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## **The Dutch Supreme Court: A Reluctant Positive Legislator?**

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## THE DUTCH SUPREME COURT: A RELUCTANT POSITIVE LEGISLATOR?

J. Uzman, T. Barkhuysen & M.L. van Emmerik\*

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## 1. Introduction

With respect to constitutional fundamental rights review by the judiciary, the Netherlands has always been a bit of a stranger in Europe. Comparatists usually describe the way judicial review of statutes in Europe is shaped as rather different from the American system, where the Supreme Court has basically empowered itself to review the constitutionality of statutory laws.<sup>1</sup> The authority to strike down legislation in the New World is therefore exercised by the judiciary at large and it is the highest appellate court that ultimately decides upon the matter.<sup>2</sup> By contrast, the European tradition is closely connected to the existence of ‘Kelsenian’ constitutional courts specialized in reviewing the constitutionality of statutes and executive action.<sup>3</sup> Such courts notably exist in for instance Germany, Italy, Austria, Spain and Belgium, but also in the relatively younger liberal democracies like Poland and the Czech Republic. Constitutional courts almost by definition engage in a critical dialogue with the national legislature. When Hans Kelsen famously described constitutional courts as ‘negative legislators’, he was referring to their power to annul acts of the legislature.<sup>4</sup>

It is at this point that the Dutch differ from most of their European neighbours. Their legal system does not involve concentrated review by a specialized constitutional court. This is largely because judicial review of primary legislation is traditionally prohibited pursuant to Article 120 of the Dutch Constitution. It is clear from the outset that this ban on judicial review reduces the need for a specialized court. One would be mistaken, however, to conclude that there is no such thing as judicial fundamental rights review in the Netherlands. Quite the contrary, Dutch courts usually subject executive action and occasionally Acts of Parliament to rigorous fundamental rights review in a way that Mark Tushnet would probably describe as ‘strong judicial review’.<sup>5</sup> This kind of review is dispersed in the sense

<sup>1</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> Tushnet 2006, p. 1242-1244.

<sup>3</sup> See e.g. Von Beyme 1988, p. 24-25.

<sup>4</sup> Kelsen 1945, p. 268-269.

<sup>5</sup> See Tushnet 2008.

that it is carried out by any court in the country. They do so on the basis of another provision in the Dutch Constitution, Article 94. It contains the duty to set aside any kind of regulation – be it statutory or not – if the application of these regulations conflicts with provisions of treaty law that ‘bind all persons’, which means that they have direct effect or contain – as one might say – judicially manageable standards.<sup>6</sup> Statutes can therefore be reviewed by the judiciary for their consistency with written provisions of international law. The gradual growth of human rights treaty systems such as the International Covenant on Civil and Political Rights (ICCPR) and, even more notably, the European Convention on Human Rights and Fundamental Freedoms (ECHR) has resulted in an increasingly self-conscious attitude of the courts towards parliamentary legislation. This is strengthened by the fact that the Dutch courts are moreover obliged to ensure the effective application of European Union law – that also contains fundamental rights – in the domestic legal order as a matter of EU law itself.<sup>7</sup> They must therefore carefully examine whether national law is compatible with the law of the European Union and, if necessary, either construe national law consistently with EU law or set it aside if such an interpretation proves impossible under national constitutional law.<sup>8</sup>

In this contribution we will describe the way the Dutch courts have – in a sometimes rigorous, sometimes cautious and sometimes downright activist way – engaged in rights review of parliamentary legislation. As we will note, the case law of the highest courts shows a tendency to assume a positive lawmaking role in a limited number of cases. Yet, simultaneously the courts have gradually adopted a cautious doctrine to draw a line between, what they consider to be, acceptable and illegitimate judicial lawmaking. Although, as we have observed, it is not a constitutional court, our account will focus on a specific court, called the *Hoge Raad* (literally: ‘High Council’). It is usually referred to as the Supreme Court of the Netherlands. As the highest court in civil, criminal and taxation cases, it ultimately rules on the lawfulness and interpretation of statutory law in a majority of cases. However the Court has a very limited jurisdiction over the administrative courts. This particular field of law has its own highest courts (most notably the Administrative Jurisdiction Division of the Council of State) carrying out a similar lawmaking role.<sup>9</sup> For the sake of clarity, we will generally limit our account here to the case law of the Supreme Court. The highest administrative courts usually follow

<sup>6</sup> On ‘judicially manageable standards’, see Fallon 2006, p. 1274-1332.

<sup>7</sup> European Court of Justice (ECJ) judgments of 5 February 1963, Case 26/62 (*Van Gend & Loos*); 15 July 1964, Case 6/64 (*Costa v. E.N.E.L.*).

<sup>8</sup> This duty for national courts is consistently underlined by the ECJ, for example in the *Colson & Kamann* case (ECJ 10 April 1984, C-14/83, *Jur.* 1984, p. 1891). For further reading, see: Craig & de Búrca 2008, p. 305-376; Claes 2006; Arnall, Dashwood, Ross & Wyatt 2000, p. 60-83; Van Gerven 2000, p. 501-536.

<sup>9</sup> The others being the Central Appeals Court (*Centrale Raad van Beroep*) and the Industrial Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*). For a brief account of the Dutch judicial organization, see Kraan 2004, p. 635.

a comparable approach and use similar terminology when it comes to their constitutional position with regard to judicial lawmaking.<sup>10</sup>

Before starting our account of the lawmaking role of the courts in civil liberties adjudication, we will touch upon the way in which fundamental rights are protected in the Dutch domestic legal order by virtue of international law. This subject will be more extensively discussed by our colleague Evert Alkema in his national report with regard to the incorporation of public international law in the Dutch legal order.<sup>11</sup> Before we do, it is noteworthy to underline that the position of national courts within the structure of European Union law is very different from their position under the European Convention on Human Rights and the other human rights treaties. We will touch only briefly on the subject of EU law and focus mainly on the human rights treaties. After discussing the international law framework, we will proceed with a discussion of the leading cases with regard to the lawmaking powers of the courts. To that end, we will analyse some of the more activist judgments of the Supreme Court in which it has tried to judicially reform legislation on the basis of international fundamental rights review. We will also attempt to offer some flavour of the dialogue in which the Court has sometimes tried to manipulate or guide the legislature in a certain direction. From that perspective we will moreover deal briefly with some of the reactions offered by legal scholarship. We will then cover some of the more procedural aspects of the lawmaking role of the courts, such as the means and effects of judicial review of legislation. This entails a brief account of the current legal actions open to individuals challenging the validity of statutes and the specific injunctions the courts are allowed – or expressly not allowed – to issue in such cases. We will end this contribution by summarizing very briefly the different issues we encountered, thereby dealing explicitly with the questions posed by the general reporter.

## **2. The Ban on Judicial Constitutionality Review and its Scope**

### **2.1. Article 120 of the Dutch Constitution**

As a convenient starting point for a debate on rights review in the Netherlands might serve the fact that the Netherlands does have a written constitutional document, which – like in Germany – is literally called the Basic Law (*Grondwet*), but which is usually translated as the ‘Constitution’. It is a relatively sober document, outlining the system of government. The first chapter is devoted to civil

<sup>10</sup> See, for instance, two relatively recent judgments of the Administrative Jurisdiction Division of the Council of State on suffrage: ABRvS 29 October 2003, JB 2004/3 (*Suffrage for mentally handicapped*); ABRvS 21 November 2006, JB 2004/308 (*Eman & Sevinger*). An interesting example of the administrative courts engaging in positive legislating provides their case law on the reasonable time requirements in judicial decisions. Departing from the clear text of the statute in question, it formulated clear rules on the basis of Art. 13 of the European Convention. See ABRvS 4 June 2008, AB 2008/229. Moreover see (in Dutch): De Poorter & Van Roosmalen 2009, p. 219-227.

<sup>11</sup> To be published in the IACL series.

liberties and social rights. Chapter six includes some provisions on the administration of justice. As we have already mentioned, the traditional cornerstone concerning the constitutional position of the courts in the Netherlands is Article 120 of the Constitution, which reads:

'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'.<sup>12</sup>

The message this provision contains is threefold. First and foremost, there is to be no judicial review of the constitutionality of statutes.<sup>13</sup> This means that there is no role for the courts to play when it comes to deciding either whether a certain statutory provision is in breach with the Constitution or whether the legislative process followed the correct procedural rules.<sup>14</sup> Such matters are to be left to the legislature, which in the Netherlands is composed of both the government (i.e. the Queen and the Cabinet) and the First and Second Chambers of the parliament, or the 'States General' as it is properly called.<sup>15</sup> We will henceforth use the terms Parliament and legislature interchangeably.

The term 'constitutionality' in Article 120 is to be interpreted broadly. The courts assume that they are not only banned from determining the unconstitutionality of statutes, but equally from declaring them incompatible with the Kingdom Charter<sup>16</sup> or general principles of law.<sup>17</sup> They might occasionally refuse to apply a certain statute by reference to the fact that such an application violates a legal principle.<sup>18</sup> However, they can do so only where there are exceptional circumstances which the legislature did not expressly consider at the

<sup>12</sup> As derived from the jointly published translation of the Ministries of Foreign Affairs and the Interior (2002). A copy of this translation can be found at <[www.minbzk.nl/english](http://www.minbzk.nl/english)>. There is currently a bill pending in Parliament to amend Art. 120. This 'Halsema proposal' aims at allowing the courts to review statutes for their consistency with most of the civil liberties mentioned in the Constitution. See Heringa & Kiiver 2009, p. 165.

<sup>13</sup> When using the term 'statutes', we refer to primary legislation, enacted by the national legislature, which – according to Art. 81 of the Constitution – is composed of Parliament and the government.

<sup>14</sup> Supreme Court judgment of 27 January 1961 (*Van den Bergh*). The courts consider themselves banned from interfering in the legislative process on the basis of procedural constitutional requirements as well. See Supreme Court judgment of 19 November 1999, *NJ* 2000/160 (*City of Tegelen v. Province of Limburg*).

<sup>15</sup> Cf. Art. 81 of the Constitution. For further research, see Heringa & Kiiver 2009, p. 103-107, *supra* note 13.

<sup>16</sup> The Kingdom of the Netherlands is more or less structured in a way between a federation and a confederation of states (the Netherlands, the Netherlands Antilles and Aruba). They are united by the Crown and a constitution for the federation called the Charter for the Kingdom of the Netherlands, or the Kingdom Charter (*Statuut*). It is relatively concise, however, compared to the constitutions of the three member states. Unquestionably, the Charter takes precedence over the national constitutions but in reality those constitutions are far more relevant in practice. Charter review is therefore something quite rare.

<sup>17</sup> Supreme Court judgment of 14 April 1989, *NJ* 1989/469 (*Harmonisation Act*).

<sup>18</sup> See, for instance, the Supreme Court judgment of 9 June 1989, *AB* 1989/412 (*Short-term volunteers*).

time of passing the act. In such cases the refusal to apply the law does not in itself affect the binding nature of the Act in question. The courts then assume that Parliament would most probably have wanted them to ignore the statute. This was for instance the case in 1989, when a group of short-term civil servants were promised a pension benefit which, at the end of the day, the administration was not prepared to award them. In the *Short-term volunteers* case, the government argued that the pensions of civil servants were carefully regulated by parliamentary legislation. As the Act in question had not incorporated the promise, the denial of the benefit was a matter of parliamentary legislation and the courts were not allowed to have a say on the matter.<sup>19</sup> The Court decided differently and allowed the appeal. It considered that Parliament had not deliberately refused to meet its obligations and that the Court was thus in a position to disapply the statute in question.

Even if no such situation arises, the courts are not prevented from expressing their views on the issue put before them. In the 1989 *Harmonisation Act* judgment – its landmark case on Article 120 – the Supreme Court maintained that it was clearly not entitled to review whether an Act of Parliament was compatible with legal principles but it made it painfully clear that – had it been allowed to do so – it would have ruled that the 1988 Harmonisation Act violated the principle of legal certainty. The court thus gave the legislature some piece of, what might properly be called, ‘expert advice’ and the latter, taking the hint, eventually changed the law. The ban on judicial review of legislation then does not prevent the judiciary to engage in a dialogue with the legislature, be it that such occasions remain rare.

Second, the prohibition against primary legislation review that Article 120 imposes on the courts is a narrow exception to the general rule that the courts are in fact competent to test any provision for its consistency with rules of higher law including general legal principles.<sup>20</sup> Courts may therefore decide upon the constitutionality of ministerial decrees and administrative, provincial or municipal regulations. The competence to do so was already established in 1864 by the Supreme Court.<sup>21</sup> A third message to be read in Article 120 of the Constitution is that the courts may not review written international law for its compatibility with the Dutch Constitution. This effectively means that in the Dutch legal order, treaties take precedence over any kind of national law including the constitution itself. Article 120 is complemented by Article 94 of the Constitution, which basically states that any law (including the Constitution itself) which is incompatible with justiciable provisions of treaties is not to be applied. Quite apart from Article 120, the Courts also consider themselves banned from deciding upon the constitutionality of European Union law. The Supreme Court has completely accepted the absolute supremacy of EU law over national law, emphasizing that the effect of EU law in the Dutch legal order is a matter of the Community rather than

<sup>19</sup> *Ibid.*

<sup>20</sup> See the Supreme Court judgment of 16 May 1986, NJ 1987/251 (*The State v. The Society for Agricultural Aviation*).

<sup>21</sup> Supreme Court judgment of 6 March 1864, W 2646 (*Pothuys*). For further reading on the subject, see Kortmann & Bovend’Eert 2000, p. 134-135.

the national Constitution.<sup>22</sup> As we will see, this has great consequences for the role of the courts.

## 2.2. *Summary*

The conclusion of this brief introduction to Article 120 of the Constitution may be that – as a general rule – it formally bans the courts from reviewing whether Acts of Parliament are compatible with higher law, with the notable exception of self-executing treaty provisions. Sometimes the courts do express their views on the constitutionality of primary legislation and consider themselves entitled to refrain from applying unconstitutional legislation on the basis that Parliament would not have wanted them to apply it in view of exceptional circumstances in a particular case. They are moreover empowered to review any other piece of legislation for its constitutionality and may review Acts of Parliament for their compliance with written provisions of international law to the extent that these provisions provide judicially manageable standards for review. This has practically led to a situation where international human rights law (most notably the ECHR) has taken over the role as the most important civil rights charter for the Netherlands. Judicial review – whether of legislation or of executive action – is primarily focused on the European Convention, the International Covenant and some other human rights treaties. As we limit our discussion here to judicial review of parliamentary legislation, we will from now on focus primarily on the role of the courts in reviewing on the basis of these treaties. We will therefore proceed with a discussion of the constitutional framework for the implementation of international law.

## 3. **Enforcing International Human Rights Law**

### 3.1. *Introduction: Monism and Article 94 of the Constitution*

The Dutch are widely known to have a very friendly constitutional climate for international law. As we said before, international law takes precedence even over the Constitution itself. This friendly climate essentially originates from the traditionally rather monist approach of the Dutch legal profession. As early as 1919, the Supreme Court expressed its opinion that international law as such is automatically applicable in the domestic legal order. There is thus no need for any kind of conversion to norms of national law.<sup>23</sup> Not only are treaty provisions as such accepted as valid law as a matter of customary law. They are also recognized to be of a higher order. Accordingly, the courts generally assume that unless Parliament expressly deviates from its international obligations, it must clearly have intended any provision in its Act to be consistent with a given treaty. This assumption is the basis for the courts' usual practice to interpret national law as far as possible in a

<sup>22</sup> Supreme Court judgment of 2 November 2004, *NJ* 2005/80.

<sup>23</sup> Supreme Court judgment of 3 March 1919, *NJ* 1919, p. 371 (*Treaty of Aachen*). For a further discussion, see Zwaak 2001, p. 597-599.



way consistent with the rights laid down in conventions such as the ECHR. And it is this practice that has given rise to a few of the most celebrated but also deeply notorious (some might even say activist) Supreme Court judgments. On such occasions it may well read in the statute some highly detailed rules that have very little to do with either the text of the statute in question or its legislative history.<sup>24</sup>

To turn back to the supremacy rule: should Parliament legislate expressly against the text and the prevailing interpretation of a treaty, the treaty irrefutably takes precedence over the conflicting statute. This has arguably always been the case but as from 1953, there has been a clear provision in the Dutch Constitution empowering the courts to disapply the statute in question. This provision is currently laid down in Article 94 of the Constitution, which reads as follows:

‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions’.

The key question, which is ultimately for the courts to decide upon, is what exactly constitutes a provision of a treaty ‘that binds all persons’. The importance of the answer to this question lies in the fact that the courts may not disapply the national statute if it ‘only’ conflicts with provisions of international law that do not fit this description. According to Article 93, a treaty ‘binds all persons’ when it is proclaimed and in so far as it contains provisions that may by their very nature be eligible to ‘bind all persons’. This only shifts the issue to what kind of provision would be ‘eligible to bind all persons’.

### 3.2. *‘Eligible to bind all Persons’ and Judicial Lawmaking*

In the current case law of both the Supreme Court and the highest administrative courts, this requirement comes down to two questions.<sup>25</sup> First of all, whether the contracting state parties have expressly agreed upon the nature of the treaty provision. This is seldom the case, however. The courts therefore usually convert the question into a matter of justiciability. Does the text of the provision provide the courts with judicially manageable standards to decide the case? In the words of the Supreme Court in its 1986 landmark judgment concerning a major railway strike: ‘does the provision require the legislature to legislate on a certain subject or is it by its very nature eligible to function as “objective law” without further ado?’<sup>26</sup> The real question thus becomes whether the courts are able to derive from the provision some clues as to how to decide cases without having to engage in extensive judicial lawmaking. This brings us near the heart of our subject in this paper. Because if the

<sup>24</sup> See, for instance, the two Supreme Court judgments of 21 March 1986, *NJ 1986/585* and *NJ 1986/588* (*Spring judgments*) on parental authority. See further the judgment of 27 May 2005, 2005/485 (*Parental authority II*). We will discuss these cases at length further on.

<sup>25</sup> See, e.g., the Supreme Court judgment of 30 May 1986, *NJ 1986/688* (*Railway Strike*); Judicial division of the Council of State, judgment of 15 September 2004, *AB 2005/12*.

<sup>26</sup> *Ibid.*

courts decide wrongly on this issue, they might end up having to decide the case by reading into the treaty detailed rules which the treaty itself is really unable to yield. And they may then be legislating rather than judging the case, which makes them vulnerable to charges of judicial activism. The key criterion (whether the treaty provision textually provides a sufficient degree of manageable standards) therefore theoretically serves as a preliminary question for the courts to solve in order to keep them away from political territory.

What complicates matters, however, is that the decision whether a particular treaty provision is likely to 'bind all persons' is generally a 'yes or no' decision. Once the courts consider a provision to be self-executing (which we will, for the sake of simplicity, use interchangeably for the phrase 'binding on all persons'), they consider themselves bound by such a ruling in further cases. Both the circumstances and the context of a specific case are therefore irrelevant when it comes to the question of the self-executing nature of the treaty provision. Deciding whether or not the provision is self-executing is pretty much like deciding whether the patient is pregnant. She either is or is not, but that has little to do with the circumstances. Yet, this may confront the courts with a dilemma. Because although the text might produce a clear outcome in one case, it might equally fail to do so in the next. Phrased differently: the text might yield some clear standards, but those standards might prove insufficient in a particular national context. A clear example is furnished by the principle of non-discrimination as laid down, for instance, in Articles 26 ICCPR and 14 ECHR. These provisions provide the applicant with a relatively clear right so it is usually equally clear for the government what it must or may not do. The question whether a given statute constitutes unlawful discrimination might sometimes pose a challenge to the courts, but usually not one they cannot handle by using a balancing test. The text of these provisions may therefore be considered self-executing. Having met this challenge, however, the court might then face the equally difficult task of providing a remedy for the violation. In some cases there might be several different outcomes of the case, each of which could be equally lawful.

Suppose that the court holds that the exclusion of a certain group of people from a tax exemption is unjustified. Because it is clear what the government should not have done - exclude people from a benefit granted to others - the treaty provisions give the courts relatively clear guidance as to whether there is a violation. They are therefore 'binding on all persons'. However, just disapplying the statute would either not provide the applicants with a remedy or it would take the courts in political territory because it would grant a benefit to a large group of people where the legislature might just as lawfully have denied it to anyone. The principle of non-discrimination only requires after all that both groups are treated the same, not that they should both have the tax benefit. In such cases the 'binding on all persons' requirement itself does not prevent the courts from having to engage in positive lawmaking.

This dilemma raised some discussion in legal literature on the question whether the decision to mark a provision as self-executing ought to be contextual (depending on the characteristics of a given case) or dichotomic by nature. The Supreme Court has never been very explicit on the subject. Several authors

concluded from the above-mentioned judgment in the 1986 *Railway Strike* case that as it was either the agreement between the contracting parties or the text of the treaty provision which was decisive, it must logically follow that the nature of the case in question was not a relevant factor in the decision whether the treaty was self-executing or not. In their view, the Supreme Court took a dichotomic approach.<sup>27</sup> Others maintained quite the opposite. In a case in 1984, the Supreme Court had for the very first time in its history explicitly acknowledged the fact that it had a lawmaking role to play.<sup>28</sup> But it pointed out that this lawmaking role would have been overstretched had it accepted the claim of an applicant who felt discriminated against and invoked the non-discrimination clause of paragraph 26 of the ICCPR to acquire a right to Dutch citizenship. The Court made it clear that it would have to choose between different outcomes, each of which were equally consistent with the non-discrimination requirement of Article 26. Since that would involve a choice the Court took to be essentially political by nature, it granted that the going practice of the government constituted a different treatment between men and women but it refused to rule on the question whether that constituted a violation of Article 26. Most scholars then concluded that the Court had meant to say that Article 26 was not self-executing *in that particular case* as it had otherwise refused judgment which the courts are not allowed to do under Article 13 of the General Provisions Act 1829.<sup>29</sup>

Meanwhile, the general feeling has turned to the dichotomic view. It is important to note in this respect that the Supreme Court itself seems to have abandoned its practice of refusing to rule on the question whether there is a violation. It is still very reluctant to provide a remedy (other than an informal declaration of incompatibility) in cases where that would involve political decision-making, but it does deal with the argument of complainants that the statute in question is incompatible with fundamental human rights law.<sup>30</sup> And so it reviews statutory legislation on the basis of treaty law – thereby implying that the treaty is self-executing – even in cases where the remedy remains a political issue. The Court moreover confirmed its new course in its Yearly Report of 1995-1996.

To sum up, fundamental rights review in the Netherlands primarily relies on international human rights documents such as the European Convention and the ICCPR. These treaties automatically have legal effect in the Dutch legal order. Courts may, on the basis of Article 94 of the Constitution, review Acts of Parliament for their compliance with Convention rights if the treaty is proclaimed and in so far as the individual provisions are self-executing. A provision either is considered self-executing at all times or it is not. The key criterion is whether the treaty provision textually provides a sufficient degree of manageable standards for the courts to decide the case upon. The ‘binding all persons’ requirement therefore theoretically

<sup>27</sup> Fleuren 2004.

<sup>28</sup> Supreme Court judgment of 12 October 1984, NJ 1985/230 (*Dutch citizenship*).

<sup>29</sup> See, for instance, Brouwer 1992, p. 279.

<sup>30</sup> The landmark case in this respect is the *Labour expenses deduction* judgment in 1999. See Supreme Court judgment of 12 May 1999, BNB 1999/271. This judgment will reappear frequently in the course of this article.

serves as a preliminary question to be solved by the courts in order to keep them from having to decide between several political outcomes. However, because the specific constitutional characteristics of a given case do not play a role in deciding the issue whether or not a particular treaty provision is self-executing, the courts may frequently be confronted with a provision that in itself may provide some clear standards but which may nonetheless force the court to engage in positive lawmaking in certain specific situations. These days the courts are very aware of this dilemma and they have tried to cope with it in a careful manner. Before we turn to the case law of the Supreme Court and its reception by legal scholarship, let us first say something about the historical reception and current position of European human rights law in the Netherlands, as they are closely connected to the way the Dutch courts carry out their lawmaking role.

### 3.3. *The Increasing Role of the European Convention in National Case Law*

Although the Netherlands has usually lived up to its relatively monist tradition, it does not follow that the European Convention was always given the full weight in practice it ought to have had on a purely formal basis. As we have said before, with the introduction in 1953 of the current Article 94 of the Constitution, it became common ground that treaty law clearly takes precedence over any kind of legislation. Only a year later, on 31 August 1954, the Kingdom of the Netherlands joined the ECHR and yet, for nearly thirty years the courts remained very reluctant indeed to apply the Convention, let alone disapply legislation violating it.<sup>31</sup> Until the 1980s, the judiciary was so cautious that there was hardly one case where the Supreme Court found a violation of a Convention right.<sup>32</sup> If a Convention right was involved, the Court would either try to refer to a comparable right in Dutch law or it would deny the self-executing nature of the Convention right. It was also common practice to interpret Convention (or indeed Covenant) rights in such a way that they had either a very narrow scope or a very broad limitation clause.<sup>33</sup> Conflicts between national legislation and human rights treaty law thus seemed very rare in the 1960s and 1970s. This led E.A. Alkema to conclude in 1980 that the courts had played only a very limited role in the implementation of the ECHR.<sup>34</sup> However, things started to change rapidly soon after Alkema reached this conclusion and already in 1988 the story sounded very different.<sup>35</sup> After a remarkable decision of the Maastricht District Court in 1977, disapplying a provision of the 1935 Road Traffic Act due to it violating Article 8 of the ECHR, an era began in which the courts overcame their initial reluctance within a few years.<sup>36</sup>

<sup>31</sup> What might have played a role, though, was that the Convention was initially rarely invoked before the courts.

<sup>32</sup> The notable exception being a judgment of the Supreme Court of 23 April 1974, *NJ* 1974/272.

<sup>33</sup> Van Dijk 1988a, p. 640-641.

<sup>34</sup> Alkema 1980, p. 182-183.

<sup>35</sup> See Van Dijk 1988a, p. 641-649.

<sup>36</sup> Maastricht District Court, judgment of 14 November 1977, *Netherlands Yearbook of International Law* 1978, p. 293. For further reading: Van Dijk 1988a, p. 641; Myjer 1980, p. 21-29.

The Supreme Court was no exception. In 1980 it ruled that Article 959 of the Civil Procedure Code was to be interpreted in the light of Articles 8 and 14 of the European Convention. The legislature had knowingly established a difference in procedural treatment between cases concerning the custody of legitimate and illegitimate children. In the latter case, it was impossible for relatives of an illegitimate orphan to appeal against a decision of the local magistrate withholding custody. The Civil Procedure Code granted a right to appeal only to legally recognised kin and the legislature had always explicitly taken the view that there was no kinship between illegitimate children and family members of the parents.<sup>37</sup> The Court considered the views on the justification of this different treatment of legitimate and illegitimate children considerably changed. This was reflected in the case law of the European Court of Human Rights, notably in its 1979 *Marckx* judgment.<sup>38</sup> This judgment thus served as an argument to replace legislative history as the appropriate method of interpretation. The Supreme Court might have made law in the sense that it created a right to appeal for relatives of illegitimate children. But it is clear that the Court's understanding of the word 'kinship' was rooted firmly in the case law of the European Court interpreting the Convention which, as we know, takes a clear precedence over national law. The same story applied when in 1982 the Supreme Court spontaneously introduced the duty for parents to justify their decision not to let their underage children enter marriage.<sup>39</sup> Where refusing their consent would be evidently unreasonable, the courts were allowed to substitute the parents' withheld permission, ignoring Article 1:36 (2) of the Civil Code which prohibited the courts from allowing a marriage where one of the parents objected to it. Again, this judgment was backed up by several decisions of the European Commission on Human Rights.

Halfway through the 1980s, the Court's case law was at its peak in terms of self-consciousness. In 1984 it actually went one step further when it explicitly ordered the District Courts to set aside Section 1:161 (1) of the Civil Code, thereby fundamentally interfering in Dutch family law. This provision requires the courts when allowing a divorce to appoint both a guardian and a supervising guardian, consequently implying that parental authority ends with the divorce. On the basis of Article 8 of the Convention, the Court maintained that it should be possible for the courts to leave (joint) parental authority intact when such a course would be in the best interest of the child in question. In such cases the District Court had to set aside Section 1:161 (1), thus effectively allowing for dual custody.<sup>40</sup> What was remarkable about this case – which, incidentally, is called the *dual custody* case – was that this time the Supreme Court had no clear mandate from either the European Court or the Commission when it held that the application of Section 1:161 (1) of the Civil Code violated the Convention. A more marginal and abstract review by the

<sup>37</sup> Supreme Court judgment of 18 January 1980, NJ 1980/463 (*Illegitimate child*).

<sup>38</sup> ECtHR 13 June 1979, *Publ. Series-A*, 13, p. 14-20 (*Marckx v. Belgium*).

<sup>39</sup> Supreme Court judgment of 4 June 1982, NJ 1983/32 (*Parental Veto on Underage Marriage*). See also the Supreme Court judgment of 20 December 1985, NJ 1987/54.

<sup>40</sup> Supreme Court judgment of 4 May 1984, NJ 1985/510 (*Dual custody*).

Court – leading to a different outcome – would probably have sufficed.<sup>41</sup> Furthermore, the case showed that the Court was prepared to make full use of its power under Article 94 of the Constitution to ignore an Act of Parliament in order to issue relief based on the violation of the Convention.<sup>42</sup> The Dutch judiciary evidently was no longer reluctant but appeared to be downright eager to apply Convention law. Some years later, in 1986, the Court issued its famous – or infamous – so-called *Spring* decisions.<sup>43</sup> They showed that the Court had not only overcome its reluctance to apply the Convention. It also developed a rather more self-conscious attitude towards legislation and its own ability to regulate certain areas of law such as family law. The decisions will be elaborated upon in the next section and we will consequently leave it at this for the moment.

The 1980 s are usually regarded as the high watermark in the Supreme Court's case law concerning fundamental rights review. They showed some of, what few have called the more 'activist' judgments of the Court. But they marked the beginning of a slow retreat as well. In some cases, by contrast, it exercised considerable restraint. For instance in the *dual custody* case we mentioned previously, the Court categorically refused to engage in judicial lawmaking (or rather in a positive sense in any case), and was only prepared to set aside the impugned statutory provision.<sup>44</sup> The same year, 1984, witnessed the *citizenship* case, where the Court refused to remedy an alleged violation of Article 26 of the International Covenant because there were several ways of dealing with the unequal treatment (if there was indeed a difference in treatment) and choosing would mean encroaching on the policy prerogative of the legislature.<sup>45</sup> We already touched on this judgment because it has led most authors to believe that the Court had applied the self-executing argument of Article 94 of the Constitution as an instrument to avoid entering into political territory. From the 1990s onwards, the Court explicitly recognised that it was not empowered to set aside national provisions for their inconsistency with Convention law, purely on the basis of its own interpretation of the Convention. In other words, it considered itself unable to offer claimants a broader understanding of the European Convention than the prevailing interpretation offered by the European Court.<sup>46</sup> Accordingly, judicial

<sup>41</sup> For some discussion on this issue, see (in Dutch): Alkema's Case Note under NJ 1985/510, and De Vet 1985, p. 218-222. In English: Van Dijk 1988a, p. 644.

<sup>42</sup> This was not the only case in which the Supreme Court was prepared to go that far. See, for instance, its judgments of 1 July 1983, NJ 1980/463 (*Insanity Act*); of 22 June 1988, NJ 1988/955 (*Additional Tax Claim*); of 24 November 2000, NJ 2001/376 (*Matos v. Dutch Antilles*) and of 16 November 2001, NJ 2002/469 (*Pig Farming Reform Act*). Especially the lower courts have reacted rather enthusiastically to this development. See the judgment of the District Court of Amsterdam dated 14 January 1992, NJ 1992/401; District Court of Maastricht, judgment of 11 February 1993, NJ 1993/728; District Court of Amsterdam, judgment of 28 November 1995, NJ 1996/564, and Leeuwarden Court of Appeal 5 February 2003, NJ 2003/352.

<sup>43</sup> Joint Supreme Court decisions of 21 March 1986, NJ 1986/585-588 (*Spring decisions*).

<sup>44</sup> *Supra* note 40.

<sup>45</sup> *Supra* note 28.

<sup>46</sup> Supreme Court judgment of 19 October 1990, NJ 1992/129 (*Gay marriage*); Supreme Court judgment of 10 August 2001, NJ 2002/278 (*Duty of support*).

lawmaking without a clear mandate by the European Court of Human Rights remains a phenomenon of the previous century.<sup>47</sup>

### 3.4. *Concluding Remarks*

Together with the – as some might say – highly activist ‘Spring’ decisions, this case law created a difficult legacy, both for the Court itself and for legal scholarship. It did confirm that the Supreme Court considered itself competent to assume a lawmaking role – certainly in a negative, but sometimes even in a positive sense. But it raised questions as to what extent the Court was allowed to play such a role and what ought to be its obligations towards the victims of human rights violations. These questions will be discussed in the next section. What may be concluded from the current one is that although the judiciary was reluctant at first to apply the human rights treaties, it gradually overcame its cold feet. The 1980s constituted a phase wherein the Dutch courts accepted the human rights treaties, particularly the European Convention, as a judicially enforceable Bill of Rights for the Netherlands.<sup>48</sup> Of course, the 1983 Constitution already provided a civil rights charter, but due to the ban on judicial review and its broad limitation clauses, it had only a limited role to play except perhaps for the political branches. The European Convention provided the courts with an enforceable equivalent.

To some extent, this came as a real novelty to them. For decades the relationship between the courts and Parliament had largely been shaped by the existence of Article 120 of the Constitution, prohibiting the courts from reviewing any Act of Parliament. For all its particularities and exceptions, that provision constituted a bright-line rule for the courts to rely upon. Never before had they been confronted with the difficulties concerning the boundaries of their role with respect to the prerogatives of the legislature. Not to such an extent as they were confronted with in the 1980s and the years to follow in any case. Their approach to this new question was initially not unequivocal or clear. Legal arguments concerning the positioning of the courts, the Supreme Court in particular, and Parliament scattered among several already existing doctrines. The Court and legal scholarship for instance tried to cope with some of the constitutional difficulties by using Article 94’s self-executing requirement in a somewhat dexterous manner. They also tried to fit in the Supreme Court’s new role in the discussions about its lawmaking role in general, which primarily took place in the fields of civil and criminal law but certainly not constitutional law.<sup>49</sup> This attracted the attention of constitutional

<sup>47</sup> This was also very clearly illustrated by the very recent *Post-Salduz and Panovits* case, where the Court, on the basis of Art. 6 of the Convention, introduced the duty for police authorities to provide suspected criminals access to an attorney if they so choose (Supreme Court judgment of 30 June 2009, *NJ* 2009/349). Introducing this requirement was backed, however, by two judgments of the European Court, ECtHR 27 November 2008, *appl.* 36391/02 (*Salduz v. Turkey*) and ECtHR 11 December 2008, *appl.* 4268/04 (*Panovits v. Cyprus*).

<sup>48</sup> Van Dijk 1988a, p. 649.

<sup>49</sup> This was observed by Alkema in his article (in Dutch), Alkema 2000, p. 1053-1058. See also De Lange 1991.

scholars to the debate on the lawmaking powers of the judiciary. And it is that debate to which we too will now turn our attention.

#### 4. The Lawmaking Role of the Courts

##### 4.1. Introduction

As we have observed, fundamental rights review of parliamentary legislation in the Netherlands is highly dispersed in the sense that it is carried out largely by ordinary courts on the basis of international human rights law. This means that the constitutional position of courts engaging in fundamental rights review is essentially not different from that of the courts in general. Having a separate constitutional court to decide upon the constitutionality of statutes and their consequences might produce a separate set of rules regarding the proper boundaries for such a court. This is because it is not hierarchically subordinate to other courts nor can it, strictly speaking, subject other courts to its general jurisdiction. That is definitely not the case in the Netherlands, where constitutional review in the sense of *rights* review only takes place within the general judicial framework. The rules that govern the boundaries of ordinary statutory interpretation therefore apply equally to fundamental rights adjudication.

A general characteristic of a civil law system is the lack of a doctrine of judicial precedent. The Dutch are no exception in this regard. Here, the concept of *res judicata* traditionally has a rather narrow meaning: it prevents the same parties from litigating the same case over again. Moreover, what the Court has dictated in its judgment, either on points of law or on points of fact, is lawfully binding, but theoretically only on the parties before it.<sup>50</sup> The Dutch legal system officially does not recognise a doctrine of *stare decisis*, where courts are bound by their own precedents or the precedents of higher courts.<sup>51</sup> In practice, however, the reasoning of the Supreme Court is generally followed by lower courts and sometimes – on a voluntary basis – even by the highest administrative courts.<sup>52</sup> As the Supreme Court has the power to reverse decisions of the ordinary courts, there seems little point for the latter to do otherwise. Following the case law of the Supreme Court is thus largely a matter of pragmatism besides the more fundamental reason of equality.<sup>53</sup> The Supreme Court also considers itself to some extent bound by its own case law and frequently refers to it. In practice, therefore, the Court's case law may be regarded as a source of law.<sup>54</sup> However, that does not alter the fact that the Court operates in a civil law system, where the separation of powers traditionally places some weight on the fact that it is the duty of the legislature to make the law and that

<sup>50</sup> Van Hooijdonck & Eijssvoegel 2009, p. 39.

<sup>51</sup> See Loth 2009, p. 278.

<sup>52</sup> *Ibid.*

<sup>53</sup> That is even more true of the administrative courts, whose judgments are not under review from the Supreme Court. When administrative courts follow the Supreme Courts case law they do so on an entirely voluntary basis, mainly to serve the coherence of the law in general.

<sup>54</sup> *Supra* note 51. Moreover: Koopmans 1999, p. 124-125.



of the courts to apply it.<sup>55</sup> And although this principle has, on the whole, never been applied very strictly in the Netherlands, it is certainly not an open-and-shut case that the courts have a lawmaking role to play. There is then a slight tension between Dutch constitutional theory on the one hand – more or less repudiating a lawmaking role for the courts – and current legal practice.

In this section we will first describe the case law of the Supreme Court on its supposed lawmaking function. We will then turn to the justifications and the critique legal scholarship has offered in reaction to this case law. And finally, we will discuss some of the proposals that have recently been put forward to facilitate the Court's lawmaking function.

#### 4.2. *Defining the Process of Lawmaking*

It has often been said that the courts have always assumed a lawmaking role, even from the outset.<sup>56</sup> The legal process simply is inconceivable without some judicial lawmaking. Until the 1980s, the Dutch Supreme Court never actually said that it had a duty to do so, but clearly it had always been forced to interpret the law. However, according to one prominent author, the Court was not likely to engage in lawmaking before 1960.<sup>57</sup> That raises the question what the term 'lawmaking' actually stands for. When former president Martens of the Supreme Court spoke of lawmaking as intrinsic to judging a case in his remarkable farewell speech for the Court, he evidently used it in a different way than the prominent author we mentioned just now. Martens evidently used a broader notion of what constituted judicial lawmaking than the other author, whose use of the term came closer to what one might call 'judicial activism'.

Lawmaking in the spirit of Hans Kelsen is indeed intrinsic to the judicial process. The courts 'create' law just by interpreting a statute and applying it to an individual case.<sup>58</sup> In that view any interpretation means creating law, no matter how close the court sticks to the literal wording of the provision in question. However, such lawmaking is hardly something to get excited about. True as the description in legal-theoretical terms may be, such a definition is far too broad to distinguish between legitimate and illegitimate lawmaking. One may, however, also speak of lawmaking when the court deviates from the literal wording of a legislative text in order to fill a legal gap. In this sense, it is perfectly possible for the court to remain firmly within the boundaries of the system and the objectives (teleology) of the statute, but then again, it might not.<sup>59</sup> Where that is the case, the court would have

<sup>55</sup> *Ibid.*

<sup>56</sup> See, for instance, a contribution by former Supreme Court president Martens 2000, p. 747.

<sup>57</sup> Schoordijk 1988, p. 8-9.

<sup>58</sup> See Kelsen 1934/1992, p. 68.

<sup>59</sup> This is what the German legal literature calls *Gesetzesimmanente Rechtsfortbildung* as opposed to *Gesetzesübersteigende Rechtsfortbildung* where the courts exceed such boundaries. See Larenz 1991, p. 366-367.

to assume a clearly political role. In such cases, the Court, rather than the legislature, gives direction to society.<sup>60</sup>

#### 4.3. *The Case Law of the Supreme Court concerning its Lawmaking Role*

Since the beginning of the twentieth century, the Dutch Supreme Court has increasingly assumed that it may not only apply the law but develop it as well.<sup>61</sup> In 1959, in *Quint v. Te Poel*, it explicitly ruled that where an Act of Parliament leaves a legal vacuum, the answer must lie within the existing statutory system.<sup>62</sup> The Court thus firmly implied that it was obviously empowered to fill the gap. Moreover, it marked a clear boundary between what the court understood to be legitimate lawmaking in the sense of developing the law on the basis of existing law, and illegitimate lawmaking. That boundary was to be comprised by the existing statutory system.

As we have already implied, the Court has explicitly recognised its lawmaking role in the 1980 s. In the *Citizenship* case of 1984 it mentioned a ‘lawmaking duty’ for the courts but quickly added that making policy decisions clearly exceeded this duty.<sup>63</sup> Several authors have since noted that when the Court speaks of lawmaking, it nearly always does so in a negative way – refusing to accept a specific interpretation or remedy because that would outstretch its judicial role.<sup>64</sup> When it does feel that it may fill a gap, it hardly ever argues why lawmaking in this particular case is justified. This is very clearly illustrated by two cases we have already mentioned. In the *citizenship* case of 1984 it ruled that the limitations of its lawmaking duty would not allow it to remedy a violation of Article 26 of the International Covenant, whereas in the *Spring decisions* of 1986, it made no reference whatsoever to its lawmaking duty in order to justify its rather consequential judgment.<sup>65</sup>

After the Supreme Court openly coined its own ‘lawmaking duty’ in 1984, the legislature quickly followed suit. In 1988 it adopted the proposed Bill for a revised Judicial Organisation Act, in which a new Article 101a (currently Article 81) included specifically as the duties of the Supreme Court, to ‘secure the uniformity of the law and advance the development of the law’.<sup>66</sup> With the ‘development of the

<sup>60</sup> For an example of this use of the term ‘lawmaking’, see Stolker 1993, p. 57. See further Bell 1985, p. 6.

<sup>61</sup> See for instance its landmark case on the interpretation of torts: *Lindenbaum v. Cohen*, Supreme Court judgment of 31 January 1919, *NJ* 1919, p. 161.

<sup>62</sup> Supreme Court judgment of 30 January 1959, *NJ* 1959/548 (*Quint v. Te Poel*).

<sup>63</sup> *Supra* note 28.

<sup>64</sup> See, for instance (in Dutch) Kortmann 2005, p. 250.

<sup>65</sup> Although admittedly, the Advocate General had extensively gone into the matter. See the Supreme Court judgments of 12 October 1984, *NJ* 1985/230 (*Dutch citizenship*), and of 21 March 1986, *NJ* 1986/585-588 (*Spring Judgments*).

<sup>66</sup> Act of 1827 concerning the Judicial Organisation, *Stb.* 1827, 20, most recently amended on December 11, 2008, *Stb.* 2009, 8.

law' Parliament clearly recognised a lawmaking duty for the courts.<sup>67</sup> However, the question remains what constitutes 'development of the law' and what exceeds mere development and turns into (illegitimate) lawmaking.

#### 4.3.1. The Dual Custody Case: Distinguishing Positive from Negative Lawmaking

In its 1984 judgment on dual custody, the Supreme Court followed the line of reasoning it had already set out in the 1959 *Quint v. Te Poel* case and applied it for the first time to fundamental rights review. As we have seen before, this case concerned the applicability of Section 1:161 (1) of the Civil Code, which required the courts to appoint one guardian when granting a divorce.<sup>68</sup> In a case before the District Court of Amsterdam, the parents of six-year-old Ingolf requested joint custody after the divorce. The District Court refused the request, arguing that its duty pursuant to Section 1:161 (1) to appoint one guardian clearly ruled out the possibility of appointing two. Appealing the decision, the parents invoked Article 8 of the ECHR. However the Supreme Court agreed with the District Court. It argued that the legal system did not allow joint guardianship, not even on the basis of Article 8 of the Convention. This interpretation of Article 1:161 (1) of the Civil Code would outstretch the judicial function as it would engage the Court in positive legislating. It considered that introducing dual custody would not easily fit into the existing statutory system. It did not explain why that was the case, nor had the Advocate General done so (he had actually argued the opposite), but there it was. Yet, the Court managed to find a solution. The justices pointed out that Article 94 may not have allowed them to positively engage in judicial rulemaking but it did give them the power to set aside certain provisions of the Civil Code on the ground that their application would violate the Convention. Considering that ignoring Section 1:161 (1) would leave parental authority – on the basis of Article 1:161 (4) of the Civil Code – intact, it subsequently ordered the District Court to enquire whether joint responsibility for both parents would serve the child's best interest.<sup>69</sup>

What the *dual custody* case shows remarkably well is that the Court made a crucial distinction between its power (based on Article 94) to set aside the Civil Code on the one hand and on the other, its lack of power to settle the issue by promulgating its own, more convenient, rules if those rules were incompatible with the existing statutory scheme. Ignoring one statutory provision in order to apply another hardly qualifies as doing justice to this statutory scheme but evidently the

<sup>67</sup> Koopmans 1999, p. 131; Martens 2000, p. 747. Recognition of the lawmaking duty of the courts moreover appeared in some correspondence between the Minister for Justice and the Second Chamber of Parliament in 1989 (after the adoption of the Bill), where the minister mentioned three duties for the Supreme Court: securing the uniform application of the law, leading the development of the law and provide individuals with adequate legal protection. He marked the first two elements as a 'the lawmaking duty' (*Kamerstukken II 1988/89*, 21 206, No. 2, p. 42).

<sup>68</sup> *Supra* note 62.

<sup>69</sup> Supreme Court judgment of 4 May 1984, *NJ 1985/510 (Dual custody)*.

Court took Article 94 of the Constitution for a clear mandate to deviate from that scheme so long as it stayed on the negative side by ‘just’ ignoring a provision.

#### 4.3.2. The Dutch Citizenship Case: Avoiding Policy Decisions

The 1984 *citizenship* judgment, in which the Court explicitly recognized its lawmaking duty, added a new dimension to this. In this case the Court was confronted with a claim of an illegal immigrant who, during his stay in the Netherlands, had married a Dutch woman. Because his stay in the Netherlands was illegal and because he had built up quite a remarkable criminal record, he was asked to leave. The applicant then informed the authorities of his wish to acquire Dutch nationality. He relied upon Article 8 of the Nationality Act, granting the foreign wife of a Dutch husband the right to acquire Dutch nationality by informing the authorities of her wish. However, the provision obviously applied only to women, not men. The applicant argued that Article 8 violated paragraph 26 of the International Covenant and had therefore to be interpreted in such a way that men too had the right to acquire Dutch nationality. The Court did not accept the argument. It even refused to review whether the Act violated the Covenant because had it found a violation, it would not have been able to remedy the situation. Unlike in the *dual custody* case, setting aside the statute would clearly not benefit the claimant because the provision was positively phrased. It did not deny the applicant a right, just awarded it under-inclusively to women. Setting aside the statute would only deprive women of their privileged position, however women in general were not party to the case.

The question thus became whether the Court was allowed to read in the words ‘and men’ in the provision, thereby widening its scope. Under the *Quint v. Te Poel* reasoning, the issue would have been whether such ‘reading in’ would contradict the statutory scheme. It might have done, but the Court did not go into that. Instead, it argued that widening the scope to include men would not be the only lawful solution. Article 26 of the ICCPR merely prohibited unequal treatment and to abrogate the right for women was just as lawful as extending the right to men. This was a matter of policy and to choose between the two would be to encroach upon the political prerogative of Parliament. And so the Court left open the question whether the statutory provision violated Article 26 of the Covenant and turned down the applicant’s claim. It thereby added to its discourse a new ground to abstain from issuing a remedy: it was not prepared to choose between different policy outcomes. What might also have played a role though is the fact that at the time of the judgment a new statutory scheme had already been introduced in Parliament.

The *citizenship* judgment has received some criticism for its perceived overspill of judicial restraint.<sup>70</sup> It is striking therefore that the Court delivered two judgments that are widely considered to be among its most activist only a year later.<sup>71</sup>

<sup>70</sup> See Van Dijk 1988b, p. 199-202.

### 4.3.3. The Spring Decisions: Judicial Activism or Prudent Lawmaking?

September 21, 1984: a child was born from two parents. That was not unusual. Indeed, most people are born from two parents. Nature will not have it any other way, at least not for the time being. What was so special about this case was that the parents were not married at the time of birth nor had they ever been married or had they any intention of doing so in the near future. They were happily living together and saw no need for marriage. That had been quite unusual for decades, but in the 1970s and 1980s more and more people in the Netherlands decided not to marry. Under Dutch law, such parents could exercise no parental authority at all. They could only obtain shared guardianship. The Court held that this distinction violated Articles 8 and 14 of the European Convention. What followed was an obscure mixture of setting aside certain provisions of the Civil Code while extensively interpreting others so that they might be read consistently with the Convention. The Court thus elaborately tried to regulate the conditions under which a request for joint parental authority was to be granted by the courts. The Court devoted an entire page in the case reports to describe these conditions. It did not elaborate on the question as to what authorised the Court to issue such regulations. They were not formally proclaimed or anything, but were mentioned as part of the interpretation of the Civil Code. What the Court effectively did was providing lower courts with a manual how to work through these difficult cases by using their combined powers to set aside and reinterpret national law in a uniform and Convention-proof manner. It probably considered it necessary to do so in the interest of legal certainty. However, as one author wrote: 'This is legislation rather than judgment'.<sup>72</sup> The question may well be asked whether such an extensive interpretation suited the contemporary statutory scheme. It probably did not. To that extent, the judgment did not seem to meet the criterion of the 1959 *Quint v. Te Poel* judgment. Moreover, many political policy issues were involved here. The question might equally be asked why the Court did not make reference to the criterion it had set out in its *citizenship* judgment just one year earlier.

### 4.3.4. After the High Watermark: a Slow Retreat to Judicial Restraint

After the 1980's, the Supreme Court began its slow retreat to an attitude of greater judicial restraint. It increasingly refused to review Acts of Parliament based on the argument that it was not in a position to offer a remedy. In a vast number of cases it followed the reasoning it had already followed in the *citizenship* judgment.<sup>73</sup> The *Spring* decisions had fundamentally changed Dutch family law, but they remained exceptions in the fundamental rights case law of the Court. What changed, though, was that the Court sometimes applied the *citizenship* reasoning even in cases where

<sup>71</sup> *Supra* note 43.

<sup>72</sup> Alkema in his Case Note under the judgment in *NJ* 1986/588.

<sup>73</sup> See for instance the Supreme Court judgments of 16 November 1990, *NJ* 1991/475 (*Paternity*), and 8 July 1994, *NJ* 1995/30 (*Expert Witness*).

it might have had the opportunity to set aside a provision on the basis of Article 94 of the Constitution. The sharp contrast it had introduced in the *dual custody* case, when it said that it could not add something to the law but was able to set it aside (effectively reaching the same outcome) might not have really been abandoned but it was certainly blurred to some extent. The Court may have taken in some of the critique of Advocate General Moltmaker in the *Spring* cases. He argued that the difference between filling a gap and setting aside a provision is of a formal rather than of a substantive nature.<sup>74</sup> For Moltmaker, there existed no clear distinction between negative and positive lawmaking.

Whenever setting aside a statute would have rather undesirable consequences, either because that would create a legal gap or otherwise, the Court would abstain from doing so. In the 1998 *Car expenses deduction* case for instance, the Court refrained from setting aside a provision of the Income Tax Act 1964, because even though it would have solved the relevant inequality, it would instantly have introduced another inequality.<sup>75</sup> In another case concerning court levies, its motive not to set aside the statutory provision probably resulted from fear for the financial consequences for public expenditure.<sup>76</sup> Incidentally, the Court even applied the *citizenship* reasoning to cases where setting aside the statute would have been an appropriate remedy. Thus in a 1997 case concerning the possibility for two women to adopt a child, it refused to review whether Article 1:227 of the Civil Code – which effectively excluded same-sex couples from adopting a child – violated Articles 8 and 14 of the European Convention.<sup>77</sup> It followed the reasoning of the Advocate General, who had argued that there were several possible policy outcomes and as setting aside the statute would lead to one of them, by doing so the Court would make a political choice, which of course would not do.

#### 4.3.5. Towards a New Model: the 1999 Labour Expenses Deduction Judgment

In the 1990s, several scholars expressed their uneasiness with regard to the abstaining practice.<sup>78</sup> Some of the questions that arose were whether Article 94 of the Constitution allowed such a move and how abstaining had to be considered from the perspective of effective legal protection of fundamental rights. The Court eventually responded with a landmark judgment in 1999, which addressed both questions by introducing a new model composed of elements of some of the cases we have just discussed.<sup>79</sup>

The case itself concerned a technicality regarding the tax deduction for those with relatively high labour costs as compared to those with standard labour costs.

<sup>74</sup> See para. 6.1.3 of the Advocate General's conclusion.

<sup>75</sup> Supreme Court judgment of 15 July 1998, *BNB 1998/293 (Car expenses Deduction)*.

<sup>76</sup> Supreme Court judgment of 30 September 1992, *BNB 1993/30 (Court Fees)*. Fear for a heavy burden also played a role in Supreme Court judgment of 28 May 2004, *NJ 2006/430 (Probationary Release)*.

<sup>77</sup> Supreme Court judgment of 5 September 1997, *NJ 1998/686 (Double Mothers)*.

<sup>78</sup> See, e.g. De Wet 2008, p. 241-242.

<sup>79</sup> Supreme Court judgment of 12 May 1999, *NJ 2000/170 (Labour expenses deduction)*.

We will not discuss the facts of the case here. What matters is that the Court was confronted with a relatively clear inequality between the two groups in Article 37 of the Income Tax Act 1964. It explicitly considered this provision to be in violation of Articles 14 and 1 of the European Convention's First Protocol. The Court then proceeded to the question whether it was in a position to remove the inequality. It eventually concluded that it was not. But in doing so, it merged some of different lines of reasoning of its previous case law, adding to that a few drops of the concern articulated by legal scholarship.

For the very first time the Court connected its supposed lawmaking duty to the principle of effective legal protection. It implied that it was obviously under a duty to provide adequate protection and started off by stressing that to set aside the impugned provision was not a sound option, as this would not benefit the claimant. As was the case in the *citizenship* judgment, Article 37 of the Income Tax Act was positively framed in the sense that it allowed a deduction for an under-inclusively phrased group. The Court thus considered that to set aside the provision would not, on its own accord, create a right to the deduction for the discriminated group. This is important because what the Court appears to have implied is that *if* setting aside the statute had been a suitable remedy for the applicant, it would have done so – even if that had ultimately led to only one of several possible outcomes. Like in the *dual custody* case, the Court would then take Article 94 of the Constitution for a clear mandate to act. The Court may therefore have dismissed its cautious attitude in the 1997 *Same-sex Parents* case, where it had refused to set aside the statutory provision on the basis that there were other legitimate policy outcomes as well.<sup>80</sup>

The Court then proceeded to examine in what way it could possibly provide a remedy, given the fact that setting aside the statute on the basis of Article 94 was of no use. It considered that there was a legal gap concerning the question whether or not the applicant had a right to the deduction. It could either fill this gap on its own initiative or leave the matter for the legislature. The answer to the question which course to take, according to the Court, depended on the outcome of a balancing test involving on the one hand the principle of effective legal protection and on the other some desirable judicial restraint 'in the current constitutional structure'. The Court finally gave some clues as to how such balancing should take place, using its earlier case law as a catalogue of topoi. From its *Quint v. Te Poel* reasoning it derived that if the existing statutory scheme provided clues for deciding the case, it would fill the gap.<sup>81</sup> If on the other hand there were different policy outcomes to choose from, choosing between them would – for the time being – be a matter best left for the political branches.<sup>82</sup> This consideration led some authors to carefully try and compare it to the political question doctrine of the US Supreme Court.<sup>83</sup>

The Court did also, uncharacteristically, explain why it was not prepared to interfere in the legislative process when there were different policy outcomes to

<sup>80</sup> *Supra* note 77.

<sup>81</sup> See also the Supreme Court judgment of 17 August 1998, BNB 1999/123 (*Commercial registration number plates*).

<sup>82</sup> Which basically is the *Dutch citizenship* line of reasoning (*supra* note 28).

<sup>83</sup> Unfortunately, only in Dutch: See Bovend'Eert 2009, p. 151; De Werd 2004, p. 69-126.

choose amongst. It stressed that the courts had to observe some 'desirable judicial restraint' and that it had only limited possibilities to engage in a quasi-legislative process.<sup>84</sup> Its explanation was of course primarily intended for the ears of those who had been critical of the Court's restrained attitude in years leading up to the judgment. To that end the Court added one other remark. As we have seen, the Court had taken the view that if such a situation arose where there were different policy outcomes to choose from, it would *for the time being* leave the matter for the legislature to decide. It then explicitly stressed that the outcome of its 'balancing test' might be different if the legislature was familiar with the inconsistency and chose to ignore it. What the Court said in fact was that it assumed itself competent to engage in lawmaking even where that meant taking policy decisions, but it had to wait for the legislature to act first. Yet, if Parliament deliberately maintained the incompatible regulation, the Court would not hesitate to do whatever it thought Parliament evidently might or in any case should have done.

There is a remarkable paradox here with the approach taken by the Court in its case law concerning the ban on judicial review of the constitutionality of statutes as laid down in Article 120 of the Constitution. In its celebrated *Harmonisation Act* judgment of 1989, the Court had ruled that it may not declare statutory provisions void for their lack of consistency with either the Constitution or legal principles.<sup>85</sup> But as we have seen, it made an exception for cases where Parliament could *not* have known about the inconsistency. It then implicitly assumed that Parliament would have wanted it not to apply the incompatible provision. This approach appears to deviate from the *Labour expenses deduction* approach, where the Court considered itself competent to legislate if Parliament had *knowingly* failed to do so.

The difference between the two approaches lies in the nature of the review undertaken by the Court. With respect to Article 120 of the Constitution, the Court has to observe the fact that the question whether a statute is in fact constitutional is ultimately for Parliament to decide upon. The Dutch version of parliamentary sovereignty (as far as it exists) therefore fundamentally differs from that of the United Kingdom where, as Dicey phrased it, 'Parliament has the right to make or unmake any law whatever'.<sup>86</sup> The Dutch Parliament may certainly not make or unmake any law whatsoever. Its powers are limited by the Constitution. However, Article 120 reserves for Parliament the right to have the ultimate say on the question whether it has overstepped such limitations. So the Courts may not only safely assume that it is Parliament's desire to legislate in conformity with the Constitution, they must respect the fiction even when it is very clear that Parliament has actually no such intention at all. The situation is different with regard to treaty law. Here the same assumption applies: the legislator aims to legislate in compliance with its

<sup>84</sup> Already in 1993, a study showed that the reasons for the Court to refrain from positive lawmaking (or as the study called it, 'engaging in politics in the sense of giving direction to society'), were primarily of a rather practical nature, basically boiling down to the question whether the Court would be able to regulate in issue in society. See (in Dutch) Stolker 1993, *supra* note 60, and for a revised version Uzman & Stolker 2009, p. 475-496.

<sup>85</sup> *Supra* note 17.

<sup>86</sup> Dicey 1885/1959, p. 3-4.



international obligations but the question whether it has actually done so is ultimately a matter for the courts to decide upon. Article 94 of the Constitution makes that painfully clear. If Parliament therefore knowingly ignores its obligation to legislate consistently with, for instance, the European Convention, the courts must intervene and ultimately issue a remedy. The relationship between the Supreme Court and the legislature is then much more one between equals than the relationship with regard to constitutional review where Parliament has the authoritative say.

In the case at hand, the *Labour expenses deduction* case, the Court developed a line of reasoning it had already put in practice some years before. In another tax decision, this time concerning commercial registration number plates, the Court had been willing to grant the victims of an unequal treatment the benefit they had been denied by the legislature.<sup>87</sup> Of course, there was no clear obligation for Parliament to grant these car owners the impugned benefit. It could equally have decided to abolish the entire scheme. There were then two choices. And yet, the Court felt that it was entitled to choose the first option without leaving the matter for Parliament. There were two reasons for this. First of all, the government had actually warned Parliament that its amendment would most probably violate the Convention. Parliament had not in any way contradicted this statement but had nevertheless passed the bill amended. It was therefore painfully clear that Parliament had knowingly legislated inconsistently with the Convention. Moreover, granting the aggrieved car owners the benefit was exactly what the government had proposed to do in the first place. It therefore fitted in neatly with the existing statutory scheme and thus met the important criterion of the 1959 *Quint v. Te Poel* case.

On the other hand, it has now become clear that the Court is not very likely to assume that the legislature has consciously left a violation intact. After the 1997 *Number Plates* judgment the Court has never actually considered filling a gap when there were policy choices to make. Quite the contrary, when confronted with the alleged sluggishness of the legislature in amending the law in a few cases where the Court had declared the Act incompatible with Convention rights, it explicitly accepted the argument of the government that it had tried to amend the law with all deliberate speed.<sup>88</sup> In the same judgments it has also ruled that when remedying the inconsistency, Parliament may freely choose to change the law only for the future in the sense that it need not necessarily enact its amendments with retroactive effect.<sup>89</sup>

The 1999 *Labour expenses deduction* judgment basically sums up the Court's attitude to positive and negative lawmaking in fundamental rights cases. It is now clear that the Court recognises its duty to provide effective redress to claimants who

<sup>87</sup> *Supra* note 81. This was a case in 1997, but already in 1990 the Court had mentioned its readiness to issue a remedy if Parliament did not take up the matter after the Court had expressed its concerns. See the Supreme Court judgment of 31 January 1990, *NJ* 1990/403 (*Unreasonable delay*).

<sup>88</sup> Supreme Court judgments of 24 January 2001, *BNB* 2001/291, and 14 June 2002, *BNB* 2002/289 (*Labor Expenses Deduction II*).

<sup>89</sup> *Ibid.*

successfully invoke human rights treaties. Moreover, it has developed a kind of step-by-step plan in order to decide on the nature of the redress.

1. First of all, it will always try to interpret any indefinite provision consistently with the treaty provision in question;
2. Second, it will try to provide redress by means of negative lawmaking: it examines whether setting aside the impugned provision might settle the case.

Only if that is not the case does the question arise whether the Court may engage in positive lawmaking by using its interpretative mandate.

3. As a matter of principle, it considers itself empowered to do so when there is a clear alternative which agrees with the existing statutory scheme.
4. It should leave the matter for Parliament to resolve when there are policy decisions at stake. The Court will then not easily encroach upon the political prerogative of Parliament.
5. But it is – at least theoretically – prepared to do so when Parliament evidently has no intention of putting things right within a reasonable period of time.

The Court generally complies with its own framework and it may therefore be said that it usually exercises judicial constraint when it comes to positive lawmaking in the sense of issuing regulations on the basis of its duty to interpret the law. There is one notable exception, however, to this general rule. And we will turn our attention briefly to that exception.

#### **4.3.6. The Exception to the Rule: European Union Law**

Where a statute violates European Union law rather than the European Convention on human rights or one of the other human rights treaties, the Supreme Court does not consider it possible to leave the matter for the legislature. The basic assumption for the Supreme Court is that Articles 93 and 94 of the Constitution – regulating the effects of international law in the domestic legal order – do not apply to European Union law. As early as 1963, the European Court of Justice (ECJ) ruled in its landmark cases *Van Gend & Loos* and *Costa v. E.N.E.L.* that the European legal order is fundamentally monistic, meaning that Community law is both of direct effect and superior to any kind of national law (including national constitutions) on its own accord.<sup>90</sup> The Dutch Supreme Court has never challenged this claim and in 2004 it even accepted it explicitly.<sup>91</sup> This effectively means that it is ultimately the law of the EU itself which, in the view of the Supreme Court, determines the extent to which Community law affects the Dutch legal order. To that end the European Court of Justice has derived some very stringent rules concerning the effective legal protection of Community law by the national courts from the EC Treaty. Although

<sup>90</sup> *Supra* note 7.

<sup>91</sup> Supreme Court judgment of 2 November 2004, *NJ* 2005/80 (*Compulsary break*).

the ECJ has consistently ruled that the effects of an inconsistency between national and Community law are a matter for national courts to deal with, it has simultaneously laid down some minimum guidelines in order to secure the uniform and effective application of Community law throughout the Union.<sup>92</sup> National courts are required to interpret national law as far as possible in conformity with Community law.<sup>93</sup> Would such an interpretation, according to the national rules of adjudication, prove to be impossible, then the national court in question is obliged to set aside the national rule.<sup>94</sup> The ECJ has moreover underlined that any national rule which handicaps the possibilities for courts to secure the uniform and effective execution of Community law must be put aside as well.<sup>95</sup> Mitigating the undesired consequences of the application of Community law can be considered only by the ECJ itself.<sup>96</sup> Last but not least, the ECJ takes a relatively straightforward approach to remedies in discrimination cases. In such cases the national courts will have to extend the more favourable rule to the aggrieved party as well.<sup>97</sup> The ECJ does not consider such an extension to be any kind of policy decision, but a logical outcome of applying the principle of non-discrimination to a given case, thereby deviating considerably from the approach usually adopted by the Dutch Supreme Court.

The Supreme Court has faithfully carried out its duties under Community law in this respect. A recent example taken from the field of taxation might illustrate this. In the *Ilhan* case, the Court determined that Article 1 of the Car and Motorcycle Taxation Act constituted a violation of Articles 43 and 55 of the EC Treaty.<sup>98</sup> It considered that modifying – and consequently interpreting the statutory provision consistently with Community law – would outstretch its lawmaking duties as the existing statutory scheme and its legislative history did not yield any particular way forward. However, it refused to consider leaving the matter for Parliament, as it surely would have done, had it concerned a case under a human rights treaty. Instead it decided to set aside the Act at large, thereby effectively annulling the entire tax measure.<sup>99</sup> In order to provide the required redress, the Court thus fell back on to its classical role of a Kelsenian negative legislator.

<sup>92</sup> See, for instance, ECJ judgments of 27 March 1980, Case 61/79 (*Denkavit*); of 30 April 1998, C-37-38/96 (*Sodiprem*); of 16 January 2003, C-265/01 (*Pansard*), and of 6 March 2007, C-292/04 (*Meilicke*).

<sup>93</sup> *Supra* note 8.

<sup>94</sup> See a.o.: ECJ judgments of 15 July 1964, Case 6/64 (*Costa t. E.N.E.L.*), and of 9 March 1978, Case 106/77 (*Simmenthal*).

<sup>95</sup> See, for instance, the *Simmenthal* judgment in the previous footnote.

<sup>96</sup> ECJ judgments of 17 May 1990, C-262/88, (*Barber v. Guardian*); 1 April 2008, C-267/06 (*Tadao Maruko*).

<sup>97</sup> See a.o.: ECJ judgments of 27 June 1990, C-33/89 (*Kowalska*), and of 26 January 1999, C-18/95 (*Terhoeve*).

<sup>98</sup> Supreme Court judgment of 14 November 2008, *BNB* 2009/3 (*Ilhan*).

<sup>99</sup> The Judicial division of the Council of State seems to take a less rigorous stand. In the *Eman & Sevinger* case it did invoke the limits of its lawmaking duties in a case concerning EU law, *supra* note 10.

#### 4.4. Reactions of 'la doctrine' after 1999

As we have seen, there has always been a considerable debate on the question whether the courts have a lawmaking role to play and if so, how far this role might be stretched. This has traditionally been a debate among civil lawyers interested in methods of interpretation. But as the role of the courts with respect to fundamental rights review changed and increased in the 1980 s, the lawmaking powers of the ordinary courts clearly became a matter of constitutional law. This presented constitutional scholars with the basic question whether the traditional doctrines on the role of the courts were adequate in the field of fundamental rights review.<sup>100</sup> However, such was the general consensus among civil lawyers by now that the courts were under a clear duty to develop and shape the law that there was also from the very outset among constitutional scholars a tendency to agree on the basic fact that the courts had a considerable lawmaking role to play.<sup>101</sup> Dutch constitutional doctrine has therefore never been very fundamentally critical of the courts acting as a positive legislator. What is more, the term 'positive legislator' would hardly be used at all.

Consensus somewhat eroded in 2005 as a Nijmegen law professor questioned the lawmaking duty of the courts.<sup>102</sup> He argued that this 'so-called lawmaking duty' was an invention by the Supreme Court itself, the creation of which was to a large extent itself a piece of lawmaking without any basis in written law.<sup>103</sup> However, he was not the only one critical of the Supreme Court's attitude. At the other end of the spectre, there had already been scholars arguing that the Court's attitude towards individual victims was possibly too restrained to provide effective legal redress.<sup>104</sup> In short, the debate was renewed.

Today legal scholarship can roughly be divided into three categories. First, there are those who are of the opinion that there is no legal basis whatsoever for the courts to engage in lawmaking.<sup>105</sup> Courts decide cases and in the process of doing that, they might 'find' and apply the law but they do certainly not go about creating it. Second, probably the vast majority of scholars argue that there is a role for the courts with respect to judicial lawmaking, but it is equally clear that it should primarily be Parliament that enacts the law.<sup>106</sup> They generally assume that Article 81 of the Judicial Organisation Act provides a clear basis for the courts to develop – and thus shape – the law, even if that means engaging in an activity close to legislating. They expressly reject the argument that the Supreme Court may never engage in lawmaking because it lacks the appropriate democratic legitimacy. Most

<sup>100</sup> See a.o. the authors mentioned in footnote 49.

<sup>101</sup> This attitude was expressed in 2000 by the parting president of the Supreme Court Martens in his farewell speech (*supra* note 56).

<sup>102</sup> Kortmann 2005.

<sup>103</sup> *Ibid.*

<sup>104</sup> Van Dijk 1988b; Martens 2000; Barkhuysen & Van Emmerik 2006, p. 63.

<sup>105</sup> *Supra* note 102. Moreover: Schutte 2009, p. 676-680.

<sup>106</sup> See, for instance, Koopmans 1999, p. 134; Martens 2000, p. 751; Brenninkmeijer 2001, p. 26; De Werd 2004, p. 120.

of them assume that the courts do not derive their legitimacy no from any democratic principle but from the rule of law.<sup>107</sup> However, this group lacks coherence in the sense that although most scholars agree that the courts have a lawmaking role to play when reviewing legislation, they differ on the extent of the lawmaking duty. The basic question here is whether the courts may encroach upon the policy prerogative of the legislature. There are those who think the courts clearly incompetent to do so.<sup>108</sup> They consequently disagree with the stance the Supreme Court has taken in its *Labour expenses deduction* judgment, when it abstained from lawmaking but warned that it might in the future decide otherwise if Parliament remained inactive.<sup>109</sup> Others maintain that although it is usually improper for the courts to engage in politically sensitive issues, it may nonetheless be necessary for them to do so in order to provide effective redress.<sup>110</sup>

Apart from this difference in opinion, the common denominator of this second group is that it regards lawmaking by the courts as possible but clearly the exception. It is first of all a spin-off of deciding individual cases and, in the case of fundamental rights review, something necessary but abnormal. Setting aside statutory law and subsequently formulating guidelines for society are not the core business of the courts but of Parliament.<sup>111</sup> They stress, in other words, the *primacy* of Parliament in policy-making and legislating.<sup>112</sup> There is, however, a third group of authors that appears to argue for a more sweeping understanding of the lawmaking role of the courts. For such authors, the courts – especially the Supreme Court – and the legislature are ‘partners in the business of the law’.<sup>113</sup> Building firmly on the civilian tradition, they argue that Parliament is just not able to anticipate every sudden change of direction society takes. Therefore, judge-made law is now ‘an absolute must’, its contribution to the development of the law indispensable and it should certainly not be regarded as the exception but rather as the rule.<sup>114</sup> Looking after the parties of the case at hand is not the only primary duty of the courts: they have an equally important duty towards the development of the law in general as well. However, one may wonder whether such scholars are still addressing the same subject. As we have seen, there is some disagreement about the extent to which the term ‘lawmaking’ ought to be used. The civil law approach is very much directed towards the filling of legal gaps the legislature is simply unable to fill. That situation substantially differs from what concerns constitutional scholars most, that is when the courts must set aside a clear statutory provision which nevertheless fails to produce an appropriate remedy for the case at hand. Still, the Dutch debate on the lawmaking powers of the courts is very much fashioned by the

<sup>107</sup> See the authors mentioned in the previous footnote. Critically however: Bovend’Eert 2009, p. 142-143.

<sup>108</sup> Most recently for instance Bovend’Eert 2009, p. 143 (see the previous footnote).

<sup>109</sup> See the previous section.

<sup>110</sup> Notably Martens 2000, p. 751; Moreover Happé 1999, p. 43; Adams 2009, p. 1098.

<sup>111</sup> See the outline drawn up by Bovend’Eert 2009, p. 140-142.

<sup>112</sup> See also Adams 2009, p. 1098.

<sup>113</sup> See e.g. Vranken 2006, p. 8-9.

<sup>114</sup> *Ibid.*

existence of this group. As we will see in the next section, their efforts seem to have influenced the Supreme Court as well as the legislature and reforms are now under way to adapt the Court's position in the legal system to its lawmaking role.

## 5. Means and Effects of Judicial Review

### 5.1. Introduction

In this section we will offer a brief outline of the way in which dialogue between the courts, the parties of the individual case and the legislature is shaped. Particular topics include the specific procedures to attain a remedy for a human rights violation (including legislative omissions), specific injunctions concerning unlawful legislation, and the effects of decisions concerning rights review. Moreover, we will turn our attention briefly to the specific techniques the Supreme Court occasionally applies to mitigate the consequences of its lawmaking activities.

### 5.2. Procedures available to Enforce Fundamental Rights Law

As we have said before, the Netherlands does not have a constitutional court. Consequently, there are no specific procedures for claimants to complain about infringements of fundamental rights. No *Recurso de ampáro*, *habeas corpus* or *Verfassungsbeschwerde* exist in the Dutch legal order. As we have noted before, this does not mean that the courts have no role to play when confronted with violations of (international) human rights. As long as the right in question is laid down in a self-executing treaty provision, the courts may review legislation for its consistency with such rights both in a direct and an indirect way.

The power for the ordinary and administrative courts to review legislative rules for their consistency with higher laws was already established in 1864.<sup>115</sup> As we have discussed, rules of international law automatically take precedence over national rules and are therefore recognised as 'higher law' in the Dutch legal order. Should the courts conclude that national provisions are inconsistent with treaty law then, as we have seen, they must either interpret the provision in conformity with the treaty or, if that is impossible, set aside the national provision on the basis of Article 94 of the Constitution. The courts then apply either remaining national law or the norm of the treaty provision itself. This may ultimately lead to a remedy by way of granting the requested permit after all, awarding damages or acquittal of criminal charges, whatever the case may be. It is important, however, to stress that Article 94 of the Constitution does not empower the courts to declare statutes void. It only requires the courts to set aside individual provisions in individual cases.

Direct review of legislation is also a possibility, be it that it does not happen very often with regard to statutes. The bulk of both positive and negative legislating by the courts with regard to primary law takes place in procedures of indirect review. But having said that, it is certainly possible to start civil proceedings against

<sup>115</sup> Supreme Court judgment of 6 March 1864, *W 2646 (Pothuys)*, *supra* note 21.

the State for unlawfully enacting a statute. In a landmark judgment of the Supreme Court called *Pocketbooks II*, the Court ruled that Article 1401 of the Civil Code (currently Article 6:162), which concerns a general tort, was generally applicable to the legislative function of the government.<sup>116</sup> Although successful appeals concerning the unlawfulness of primary legislation remain very scarce, it is by no means impossible that the Supreme Court may one day accept this kind of claim. In the 2001 (first) *Pig farming Reform Act* judgment, the Court was in any case prepared to review whether some of the Bill's provisions constituted an unlawful act in the framework of Article 6.162 of the Civil Code, rendering the State liable for damages.<sup>117</sup>

### 5.3. Remedies for Fundamental Rights Violations

The difficult question, however, is not whether the courts may accept a claim concerning the lawful enactment and application of an Act of Parliament, but the question rather is what remedies they may issue when they conclude the Act to be inconsistent with international law.<sup>118</sup> Perhaps the least difficult remedy in this particular respect is the power of the civil courts to award damages for unlawful legislation. This may certainly be an option.<sup>119</sup> Another available remedy concerns the power of the courts to issue a declaratory judgment to the effect that the enacted bill is unlawful, where the unlawfulness may of course arise from incompatibility with international treaty law. Such declarations may be made by all ordinary courts whether low or Supreme, and as we will see in the next section, they can formally only bind the parties in the case at hand. In practice, however, the binding force of such declarations is rather substantive. The courts may also issue an injunction to the effect that the government may not apply to the impugned Act. This is called *buitenwerkingstelling* ('rendering inapplicable'). Like declaratory judgments and other decisions by the regular courts, this kind of injunction formally only binds the parties before the court.<sup>120</sup> However, it is possible for interest groups, for example, to claim that the government be ordered not to apply the statute in question in any case.<sup>121</sup> Third parties may therefore profit from such a judgment in the sense that applying the statutory provision in their cases would constitute another unlawful Act towards the original claimant.

There are also injunctions, however, which the courts consider themselves prohibited from applying. The courts do not have the power to annul Acts of Parliament or indeed any other kind of legislation. An injunction formally

<sup>116</sup> Supreme Court judgment of 24 January 1969, NJ 1969/316 (*Pocketbooks II*).

<sup>117</sup> Supreme Court judgment of 16 November 2001, NJ 2002/469 (*Pig Farming Reform Act*). Moreover see Supreme Court judgment of 14 April 2000, NJ 2000/713 (*Kooren Maritiem v. the State*).

<sup>118</sup> Cf. Schutgens 2009, p. 36-39.

<sup>119</sup> See a.o. the *Pig farming Reform Act* judgment, *supra* note 117.

<sup>120</sup> See Supreme Court judgment of 1 July 1983, NJ 1984/360 (*LSV*). Moreover: Schutgens 2009, p. 78 ff.

<sup>121</sup> *Ibid.*

compelling the State to withdraw a particular piece of legislation – no matter how unlawful it is – cannot be issued.<sup>122</sup> Such an order would be tantamount to quashing the provision, to which the courts have no constitutional power.

Another injunction the courts consider themselves not empowered to issue concerns the order to Parliament (or indeed any other legislator) to produce legislation where the inconsistency with higher law is a question of legislative omission rather than an express act.<sup>123</sup> In its landmark judgment on this matter, the Supreme Court explicitly ruled that it could not issue such an order, even though the omission rendered the legislation incompatible with EC law and therefore unlawful.<sup>124</sup> The Court ruled that the question whether the State should meet its international obligations and, if so, in what manner – was a political decision for Parliament. Furthermore, the question whether there ought to be legislation and, if so, what should be its content equally was a political matter on which the courts should have nothing to say.<sup>125</sup> There is a curious paradox here, because on the one hand, the Supreme Court considers itself incompetent to order the legislature to enact or withdraw legislation because that would be a political matter, but on the other hand considers itself, as a matter of last resort, empowered to carry out its lawmaking duty to the extent that it issues positive legislation.<sup>126</sup> Moreover, the Court has had no objection against warning the legislature that it might in the future carry out this duty if Parliament stayed inactive for too long a period. However, according to the Court, there is a clear difference between on the one hand setting aside a statute (and extensively interpreting it) and an order to Parliament to the effect that it should produce legislation. The difference is that the latter has a generally binding effect because the future legislation will of course have such an effect, whereas the effects of both setting aside the statute and interpreting it are, at least on a formal basis, limited to the parties at hand.

#### 5.4. *Effects of Judgments*

We will now describe briefly the effects court decisions regarding the interpretation of statutory law usually have. Such effects may have two dimensions. The first dimension concerns their binding nature. Do judgments of the courts, those of the Supreme Court in particular, bind the legislature, the government and other courts? We will deal here mainly with the distinction between effects *erga omnes* and *inter partes*, and the concept of *res judicata* in Dutch law. The second dimension relates to the temporal effects of courts decisions. We will outline those effects in the next section and while we are at it, try to give some impression of how the Supreme Court tries to mitigate the more far-reaching consequences of its judgments.

<sup>122</sup> Supreme Court judgment of 1 October 2004, NJ 2004/679 (*Fauna-protection v. Province of Friesland*).

<sup>123</sup> Supreme Court judgment of 21 March 2003, NJ 2003/691 (*the State v. Waterpakt*).

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Cf. Boogaard 2008, p. 478-483.



The first question is whether Supreme Court decisions concerning the lawfulness and the interpretation of statutory law in the light of fundamental rights have general (*erga omnes*) effects. The simple answer is: they do not. First of all, the judicial system contains several columns which are not necessarily hierarchically subordinate to each other. The lack of any constitutional court having ultimate authority in that respect is clearly felt here. Moreover, as we have already outlined, the Dutch court system does not include a rule of judicial precedent.<sup>127</sup> This means that the decisions of any court, including the Supreme Court, theoretically bind only the parties before it. Even within the ordinary judiciary, there is no formal obligation to follow Supreme Court precedents.<sup>128</sup> On the other hand, as we have also remarked earlier, the practical effects of court decisions are not as meagre as they look at first sight, quite the contrary in fact. In the interests of equality and legal certainty, the courts generally observe each other's decisions, particularly within the column of the ordinary courts where the lower courts are in fact bound by judgments of the Supreme Court. Even the administrative courts and the Supreme Court usually try to respect each other's judgments, be it on a voluntary basis. There is then a relatively strong general effect. It has recently been argued that the Supreme Court has established this substantive approach in a judge-made rule, partly by using its doctrine on *res judicata*.<sup>129</sup>

To start with, the Court may of course reverse the decisions of the lower courts in its own columns, viz. the civil, criminal and tax divisions. If those courts do not observe the judgments of the Supreme Court, it will regularly make use of its power to do so. Problems arise primarily with respect to administrative law. Neither the Supreme Court nor the highest administrative courts exercises any true jurisdiction over each other. Neither is therefore forced to follow any case law of the other. In a series of judgments in 2004 and 2005, however, the Supreme Court considered itself bound by a ruling of the highest administrative courts to the extent that such a ruling determines the *inapplicability* of a legislative provision because of its inconsistency with higher law<sup>130</sup> It did not matter whether the parties before the Supreme Court had been involved in the administrative procedure. Third parties were equally bound to this ruling of the administrative courts. Things may be different if the administrative court decides to declare the legislative provision consistent with higher law. In that case third parties – which had not been litigating in the administrative procedure – would not be bound to that ruling in the sense that they are allowed to bring an action in the civil court system.<sup>131</sup>

The question remains, of course, whether there is a similar rule compelling the administrative courts to give effect to the judgments of the Supreme Court. Although pleaded for by some scholars, there has not yet been any case law in that

<sup>127</sup> *Supra* note 51. Moreover, in Dutch: Bovend'Eert 2006, p. 157-177.

<sup>128</sup> See Schutgens 2009, p. 221.

<sup>129</sup> *Ibid.*, p. 222.

<sup>130</sup> Supreme Court judgments of 18 February 2005, NJ 2005/283 (*Aujesky*), and 11 October 2005, NJB 2005, p. 2106-2107 (*Territorial order Nijmegen*). See Schutgens 2009, p. 222-235 as well.

<sup>131</sup> Supreme Court judgment of 17 December 2004, NJ 2005/152 (*OZB v. the State*).

direction.<sup>132</sup> However, one might argue that Supreme Court judgments generally bind the organs of the legal entity that is party to the proceedings. If the complaint about the unlawfulness of a legislative Act is brought forward in a direct action against the State, any organ of the state – including the administrative courts – should consider itself bound by a ruling of the Court. This argument does not apply, however, to the many cases in which a complaint against a statutory provision occurs indirectly in the course of proceedings before the ordinary courts. On the other hand, as we have said before, the administrative courts usually try to observe the rulings of the Supreme Court, irrespective of whether they consider themselves bound to them. It is therefore to be expected that they will comply with a ruling concerning the unlawfulness of legislation.

### 5.5. *Mitigating the Temporal Effects of Judgments*

The other dimension concerns the temporal effects of Supreme Court judgments. Such judgments usually have retrospective effect in the sense that the courts have traditionally always assumed that any interpretation regarding the law they might arrive at is part of the law itself.<sup>133</sup> In this, rather old-fashioned, view, it is not the court shaping the law but rather the court ‘finding’ the correct interpretation of the law as rightfully intended by the legislature.<sup>134</sup> The Supreme Court was never very clear, however, about the classic temporal effects of its judgments. In the older case law it just implicitly assumed that its new interpretation had retrospective effect.<sup>135</sup> As we have showed in the previous section the Court’s view of its own role as well as that of legal scholarship has changed over the years and from the 1970s onward, the Court has increasingly become more willing to mitigate the temporal effects of its judgments.<sup>136</sup> As the Court embraced a lawmaking duty, it became possible to openly discuss the consequences of judicial overruling. The last few decades have therefore showed some examples of judicial prospective overruling. Legal literature distinguishes both ‘true’ prospective overruling and ‘qualified’ prospective overruling.<sup>137</sup> One may speak of the true variant if the Court does not apply its new interpretation in the case at hand but rather postpones it to some time in the future. One uses the term ‘qualified’ prospective overruling when the Court immediately applies its new interpretation or rule, but limits the possibilities for other parties than those in the case at hand, to appeal to the new rule. An example of the latter provides the 1981 *Boon v. Van Loon* judgment, where the Court changed its case law on the ownership of pensions in divorce law.<sup>138</sup> Here the Court explicitly limited the

<sup>132</sup> See, for instance, Schutgens 2009, p. 234.

<sup>133</sup> See Supreme Court judgment of 22 June 1883, *W* 4924 (*Jansen v. Heiting*). See moreover: Scholten 1974, p. 137.

<sup>134</sup> See Polak 1984, p. 229-230. For criminal law, see Rozemond 1998, p. 246-268.

<sup>135</sup> See the *Jansen v. Heiting* case mentioned in footnote 133.

<sup>136</sup> For a historical overview of the changing attitude of the Court, see Polak 1984, p. 231-244.

<sup>137</sup> Polak 1984.

<sup>138</sup> Supreme Court judgment of 27 November 1981, *NJ* 1982/503 (*Boon v. Van Loon*).

temporal effect of its new course to the case at hand and future cases. Where the divorce had already been pronounced, no appeal to the new rule would be possible.

As a clear example of the first option ('true' prospective overruling) might serve the classic case law concerning the *Labour expenses deduction*, we have elaborately discussed in the previous section.<sup>139</sup> Here, the Court ruled that it would not – for the time being – intervene because doing so would entail choosing from different policy options. But it made it clear that it might think otherwise if the legislature knowingly persisted in its unlawful course. It remained therefore open for the Court to overrule its 1999 judgment in the future on the basis that it had informed Parliament of the unlawful nature of the provision in question. In the follow-up of this case, it moreover explicitly ruled that Parliament was not obliged to add retroactive effect to its subsequent amendments of the impugned Income Tax Act.<sup>140</sup> This judgment also shows, however, that the Court is usually not prepared to fix a certain date before which the existing legislation should be amended. As far as we know, the Court has not yet done so anyway.<sup>141</sup>

A mixture of both options can be found in a similar decision of the Supreme Court in a case in which it ruled that the policy to exclude ministers' official cars from Income Tax violated the principle of equal treatment.<sup>142</sup> However, it temporarily limited the possibilities of third parties to invoke the case in their own dealings with the tax authorities. It ruled that, as long as the unequal treatment concerned a small privileged group and the government was unaware of the legal principle at stake, it would not allow complaints as long as it could be said that the tax inspector was unaware that he was treating taxpayers unequally. The Court effectively said that the government should immediately quit the impugned practice, but refused to accept the argument for the sake of the claimants in the case at hand.

These examples show that, the Court occasionally eases some of the 'pain' of extensively interpreting or setting aside a statute by prospective overruling. It has even explicitly recognised so in a recommendation it made to the government in 1991 on questions about lifting the ban on judicial constitutional review by amending Article 120 of the Constitution.<sup>143</sup> It effectively pleaded for such an amendment and argued that the fear for infringements on the principle of legal certainty might be dispelled by pointing at the possible ways of mitigating judgments which could pose a threat to legal certainty.

<sup>139</sup> *Supra* note 79.

<sup>140</sup> Supreme Court judgment of 14 June 2002, *BNB 2002/289 (Labour expenses deduction II)*.

<sup>141</sup> None of the other courts has ever fixed a specific date, but one of the three highest administrative courts, the Central Court of Appeal in social security matters did retrospectively consider once that time was up as it overruled an earlier judgment to effectively give the government some time. See, for example, its judgment of 7 December 1988, *AB 1989/10 (General Widows and Orphans Act)*.

<sup>142</sup> Supreme Court judgment of 5 February 1997, *BNB 1997/160 (Ministers' official cars)*.

<sup>143</sup> The recommendation of 31 October 1991 was published in *NJCM Bulletin* 1992, p. 243-259.

### 5.6. *Judicial Reforms*

In a recent report by members of the Supreme Court itself, concerns were expressed about the way in which the Court was forced to carry out its lawmaking duty.<sup>144</sup> First of all, the commission responsible for the report emphasized the crucial role the Supreme Court had to play in the administration of justice and the development and, consequently, the creation of the law. It argued that the Court is currently flooded with cases that, from the perspectives of either legal protection of citizens or the development of the law, were of little importance. More importantly, however, the commission also drew attention to the fact that the Court was partly unable to fulfil its lawmaking duties because important cases might not necessarily reach the court or, if they do, reach it only after a lengthy period of time. The commission suggested two remedies. First of all, it pointed to an already existing instrument, which it thought would be worth using more extensively, which concerns 'cassation in the interest of the law' (*cassatie in het belang der wet*). The Procurator General at the Supreme Court may, under Article 78(6) of the Judicial Organisation Act, appeal to the Supreme Court on behalf of the government where both parties in the case are unable to do so and he is of the opinion that there is a need for a clear judgment by the Court. The judgment of the Supreme Court in such a case cannot affect the legal position of both parties in the case at hand, but it can provide clarity. Second, the commission pleaded for experimenting with a limited preliminary question procedure. This would allow a relatively speedy clarification of legal issues where there is massive uncertainty among the courts and the legal profession. Meanwhile, the Minister for Justice has expressed his endorsement of the proposals and has announced plans to establish a limited preliminary procedure in cases of mass claims.<sup>145</sup> It remains to be seen how this development will affect the lawmaking role of the Supreme Court in due time. The reforms envisaged show however that both the Supreme Court itself and the responsible cabinet ministers openly acknowledge the positive lawmaking role of the Supreme Court.

## 6. Summary

In the introduction to this contribution we promised to briefly summarize our findings thereby attending to the questions posed by the general reporter. In the course of our analyses we touched upon three main themes. As a preliminary point of order we gave a brief account of how fundamental rights review takes place in the Dutch legal system. The Constitution contains a bill of rights but it also bans the courts from reviewing parliamentary legislation on the basis of the Constitution. Fundamental rights review thus mainly takes place on the basis of international human rights law.

<sup>144</sup> This is the Hammerstein report: *Versterking van de cassatierechtspraak* ('Strengthening Cassation'), The Hague, 2008.

<sup>145</sup> *Parliamentary Reports of the Second Chamber 2007/2008*, 29 279, No. 69.

With regard to the *judicial means for judicial review*, it should be emphasized from the outset that the Netherlands does not have a specialized constitutional court. Fundamental rights review is both highly dispersed and general in the sense that any court is empowered to review Acts of Parliament for their consistency with self-executing provisions of treaty law in the course of general statutory interpretation. This means that there are no specific constitutional complaints available to victims of fundamental rights violations, such as the *recurso de ampáro*. Constitutional issues may be raised in any kind of judicial procedure but it should of course be noted that Article 120 of the Dutch Constitution prohibits the courts from reviewing the constitutionality of parliamentary legislation. With regard to violations of either the Constitution or any other provision containing fundamental rights, victims of violations may file a regular complaint in the civil courts on the basis of a general tort (Article 6:162 of the Civil Code). Consequently, no specific civil rights injunctions exist. Civil remedies typically include the award of damages and a formal declaration of the unlawful nature concerning the enactment or application of the statute in question. When courts consider a particular remedy outside the scope of their respective lawmaking duty, they may also issue a declaration to the extent that the statute in question is inconsistent with a fundamental right or liberty and leave it at that (besides awarding the victim the costs of the proceedings). Such declarations have no binding effect on the government, except when the State is party to the case at hand. However, the government generally recognizes the authority of the highest courts in legal matters and thus considers itself under a moral obligation to change the law. Although the courts may appeal to the legislature to enact legislation, they do not have any power to order either the government or the legislature to do so.

As a point of reference, we have chosen to offer an account of the role of the Supreme Court. The members of the Court do not have any *ex officio* powers, nor does the Court have an express power to remove and take over cases from lower courts or tribunals. As we have seen, however, the Procurator General at the Supreme Court does have the power to institute proceedings at the Supreme Court if a case is decided by lower courts and the parties are no longer in a position to appeal to the Supreme Court. Debates on the lawmaking duties and powers of the Court have resulted in proposals for a more ambitious use of this instrument. Such proposals have moreover resulted in an experiment to establish a preliminary question procedure in a limited number of cases in order to centralise and quicken the process of judicial lawmaking in the interest of uniformity and legal certainty.

We have furthermore elaborated on the Supreme Courts case law on judicial review and judicial lawmaking. As we have observed, the Court may, on the basis of Article 94 of the Constitution (or on the basis of EU law) set aside statutory provisions. Annulment is, at least theoretically, not possible as the Court's decisions bind only the parties of the case. However courts are allowed to declare the inconsistent nature of statutes and such declarations issued by the Supreme Court come very close to an annulment in practice. Our account particularly showed that the Court is usually prepared to provide victims of human rights violations redress if such redress means setting aside the statute. Using its interpretative authority to alter and reform legislation is entirely another matter. Although the Court considers

itself competent to play a modest lawmaking role, it is prepared to play that role only where it is not required to engage in political decision-making. This means that it will fill a legal gap on the basis of international human rights law only if there is just one legitimate outcome of the case, or if a specific outcome fits neatly in the existing statutory scheme. If these requirements are not met, the Court will abstain both from judicial lawmaking and accepting the claim. However, it does consider itself competent to overrule such a demonstration of restraint if it believes the legislature to be negligent. It thus only abstains *for the time being*.

This connects closely with our last point, concerning the effects of judicial decisions of the Supreme Court. As we have observed, the Court's philosophy – from a purely theoretical standpoint – has always been that its case law is not a formal source of law. It binds only the parties before it. In practice, however, the judgments of the Court clearly have a binding nature, at the very least for the lower courts in its judicial columns (taxation, criminal and civil law). Again, on a purely formal basis, the judgments of the Court have only *ex tunc* or retrospective effects. This follows from the Court's traditional approach that it 'finds', rather than creates, the law. However, in recent times the Court has adopted a more flexible view by using its practice to abstain in certain cases in order to provide the legislature with a limited period of time to remedy a particular violation. Some authors have attached the label of prospective overruling to this approach. However, the Court's practice still shows that it is very reluctant to really enforce such a conditional overruling. Furthermore, the *Labour expenses deduction* case shows that the Court does not consider it necessary for the legislature to regulate the retroactive effects of a judicially declared violation.

The general impression the Dutch Supreme Court gives is that of a very prudent Court, exercising considerable restraint, at least when it comes to the question of remedies. It should be noted, however, that the Court does leave open the possibility of judicial lawmaking if it deems it necessary for an effective protection of fundamental rights. Moreover, the case law concerning fundamental rights and judicial lawmaking shows for a large part that the legislature usually pays a great deal of respect to fundamental rights. Most cases reaching the Court concern relatively minor breaches of fundamental rights provisions. The restraint the Court shows may therefore be considered to be somewhat justified. Apparently, the Dutch legislative process includes some mechanisms to ensure a reasonable degree of consistency, at least with internationally accepted human rights norms. Such mechanisms are certainly worth looking into. But that's another story.

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