violation (usually by a court) is binding, in fact if not in law. Legislatures have some freedom in deciding *how* to remedy a problem, but the system would not be effective if they were also to decide *whether* a remedy was necessary.

The fact that it takes some time for the legislature to address the problem is not as such problematic. The Court does however seem to operate two minimum requirements. The first is that there should be some kind of remedy, usually damages, for injuries already incurred. These may be of a pecuniary or a non-pecuniary nature. As to the question what constitutes pecuniary damage, the Court uses a number of indications to decide whether damage has indeed arisen. Indications may be the nature of the violation, the number of victims and developments in the legislative process. With respect to non-pecuniary damages, the Court takes a rather more lenient approach than the Dutch courts. It does sometimes acknowledge that the mere recognition of a violation may be sufficient but it also takes into account the nature of the violation and the speed with which the legislative process can facilitate change. The second requirement is that the legislative process should not take too long. If it does, the Court tends to abandon its traditional reluctance in order to address the national courts directly. However, it does so only where the delay is extremely serious. It may be regarded as a nuclear option.

7 PRIMACY AND EFFECTIVE LEGAL PROTECTION IN THE EU

The European Court of Justice has taken a less subtle approach than its Strasbourg counterpart. It has traditionally framed the application of EU law in the member states in terms of primacy and it requires national courts to enforce this primacy by setting aside national law. National constitutions and the division of powers they intend to safeguard have traditionally had only limited relevance here. EU law requires the national legal order to provide a system of minimal remedies. This encompasses the constitutional remedies of consistent interpretation and setting aside of national law, and the procedural remedy of state liability (damages). Damages are however only an option if all else fails, and the message from Luxembourg appears to be that the national courts should ensure that, in cases such as these, an 'all fails' never sounds.

There are traditionally two strands in the case law of the ECJ regarding the duties of national courts with respect to conflict of European and national norms. The first, the *Rewe* principle, is the relatively restrained approach of procedural autonomy, which allows for national procedural law as long as it is applied indiscriminately and does not endanger the effective application of Union law. The second is the *Simmenthal-Factortame* principle which is often coupled with the principle of effective legal protection. It basically empowers courts to enforce EU law without regard to conflicting national rules.

Open remedies may be problematic under EU law, because they operate under the assumption that the impugned national norm remains applicable. This triggers the *Simmenthal* principle stipulating that the national courts are under a clear obligation to disapply the law. The question remains, however, whether this principle allows for some temporal exceptions. If it does, then there might still be some room for weak remedies.

Recent case law of the ECJ shows that the Court is reluctant to open this door, but it seems to have done so nonetheless. It does not exclude the possibility that it allows a future court to temporarily suspend the effects of its judgment in order to allow the legislature some time for the necessary amendments. The national court may not decide something like that on its own. It should make use of the preliminary reference procedure in such a case. Moreover, it does not seem likely that the ECJ will accept legislative discretion as a sufficient reason for the refusal to disapply the law. Only substantial damage to legal principles which the Court itself recognises, might serve as such a ground. In such a case the award of damages cannot be excluded.

8 COMPARATIVE LAW

Part III of the book deals with a comparison of constitutional remedies and their functioning in Germany (ch. 8), the UK (ch. 9) and Canada (Ch. 10).

The comparison concerns the ways in which courts deal with legislation violating fundamental rights. These three legal systems each operate different systems of rights protection and they each have different documents containing fundamental rights. Although Germany is a party both to the EU and to the major human rights treaties, the main focus of civil rights protection in German law takes place under the Basic Law. Something similar applies for Canada, where the Charter of Rights and Freedoms takes a central place in judicial review. The situation in the UK is somewhat more comparable to the Dutch situation, with the ECHR being its most prominent source of human rights and EU human rights law (though formally with only a limited role for the Charter) as an enforceable alternative. Unlike the Netherlands, where the reception of international law operates in a fairly monistic way, the UK is a dualistic state which has some implications for the way in which the system of remedies is shaped.

8.1 Constitutional remedies

It was submitted that constitutional remedies may be divided into two categories: constitutional remedies in a narrower sense and procedural remedies. Each of the three legal systems investigated operates a system of procedural remedies. Unlike the case of the Netherlands however, these procedural

remedies hardly have an autonomous role to play in any of the other states. Their use almost entirely depends on the deployment of constitutional remedies *stricto sensu*. We saw that this was partly the case in the Netherlands as well, but here there is the possibility of an independent civil tort action against the State for damages or an injunction. Neither Germany nor the UK or Canada operates something equivalent.

Crucial for Germany's system of rights protection is the Federal Constitutional Court (FCC) which holds the monopoly on reviewing legislation for its compliance with the Basic Law. The FCC declares legislation void (a constitutional remedy), it does not issue damages. Regular courts on the other hand may, but they cannot declare legislation unlawful on account of the Basic Law without the FCC annulling the said legislation. Needless to add that a remedy like damages or an injunction is thus quite out of the question. Apart from that, the regular courts in Germany only scarcely allow claims of damages to succeed against legislative injustice in general.

The UK does not have a constitutional court. However, the Human Rights Act 1998, the principle rights charter, makes it impossible to grant damages or an injunction on account of statutory legislation violating human rights. The courts may only issue a declaration of incompatibility which is not binding and cannot serve as a basis for damages or an injunction. Finally, it should theoretically be possible in Canada to claim damages or ask for a specific injunction under article 24 of the Canadian Charter. The courts however interpret this provision as largely irrelevant for the review of legislation, the principle remedy in such cases being the invalidation of problematic provisions. The threshold for damages is moreover extremely high. They are only awarded if the legislature would have acted in bad faith.

All three states however are familiar with a system of constitutional remedies *stricto sensu*. However, the nature of these remedies differs slightly.

In the first place courts in all three legal systems engage in the practice of consistent interpretation. The boundaries of this instrument differ however between, roughly, the federal states of Germany and Canada on the one hand and both the Netherlands and the UK on the other. The element of federalism is less irrelevant than it may seem at first sight. Federal states have a tradition of judicial review of legislation where invalidation or nullification are the traditional remedies. Reading words in or out of the impugned legislation is historically viewed with suspicion. Although the FCC and the Supreme Court of Canada (SCC) do engage in consistent interpretation, they impose fairly strict limits on the practice. The text of the provision should, for instance, yield it appropriate for multiple interpretations. By contrast, courts in the UK and the Netherlands use a more flexible concept of consistent interpretation which, in European law, is known as *remedial interpretation*. They accept more easily a strained interpretation. The ratio for this rather flexible approach is not only federalism. It is also a matter of alternative options. Judgments of both the German FCC and the Supreme Court of Canada operate *erga omnes*, be it in

different ways. As both courts have the power to annul or invalidate laws, they have a fairly suitable remedy for most cases. The UK courts by contrast cannot offer the applicant any other remedy than consistent interpretation. It is the only way in which effective legal protection can be obtained. It helps, moreover, that article 3 of the HRA specifically directs the courts to strive for a consistent reading as much as possible. Although the situation is somewhat different in the Netherlands, its courts commanding an alternative in the form of the power to set aside impugned provisions, there are some similarities as well, most notably the fact that consistent interpretation is traditionally deeply rooted in Dutch constitutional law, even more so than the power to set aside.

The main constitutional remedy in Germany is nullification of impugned legislation. Statutory provisions violating the Basic Law are automatically (*'ipso jure'*) null and void. Only the FCC has the power to declare a piece of legislation unconstitutional and thus void. Its judgments have the force of law and as such apply *erga omnes*. The relevant provision becomes non-existent and therefore ceases to serve as a basis for any legal act. Judgments of the Canadian courts invalidating legislation may not, on a formal basis, have such far-reaching effects. They do however have similar effects on the basis of *stare decisis*. Legislation, although unconstitutional, does not of itself, nor by virtue of a judicial decision, become non-existent. What sets the Canadian system apart however, is the fact that Parliament may, on the basis of article 33 of the Canadian Charter, declare its own legislation valid *notwithstanding* a possible violation of Charter rights. Judicial invalidation may thus be prevented or reversed. This may be contrasted with the German model which does not allow for such an override and indeed, in the opinion of the FCC, even prohibits the renewed enactment of an act declared unconstitutional. Finally, the UK courts, as has been said, do not command a similar power.

8.2 Open remedies and dialogue

Is there a possibility for courts in the countries compared, to defer the matter, be it temporarily, to the legislature? Yes there is. In each of the systems investigated there exists some kind of mechanism by which the courts may allow Parliament a transitional period in which the impugned legislation is applied as if it were entirely lawful. The mechanisms differ however in nature and application.

Although the core constitutional remedy in Germany, at least formally, is nullification, the FCC has introduced two ways in which it signals legislative defects to the legislature without actually declaring them void. The first is the so-called *Appellentscheidung*, where the FCC literally 'appeals' to Parliament to change the law. The *Appellentscheidung* distinguishes itself by the fact that the Court refrains from formally declaring the law unconstitutional although

it does note constitutional defects. It shows some similarities with the practice of Dutch courts to conclude an incompatibility without declaring the law formally unlawful in the operative part of the judgment.

The *Appellentscheidung*, in the mean time, is fairly controversial and not widely used. The same cannot be said of the so-called *bloße Unvereinbarerklärung* ('a mere declaration of incompatibility'). The Court, in such a case, does formally declare the law to be unconstitutional in the operative part of the judgment. It, however, expressly denies that the law is void. These declarations come in two versions. Some declarations do suspend the application of a law although they refrain from nullifying it. Pending cases should, in the mean time, be adjourned so as to give the applicants a fair chance to benefit from a future change of law. Others do not even have a suspending effect. The law remains entirely applicable. This last version is usually coupled with the promulgation of some kind of transitional arrangement, by the Court, in order to mitigate the detrimental effects of the legislation. The first category is often applied in cases where there is legislative discretion in devising rights-consistent norms (such as non-discrimination). The second is usually, although not exclusively, found in cases where the inapplicability of a law would have serious consequences for society at large.

Appellentscheidungen and *Unvereinbarerklärungen* differ in their legal consequences. The legislature is, in the first category, not under a formal obligation to enact changes because the law is theoretically still constitutional. Which is no to say of course that it would not still be wise to do so because chances are that the FCC may, in a future case, decide to change its mind. Current practice shows that the *Appellentscheidung* is not very effective in bringing about legislative changes. The *Unvereinbarerklärung* by contrast does trigger a formal obligation for legislative action and it is fairly successful. However, it does sometimes take quite some time before the new law comes into force. This has led to some discussion as to what should be the position if the legislature refuses to act in due course. The FCC, in some cases, empowered the regular courts to use their interpretative mandate thus bringing about a remedy by engaging in judicial lawmaking.

The declaration of incompatibility is also to be found in the UK. There are even some similarities in the application of the remedy but not in its legal consequences. The UK declaration of incompatibility is the only open remedy in the comparison that has an express basis in domestic law. Both the German and the Canadian versions are judge-made. It is the only alternative for the remedy of consistent interpretation and its application is therefore tied to the limits of judicial lawmaking. These limits are threefold. First, an interpretation may not be at odds with a 'fundamental feature' of the legislation. Furthermore, where there are several ways of making a provision ECHR-compliant and the choice involves issues of policy, the courts should leave such matters for Parliament. Third, the courts should refrain from engaging in compre-

hensive reforms with wideranging ramifications. In such cases the declaration of incompatibility is the obvious course of action.

The UK declaration of incompatibility has only a limited range of legal consequences. It cannot serve as a basis for any procedural remedy. In fact, according to some authors, it may hardly be called a remedy at all. It is the recognition that a remedy is beyond the realm of the courts. The litigant should simply await the outcome of the legislative process. The declaration does trigger special powers for the government to promote a speedy change of law. However, Parliament is not bound by the declaration. Although current practice shows that it regularly enacts new legislation, there are signs that this may not always be the case. A binding declaration would moreover be at odds with the principle of parliamentary sovereignty which the HRA expressly tries to preserve. Finally, the enactment of new legislation often takes quite some time and it usually has only prospective effects. The redress the declaration provides to litigants is therefore limited.

Finally, Canadian constitutional law does not as such feature a mere declaration of incompatibility. The SCC does however sometimes suspend the invalidation of a law. This so-called 'delayed invalidation' has much in common with the open remedies described before. There are, however, important differences.

What is similar, is the area of application. Canadian courts suspend their declarations of invalidity basically in two sets of circumstances. These may be coined the necessity argument and the democratic argument. Invalidation may, firstly, endanger either the rule of law or the public safety (because it would result in a legal vacuum), or it may deprive third parties of certain rights. In such cases a suspension is a matter of necessity. The SCC has however also made use of the delayed declaration in order to promote a dialogue with Parliament. Delaying the invalidation would first of all give Parliament the chance to decide what should be the appropriate redress if there would be several lawful ways of addressing the issue. Moreover, in the specific setting of Canadian constitutional law, it would even enable Parliament to use the so-called *notwithstanding clause* of article 33 of the Charter in order to override the Courts decision. Delayed invalidation may thus provide the courts with an emergency button in so-called 'hard cases'.

What is different is the result. Parliament is not formally under an obligation to enact legislation. The delayed invalidation, even when it acquires force, does not formally remove the law from the statute book like it is the case in Germany. However, if the time limit passes by and Parliament has refused to enact new legislation, then the courts will consider the law invalid and refuse to enforce it. A remedy arises retrospectively. In this regard, Canadian declarations differ from both the German and the UK declarations and also from the practice of the Dutch courts.

9 THE THREADS TOGETHER: CONCLUSIONS AND RECOMMENDATIONS

The central theme of this book is the practice of Dutch courts to declare legislation incompatible with fundamental rights while simultaneously refusing a remedy. This practice has some links with, what comparative literature calls, weak or open remedies where the courts share the responsibility of remedying a violation with the legislature.

The open remedy in the Netherlands is shaped in a refusal to either dis-apply the impugned law or interpret it consistently. The grounds leading courts to this refusal may be summarized into two categories: grounds that are democratically motivated and are rooted in the separation of powers, and grounds that follow from necessity, viz to avoid unacceptable consequences for society at large. These grounds are roughly comparable to the grounds which lead courts in Germany, the UK and Canada to the choice for an open remedy. However, the actual application of these grounds shows some differences.

In the UK and in Canada the open remedy may for instance be used as a device to facilitate a dialogue with Parliament in so-called 'hard cases', not only on the issue of *how* the violation should be resolved but also on *whether* it should be resolved. That is not the case in the Netherlands and in Germany. Although it would be possible to apply the Dutch version in such a 'dialogic' way, it is submitted that this would be at odds with both the EU and the ECHR systems of rights protection.

Moreover, several authors in the UK point out that British courts may take into account the necessity of an immediate remedy for the litigant and the chances to a speedy and succesful amendment of the law. Although Dutch case law shows a similar weighing of interests, the outcome does not appear to be influenced by the specific interests of the litigant.

This need not be a serious problem if there are safeguards guaranteeing the litigant a remedy in due course. Constitutional practice in Germany and Canada shows examples of those safeguards. A German declaration of incompatibility may suspend the adjudication of the applicants (and similar) cases until the law is succesfully changed, or it is coupled with a transitional arrangement which might deal with at least some of the concerns of the injured parties. Delayed declarations of invalidity guarantee that the law is at least, within a set time-limit, brought in conformity with the Constitution. Moreover, it is possible for Canadian courts to suspend final judgment until a change of law (or the invalidation) has taken place, although this may not happen very regularly.

None of those safeguards apply in the Netherlands. Although current practice shows that Parliament regularly implements the decisions of the courts, there is no guarantee that it will actually do so and it frequently takes quite some time. Even if the law is changed, there is no procedural mechanism ensuring that the initial applicant may profit from the changes. Moreover,

unlike the German example where a change of law is recognised as obligatory, and the UK example where it is not, but where there are mechanisms that at least promote a parliamentary reaction, there is no such thing in the Netherlands.

Does this situation meet the requirements of the principle of effective legal protection as it is incorporated in the ECHR and EU law? Not as far as EU law is concerned, but in these cases Dutch courts usually do loyally provide an instant remedy. The difference between the treatment of claims under EU law and under the human rights treaties is striking however. Whereas the case law of the Strasbourg Court may currently be characterized as ‘anything goes’, the ECJ by contrast is extremely cautious in granting national courts the power to deviate, be it only temporarily, from their obligation to enforce EU law. Although there are good reasons for this difference in approach, it currently threatens the coherence of fundamental rights protection at the national level.

Chapter 11 lists a few recommendations.

- 1 The case law of both European courts, it was noted, shows a disturbing lack of coherence. A minimum of Strasbourg-Luxembourg harmonisation would be advisable. This would first of all entail that article 13 ECHR were to be applicable to judicial review of statutory legislation.
- 2 Harmonisation could start by recognising that both the right to a remedy and the principle of primacy allow for some exceptions as long as the right in question is amply protected on a structural level. The criteria developed in chapter 6 might serve as minimum requirements here: courts declarations should be binding, they should be followed within a reasonable time and injured parties should be granted redress for past violations.

How may these requirements be implemented in Dutch constitutional law? The current practice does meet some of these criteria but there is some room for improvement.

- 3 Dutch courts could, first of all, take into account the realities of political decision-making. Recognising the fact that a timely change of law may not always be ensured, they should explicitly weigh the litigants need for an immediate remedy.
- 4 Judicial findings that legislation violates human rights are generally followed by the legislature. However, Parliament frequently takes considerable time in enacting the necessary amendments. There is no mechanism by which either the courts or some other body can ensure that lengthy delays do not occur. The courts can only afterwards revise their decision to leave the matter for Parliament. This would mean that the original litigant would have to start new proceedings, which may not always be possible. This may be remedied either by suspending the applicants case (the German

example) or by devising a suspended constitutional remedy (the Canadian example). The latter would neither fit current practice nor current views of judicial lawmaking. The first option may, in administrative cases, be accommodated by quashing the administrative decision while simultaneously ordering the administration to await the outcome of the legislative process before reaching a new decision. However, this may not solve any delays.

- 5 Another option would be to extend the so-called 'administrative loop' ('*bestuurlijke lus*') to a kind of 'constitutional loop'. Should a legislative violation arise, then the courts may summon the minister of Justice as a liaison between them and Parliament. By way of an interlocutory judgment they formulate their concerns and order the minister to report, after a parliamentary debate, on the realistic prospects of legislative change. On the basis of this report, the court may either choose to issue an immediate remedy or to suspend judgment in order to await the outcome of the legislative process. Such a constitutional loop could be incorporated in the existing administrative loop. Should it prove to be successful in administrative law, then one may consider adapting civil and criminal procedure to this practice.
- 6 A constitutional loop, either the formal or the substantial version mentioned before, would ensure that the applicant enjoys some kind of redress for his injuries. As long as such a mechanism is not in place, the applicant has – under the current case law – little chance of obtaining a remedy for past injuries. This may lead to considerable disappointment and dissatisfaction. An award of damages, however modest, might ease some of the pain. The courts are well advised to recognise this. The Strasbourg case law on both pecuniary and non-pecuniary damages, unpredictable though it is, provides some clues in this respect.

Finally, the practice of courts declaring violations but leaving it up to the legislature to deal with the matter, may perhaps be coined an open or a weak remedy. This can however only be the case where both the original and similar litigants, have actually enjoyed a remedy at all. A constitutional system, it is submitted, may of course assign different functions for both courts and legislatures and it may very well assume limits to what courts can do. But that is not a justification for leaving rights unremedied. Dialogue is not about undermining the important principle of *ubi jus ibi remedium*, nor should it be. Courts should do well to remember that.

