15 Changing Tides: The Rise (and Fall?) of Judicial Constitutional Review in The Netherlands

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15.1 Introduction

Considered to be a textbook example of stability, the Dutch Constitution has never, in its over 200 years of existence, been boring. It expresses a strong and rooted commitment to both constitutional democracy and the rule of law. Yet the idea of judicial review of legislative and executive action – an essential pillar of the rule of law – has never been uncontroversial in the Netherlands. The current state of affairs is a fairly accidental outcome of a clash between several traditions – on the one hand a clear admiration for the British concept of parliamentary sovereignty, on the other an odd combination of German, French and American influences on legal thinking and an extraordinary willingness to enforce international and European law, if necessary judicially. Like in the United Kingdom, this cumulation of traditions and the ostensible absence of any normative theory behind these constitutional arrangements, has led to a somewhat messy but on the other hand highly functional constitutional state of affairs. Most Dutch jurists would agree that the Dutch system generally 'works'. Having said that, the system undoubtedly has flaws. Moreover, one may wonder how it will develop in the years to come, given gradual changes over the years – and possible major changes yet to come – in the respective roles of the courts and the legislature within the separation of powers.

In this essay I briefly sketch the way in which the Dutch concept of judicial review has developed over the decades. I discuss both review of legislation and executive action, but I will focus mainly on review of statutory legislation. My point will be that the Dutch system is originally a politically enforced constitution but that it has gone through major transformations, pushing it more towards something closely resembling a judicially enforced constitution. To that end I first touch upon the comparative notion of politically, as opposed to judicially enforced constitutions. I then discuss the Dutch version of parliamentary sovereignty that once seemed a hallmark of constitutional law in the Netherlands, and I trace the origins and foundations of Dutch judicial constitutional review that has developed

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since. This is, as we shall see, the result of a changing tide in Europe after World War II. We then move on to the future, as we are experiencing yet another change of tides: the growing wariness of judicial review worldwide and the growing aversion of European law in general and the European Convention on Human Rights – a major source for judicial review in the Netherlands – in particular. I question whether the Dutch system of review is sustainable under these circumstances and I speculate on how Dutch courts will respond. My argument will be that courts have an important role to play under the current Dutch constitution, its seemingly aversion to judicial review notwithstanding, and that this role is now firmly rooted in the constitutional system.

15.2 Politically and Judicially Enforced Constitutions

As we will see in the next paragraph, the Dutch Constitution traditionally contemplates a rather modest role for the courts in enforcing it against the political actors. This modesty does not necessarily depend on the judicial power to engage in rights review. Dutch courts currently engage in rights review of legislation, be it based not on the Constitution itself but on the international and European human rights law, most notably the European Convention on Human Rights (ECHR). Yet the Dutch differs greatly from the US or the German systems of judicial supremacy.[1] The Dutch system distinguishes itself by a judicial modesty that is a result of a complex amalgam of cultural and historical factors that affect judicial attitudes and powers.[2] This difference is perhaps best traced to diverging constitutional perceptions about the nature of the constitution. One envisions the constitution as law, subject to judicial enforcement. The other regards the constitution as an essentially political enterprise, maximizing political room for manoeuver.[3] This difference transcends the mere judicial power to review.[4] Even if they are empowered to review legislative action, courts in a politically enforced constitution are characteristically reluctant to view the

1 *See* J. Uzman, *et al*., 'The Dutch Supreme Court: A Reluctant Positive Legislator?', *in* A.R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Study*, Cambridge, Cambridge University Press, 2013, pp. 645-692, at 645; M. Tushnet, 'Comparative Constitutional Law', *in* M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, pp. 1225-1257, at pp. 1242-1248; A. Harel & A. Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review', *International Journal of Constitutional Law*, 2012, pp. 950-975.

2 T. Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge University Press, Cambridge, 2003, pp. 15-62.

3 C. Gearty, *Can Human Rights Survive – The Hamlyn Lectures 2005*, Cambridge University Press, Cambridge, 2006.

4 J. Uzman & G.J. Geertjes, 'Conventions of Unamendability: Covert Constitutional Unamendability in Politically Enforced Constitutions', *to be published in* R. Albert & B. Emrah Oder (Eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies*, Springer, 2015. Available on SSRN: <https://ssrn.com/abstract=2619643>.

constitution as 'law'.[5] Although they play a role in protecting these values, they assume that it is primarily up to parliament to determine their content. Moreover, courts in these jurisdictions display an unqualified unwillingness to enforce the constitution within the political arena itself.

Judicially enforced constitutions, by contrast, entertain the idea that the Constitution is a set of legal rules ultimately enforced by the courts. This judicial role may be embedded in a written Constitution, or it may follow from a historical process of interaction between courts and political actors, as was the case in the United States. The United States Supreme Court has for instance repeatedly stressed that it is ultimately for the Court to define the meaning of the Constitution.[6] Similarly, the Federal Constitutional Court in Germany usually assumes that its own interpretations of the *Grundgesetz* are the final say on the matter.[7] Moreover, it is generally accepted in these jurisdictions that the courts may entertain cases that go to the heart of the political process.[8]

15.3 The Dutch Constitutional Tradition: A Political Constitution Moving Fast…

So, how to rate the Dutch Constitution from this perspective? Traditionally, the Dutch system is very much a textbook example of a politically enforced constitution. Although it is, nowadays, acquainted with the concept of judicial review of legislation, it traditionally features reluctance, if not downright scepticism, about any role of the courts with respect to the enforcement of constitutional values. These values are, to begin with, laid down in a written Constitution. Unlike the United Kingdom, parliament in the Netherlands is not supreme in the sense that it can – in the eternal words of the British scholar Dicey – "make or unmake any law whatever".[9] But the Constitution does explicitly express great faith in parliament as the main protector of constitutional values. It does so in two distinctive ways.

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5 *See, inter alia*, in the Japanese context S. Matsui, 'Why is the Japanese Supreme Court so Conservative?', *Washington University Law Review*, 2011, pp. 1375-1423, at p. 1413; R. Albert, 'Amending Constitutional Amendment Rules', *International Journal of Constitutional Law*, 2015.

6 *See e.g. Cooper v. Aaron*, 358 U.S. 1 (12 September 1958); *City of Boerne v. Flores*, 521 U.S. 507 (25 June 1997); M. Tushnet, 'Two Versions of Judicial Supremacy', *William & Mary Law Review*, 1998, pp. 945-960.

7 *See e.g.* BverfGE 96, 260 (15 July 1997), para. 12.

8 The German Federal Constitutional Court frequently hears claims about political issues such as the outcome of a vote in the Bundesrat. *See* BverfGE 106, 310 (18 December 2002). In the U.S., *see Powell v. McCormack* about the lawfulness of the Congressional decision to deny a seat to a member-elect (Supreme Court judgment of 16 June 1969, 395 U.S. 486).

9 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, MacMillan, Basingstoke, 1959, pp. 3-4.

First, in the area of constitutional rights, although the Constitution lists a number of civil liberties and fundamental or social rights, the formulation of those rights leaves the legislature a maximum of latitude in defining the scope and the limitation of those rights.[10] On the right to privacy, for example, the Constitution, in Article 10, only states that "Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament," which basically means that one has the right to privacy unless or to the extent that parliament thinks otherwise. Many a constitutional right is framed in this way, operating a very broad limitation clause. Of course, many constitutions over the globe contain similar vague notions. Often it is up to the courts to flesh out implicit limitations to such rights. However, the explicit references in the Dutch Constitution are a fairly plain indication of the fact that it is principally parliament who performs such an exercise.

That indication is, moreover, duly amplified by Article 120 of the Constitution, which excludes judicial review of statute law. It reads as follows: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."[11] '120' is an 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.[12] 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.[13] But the exception of Article 120 is interpreted broadly by the courts. It constrains them, for instance, from considering not only the compatibility of primary legislation with constitutional rights, but also whether the procedural rules of the legislative process have been met.[14] Such matters are to be left to the legislature.[15] Moreover, 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

10 See the contribution of Ingrid Leijten to this book.

11 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>. 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* M. Adams & G. van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands: A Matter of Politics, Democracy or Compensating Strategy?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, pp. 399-413.

12 *See* HR 16 May 1986, ECLI:NL:HR:1986:AC9354, NJ 1987/251 (*Landbouwvliegers*).

13 HR 6 March 1864, *W* 2646 (*Pothuys*).

14 HR 27 January 1961, ECLI:NL:HR:1961:AG2059 (*Van den Bergh*). The courts consider themselves banned from interfering in the legislative process on the basis of procedural constitutional requirements as well. *See* HR 19 November 1999, ECLI:NL:HR:1999:AA1056, *NJ* 2000/160 (*City of Tegelen v. Province of Limburg*).

15 Which, strictly speaking consists of both Parliament and the government. See Art. 81 of the Constitution. However, I adopt UK terminology in using 'Parliament' and 'the legislature' interchangeably here.

declaring them incompatible with the Kingdom Charter[16] or general principles of law.[17] They might occasionally refuse to apply a certain statute by reference to the fact that such an application violates a legal principle.[18] However, they can do so only where there are exceptional circumstances that the legislature did not expressly consider at the time of passing the act.

There is a reason for this obvious display of judicial restraint. Article 120 of the Constitution is a fairly clear expression of a rooted legal tradition dominated by downright scepticism about the role of the courts in a democracy. It originates from the post-French Revolution idea that proper government demands a clear and rigid separation of powers.[19] Such scepticism already surrounded the framing of the 1798 Constitution of the *République Batave*, the predecessor of the Kingdom of the Netherlands.[20] This Constitution was heavily influenced by the French legal tradition. Although it was replaced, first in 1806 and then ultimately in 1814–1815 by the new Constitution for what was eventually to become the Kingdom of the Netherlands, the 'French' idea of a strict separation of powers, involving an extremely modest role for the courts, remained. The General Provisions Act, proclaimed in 1829, makes this very clear.[21] The courts were to refrain from judging, in any way, the merits of any legislative act.[22] Moreover, the Act stressed the importance for courts to limit their inquiries to matters of individual justice. Collective justice was exclusively the domain of the legislature. Article 12 of the Act still states that "no court may judge by general regulation," a clear reference to – and a sharp rejection of – the so-called *arrêts de règlement* that were the hallmark of the *Ancient Régime*.[23] For a long time, Article 12 was taken to be an unequivocal signal to the judiciary that both the promulgation and the evaluation of general rules, was outside of the judicial realm.

16 The Kingdom of the Netherlands is more or less structured in a way between a federation and a confederation of states (the Netherlands and three Caribbean islands: Aruba, Curacao and Sint Maarten). They are united by the Crown and a constitution for the federation called 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 therefore remains rare.

17 HR 14 April 1989, ECLI:NL:HR:1989:AD5725, *NJ* 1989/469 (*Harmonisatiewet*).

18 *See, for instance*, HR 9 June 1989, *AB* 1989/412 (*Short-term volunteers*).

19 M. Claes & G. van der Schyff, 'Towards judicial constitutional review in the Netherlands?', *in* G. van der Schyff (Ed.), *Constitutionalism in the Netherlands and South Africa*, Nijmegen, Wolf Legal Publishers, 2008, pp. 123-142, at p. 128.

20 L. de Gou, *Dagverhaal en Decreten der Nationale Vergadering 1796-1798* (15 February 1797), part I, pp. 416-422.

21 C.J.H. Jansen, 'Over de plaats en de functie van de Wet, houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk', *Ars Aequi*, 2008, pp. 22-29.

22 *See* Art. 11 of the General Provisions Act 1823, which is currently still in force.

23 A. Gouron, 'Jurisprudence de la Cour de Cassation et Arrêts de Règlement', in: A. Gouron et al (eds.), *Europäische und Amerikanische Richterbilder* (Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte), Frankfurt a.M.: Verlag Vittorio Klostermann 1996.

In later years, as Dutch constitutional law experienced the influence of German legal doctrine, this rather 'French approach' came under attack. German theories, inspired by the famous US case of *Marbury v. Madison* (1803), held that the validity of any legislative act depended on its compliance with the higher document that had constituted the legislative power in the first place.[24] Many influential scholars in the 19th century took with this German approach.[25] However, when the important constitutional reforms took place in 1848, a remarkable coalition emerged between the French approach and yet another steady influence on Dutch constitutionalism. British constitutional law has always inspired many an architect of the Dutch constitution.[26] Central to the British tradition is of course the doctrine of parliamentary sovereignty. This Anglo-French coalition ultimately won the day and the prohibition of judicial constitutional review, currently displayed by Article 120, was a fact.

Article 120 and the ban on judicial review of legislation is important, but it is by no means the only expression of the Dutch reluctance with the concept of judicial review. For a long time, even judicial review of executive action was, for many scholars, considered to be out of the question. Dominant legal doctrine considered democratic decision-making the best guarantee against an overenthusiastic administration.[27] Article 115 of the current Constitution still provides an echo of this attitude, providing the possibility of instituting administrative review by a higher administrative authority of executive action. Although eventually, a system of judicial review developed, this system was the product of a gradual change of constitutional practice, rather than a clear commitment to the idea of judicial review.[28] Moreover, the introduction of Article 120 in the Constitution symbolizes not only the aversion of the Dutch legal profession against court-centred approaches to the Constitution. It also refrained Dutch constitutionalists in later years from participating in debates about the proper role of the courts *vis-à-vis* the legislature. This debate was, and to this day still is, dominated by civil law scholars. The ruling paradigm has long been that

24 K.E. Schmidt, *Lehrbuch des gemeinen deutschen Staatsrechts*, Jena Schmidt, 1821, p. 125; L. Minnigerode, *Beitrag zur Beantwortung der Frage: Was ist Justiz- und was ist Administrativ-Sache*, Darmstadt, I.W. Heyer, 1835, p. 85.

25 The most celebrated framer of the 1948 Constitution, Johan Rudolph Thorbecke was amongst them.

26 This was for instance the case for G.K. Hogendorp, one of the framers of the 1814 Constitution (*see* D. Slijkerman, *Het geheim van de ministeriële verantwoordelijkheid: De verhouding tussen Koning, kabinet, Kamer en kiezer 1848-1905*, Bert Bakker, Amsterdam, 2011, p. 23), and for Gerrit Count Schimmelpenninck, prime minister in 1848.

27 Prominently: A.A.H. Struycken, *Administratie of rechter: beschouwingen over de moderne rechtstaatsgedachte naar aanleiding van de aanhangige ontwerpen tot regeling der administratieve rechtspraak*, Gouda Quint, Arnhem, 1910; *see also* J. ten Kate & P. van Koppen, 'Judicialization of Politics in the Netherlands: Towards a Form of Judicial Review', *International Political Science Review*, 1994, pp. 143-151, at pp. 145-148.

28 *See* J. Uzman & G. Boogaard, 'Wetenschappelijk commentaar bij artikel 112 Grondwet', Nederlandrechtsstaat.nl.

the courts were simply subordinated to the legislature. As we will see however, things dramatically started to change in the 20th century.

15.4 The Incoming Tide: Europe, Monism and Judicial Review

The Dutch reluctance with judicial review in constitutional issues sharply deviates from the way in which the judicial enforcement of international law has developed over the ages. The Dutch are widely known to have a very friendly constitutional climate for international law. This friendly climate essentially originates from the traditionally rather monist approach of the Dutch legal profession. As early as 1919, our Supreme Court expressed its opinion that international law as such is automatically applicable in the domestic legal order. Therefore no conversion to norms of national law is necessary.[29] 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. This notion has long-standing roots in Dutch legal history. Traditionally, the courts have always assumed 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 way consistent with international law.[30]

Both this friendliness to the international community and the emerging European integration after World War II – the Netherlands being among the founding members of both the Council of Europe and the European Community – led to a constitutional amendment in 1953, introducing the power for any court to openly set aside provisions of national law violating treaty law in individual cases. Article 94 of the Constitution currently charges the courts to enforce international law that is directly applicable or, in the exact wording of our ancient Constitution, that are "binding on all persons".[31] The provision essentially declares the supremacy of treaties and decisions of international organizations (such as the European Court of Human Rights) over any kind of national law, including primary legislation. According to the dominant interpretation of the Constitution, this

29 HR 3 March 1919, *NJ* 1919/371 (*Grenstractraat Aken*). For a further discussion, *see* L. Zwaak, 'The Netherlands', *in* R. Blackburn & J. Polakiewicz, (Eds.), *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2001, pp. 595-624.

30 A recent and far-reaching example of the use of international law in domestic proceedings is the District Court of The Hague judgment of 24 juni 2015 in the climate case of *Urgenda v. The State of the Netherlands* (ECLI:NL:RBDHA:2015:7145).

31 "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons" (Art. 94 Constitution).

supremacy even extends over the Constitution itself.[32] However, the nature of this supremacy is not, as is the case with constitutional review in many jurisdictions operating a Kelsenian constitutional court, one of – what the Germans call – '*Geltungsvorrang*', but one of '*Anwendungsvorrang*': the law remains valid and on the books, yet it cannot be enforced by the courts in individual cases. Obviously, because of the lack of a constitutional court, this judicial power of setting aside legislation may be exercised by any court from the lowest district court to the Supreme Court and the highest administrative courts.[33] In practice however, review might – in the near future – be more or less concentrated with the Supreme Court, due to the fact that the Court recently acquired the power of hearing preliminary questions of lower civil courts in cases where there might be many similar legal claims.[34] This would, in practice entail that the Supreme Court evolves into a quasi-constitutional court for a limited jurisdiction.

The power of courts to enforce treaty provisions is limited to provisions of international law that are self-executing or directly applicable. This requirement may seem a technicality, but it has been used by the highest courts, as a *quasi*-political question device, a tool to demarcate their realm from the legislative domain.[35] The current case law of both the Supreme Court and the highest administrative courts shows that they usually convert the question of whether a treaty provision is directly applicable into a matter of justiciability. Does the text of the provision provide the courts with judicially manageable standards to decide the case?[36] Or, in other words, can the courts decide the case before them on the basis of international law without having to engage in extensive law-making? There are two approaches to these questions. The first approach concentrates on the text of the international provision. Is it, as such, clear enough?[37] Does it leave questions of policy to the other branches of government? This basically turns the matter of justiciability in a yes or no decision. Either a particular provision is always directly applicable or it never is.[38] The second approach, taken by the Supreme Court quite recently, focuses more on constitutional context.[39] It acknowledges that the text of a treaty provision may imply matters of public policy, but it does not follow that these policy matters are relevant to the case at hand. This second approach implies that a treaty provision may be considered to be judicially applicable in one case, but not in another. Some scholars have argued that adopting

32 K. Kraan, 'The Kingdom of the Netherlands', *in* L. Prakke & C.A.J.M. Kortmann (Eds.), *Constitutional law of 15 EU Member States*, Deventer, Kluwer, 2004, pp. 588-650, at p. 627.

33 Currently, the Judicial Division of the Council of State, the Central Court of Appeal (for matters of social security) and the Industrial Appeals Tribunal (for economic administrative law).

34 Arts. 392-394 of the Civil Procedure Code.

35 *See extensively* Uzman, Barkhuysen & Van Emmerik 2011, *supra* note 1, p. 653.

36 *See, e.g.*, HR 30 May 1986, ECLI:NL:HR:1986:AC9402, *NJ* 1986/688 (*Spoorwegstaking*); ABRvS, ECLI:NL:GHSGR:2004:BM1321, 15 September 2004, *AB* 2005/12.

37 This is, arguably, the approach taken by the courts in the judgments mentioned in the previous footnote.

38 Uzman, Barkhuysen & Van Emmerik 2011, pp. 654-655.

39 HR 10 October 2014, ECLI:NL:HR:2014:2928 (*Rookverbod*).

this approach would entail an increase of judicial power *vis-à-vis* the legislature because more provisions of international law would be applicable before the courts.[40] But the opposite could easily also be the case: some provisions that are currently considered to be directly applicable, such as Article 8 of the European Convention on Human Rights (ECHR) might, in the future, be considered too vague to apply in a particular case. In any case, the practice of Dutch courts in this respect does not support the idea that the contextual approach is used as a judicial *coup d'État*.

The introduction of the Article 94 power to review legislation against international law is a clear departure of the idea behind Article 120 of the Constitution and the vision of a political constitution that it implies. However, this 'anomaly' between both articles has been defended with respect to the different nature of constitutional and international law respectively.[41] International law, especially when it is considered justiciable, would be less 'political' by nature. It would resemble regular statute law. That may certainly be true for a provision that forces states to remove certain import duties. But it does not account for the rapid constitutionalization of international law, especially in Europe, since the 1970s. Particularly European Union law and the European Convention on Human Rights have had a tremendous impact on the legal systems of the member states, and the obligations they involve, decidedly transcend the classic nature of international law. It would certainly not be an exaggeration to say that human rights review based on the ECHR has fully replaced the constitutional protection of fundamental rights based on the Dutch Constitution.[42] I turn now to the role of European and international human rights law in shaping the judicial role in the Netherlands.

15.5 Adapting to a New Role: Strong Judicial Review in a Political Constitution

One might perhaps be tempted to believe that the introduction of Article 94 Const. in 1953 paved the way for a more robust judicial role *vis-à-vis* parliament and the government. But nothing of the sort was the case in the early decades after World War II. Although the Netherlands was a founding party to the European Convention on Human Rights in 1954, Dutch courts were extremely hesitant to apply the Convention let alone use it to override parliamentary legislation, until the 1980s.[43] Courts found many ways of either avoid having

40 *Cf.* Case Note of J.J.J. Sillen in JB (Case Law Administrative Law) 2014/224.

41 G. van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa*, Springer, Dordrecht, 2010, pp. 104-105.

42 *Cf.* Koopmans, 2003, *supra* note 2, p. 83; P. Van Dijk, 'Domestic Status of Human Rights Treaties and the Attitude of the Judiciary: the Dutch Case', *in* Nowak, M., Streurer, D. & Tretter, H., *Progress in the Spirit of Human Rights (FS Felix Ermacora)*, Strasbourg, Engel Verlag, 1988, pp. 631-650, at p. 649.

43 Koopmans, 2003, *supra* note 2, p. 79.

to apply the Convention or adopting a very restrictive interpretation of its rights. Fully in line with the Dutch way of thinking about rights and the division between law and politics, the Convention was regarded, in many circles – both legal and political – as mainly a political document that was never meant to limit national sovereignty and rather served as an instrument of foreign policy to embarrass the Soviet Union.[44]

Things changed in 1977 with a remarkable decision of the Maastricht District Court, disapplying a provision of the 1935 Road Traffic Act due to it violating Article 8 of the ECHR.[45] The Supreme Court soon followed and already by 1988, Dutch courts were not only enthusiastically applying the Convention, they had also begun using it to reform entire areas of law, most notably family and labour law.[46] It is probably fair to say that Dutch courts, having been strongly shaped by a legal tradition that was hostile to judicial firmness, were now inspired by the *Zeitgeist* of the 1970s and the rights revolution that had been taking place in the United States.[47]

Initially, the interpretation of the Convention by Dutch courts was firmly rooted in the case law of the European Court of Human Rights. The more controversial decisions of the Supreme Court were all backed by specific judgments of the Strasbourg Court.[48] However, when – at the end of the 1980s – this development reached its peak, the Supreme Court seemed even prepared to make full use of its powers of review without a clear mandate of the European Court.[49] It looked as if the judiciary had fully embraced the idea that constitutional values were not only for Parliament, but also for the judiciary to enforce. Yet they were still not prepared to do so openly. In later judgments, the Supreme Court has stressed that it is not empowered to set aside national provisions for their inconsistency with Convention law, purely based on its own interpretation of the Convention.[50] Developing fundamental rights beyond the European jurisprudence is a task for Parliament, not for the courts. In this sense, Dutch courts have adopted a course similar to the British so-

44 Most notably was the resistance of the Dutch government, Prime Minister Drees in particular, against the establishment of a European Court. *See* Y.S. Klerk & L. van Poelgeest, 'Ratificatie à contre coeur – De reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht', *R.M. Themis*, 1991, pp. 220-246; H.G. Schermers, 'Protocol 11 to the European Convention on Human Rights', *Vorträge, Reden und Berichte aus dem Europa-Institut*, Vol. 137, 1994.

45 Maastricht District Court, judgment of 14 November 1977, *Netherlands Yearbook of International Law* 1978, p. 293.

46 HR 18 January 1980,ECLI:NL:HR:1980:AC6789, *NJ* 1980/463. *See generally*: Uzman, Barkhuysen & Van Emmerik 2011, pp. 656-660.

47 *See e.g.* U.S. Supreme Court 17 May 1954, 347 U.S. 483 (*Brown v. Board of Education*); J.T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, Oxford University Press, Oxford, 2001.

48 Uzman, Barkhuysen & Van Emmerik 2011, pp. 657-658.

49 This was the case in HR 4 May 1984, ECLI:NL:HR:1984:AG4807, *NJ* 1985/510 (*Dual custody*). *See* Van Dijk, 1988, *supra* note 42, p. 644.

50 HR 19 October 1990, ECLI:NL:HR:1990:AD1260, *NJ* 1992/129 (*Samesex marriage*); HR 10 August 2001, ECLI:NL:HR:2001:ZC3598, *NJ* 2002/278 (*Duty of care*).

called 'mirror principle'.[51] Where they deviate from the Strasbourg case law, they do so silently, simply ignoring its reasoning.[52]

The 1980s were long considered to be the high watermark of judicial review in the Netherlands. Not only in the way civil, criminal and tax courts invoked the Convention in opening up their role *vis-à-vis* the legislature, also in the way that administrative courts developed – initially largely unwritten – principles of administrative justice against government authorities. Since then, the courts have gradually adopted a position of restraint. They regularly grant the legislature an extremely wide margin of appreciation.[53] Moreover, the courts often prefer exercising remedial restraint by essentially granting the legislature time to correct possible legislative flaws before they enforce human rights law.[54]

What had remained though, is the idea that parliamentary legislation is no longer immune from the judicial enforcement of constitutional values. The Anglo-French approach of a strict separation of powers combined with the idea that constitutional values are essentially political values, has made way for a distinctly American brand of judicialization of politics.[55] Judicial rights review is now an integral part of the Dutch constitutional order. Article 94 has slowly transformed from a provision that merely empowers courts to a particular remedy (i.e. setting aside conflicting legislation) to a general expression of the judicial power to enforce international law. It has gained, what I call, an institutional dimension.[56] It is currently common ground for courts to hold the State liable for laws – even primary legislation – that violates constitutional values laid down in European human rights law.[57] They only draw the line when it comes to ordering the legislature to pass legislation implementing EU, ECHR or international law. Such an order is considered to exceed the judicial power within the separation of powers.[58] But this is essentially a narrow exception to the general rule that courts now are in the business of enforcing higher law.

Moreover, recent decades have shown a perceptiveness of Dutch courts to another branch of US constitutionalism: the idea of public interest litigation as an instrument of

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51 *See* E. Bjorge, 'National Supreme Courts and the Development of the ECHR', *International Journal of Constitutional Law*, 2011, pp. 5-31, at p. 15.

52 One such example is a 2009 judgment on the lawfulness of a new Act on the combatting of squatting where the Supreme Court invoked Art. 8 of the Convention without there actually being a clear Strasbourg mandate. *See S.C.* judgment of 9 October 2009, ECLI:NL:HR:2009:BJ1254 (*Squatting Act*).

53 *See* HR 12 July 2002, BNB 2002/399 (*Child Care Deductions*); R. Happé & H. Gribnau, 'The Netherlands –Constitutional Limits to Taxation in a Democratic State: The Dutch Experience', *Michigan State Journal of International Law*, 2007, pp. 417-459, at pp. 446-447.

54 See Uzman, Barkhuysen & Van Emmerik 2011, pp. 661-676.

55 This 'judicialization of politics' is part of a global trend. *See* R. Hirschl, *The Judicialization of Politics*, Oxford University Press, Oxford, 2008.

56 J. Uzman, *Constitutionele remedies bij schending van grondrechten*, Kluwer, Deventer, 2013, p. 633 (English summary).

57 HR 18 september 2015, ECLI:NL:HR:2015:2722 (*Staat/Habing*).

58 HR 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*). *See extensively* G. Boogaard, *Het wetgevingsbevel*, Wolf Legal Publishers, Oisterwijk, 2013, pp. 257-262 (English summary).

enforcing constitutional values.[59] Courts, in this view, act as agents of broad social or institutional reform, for instance by supervising the desegregation of schools, the improvement of prison conditions or the access to housing or health facilities. In the 'Chayesian' concept of public interest litigation, courts have a role in openly intervening in the political process. It seems obvious that this role is clearly at odds with the Dutch tradition of a politically enforced constitution, where it is parliament, and parliament alone, that implements constitutional values. Perhaps the best illustration of how far Dutch courts have moved from that rationale and now view constitutional values – be it embodied by international human rights law – as a legal and not a (purely) political issue, provides the so-called *SGP* case.[60] A right-wing Christian party, the SGP refused women to stand for election on behalf of the party. A women's rights organization subsequently, sued the Dutch state in court because it failed to comply with Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), indicating that the Contracting Parties were to take all appropriate measures in order to ensure women, on equal terms with men, (among others) 'the right to participate in non-governmental organisations and associations concerned with the public and political life of the country'. The Supreme Court, agreed. It concluded that the State violated its international obligations and although it refused to issue any injunction, it did declare the State to be under an obligation to take effective measures. It thus directly intervened in the structure of Dutch party politics. Moreover it now seems as if the SGP was not an isolated case. The District Court of The Hague fairly recently made it to CNN's 'breaking news', as it issued an injunction that the Dutch State was to reduce CO_2 emission levers before 2020, based on international climate change agreements.[61] A decision that involves controversial legislative measures.

In short, Dutch courts now treat the European Convention (and to a lesser extent the EU Charter of Fundamental Rights and the UN human rights treaties) as a judicially enforceable Bill of Rights.[62] To some extent, this came as a real novelty. Not just to the courts but also to legal scholarship. For decades the relationship between the courts and parliament had largely been shaped by the existence of Article 120 of the Constitution,

59 *See generally* A. Chayes, 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, Vol. 89, 1976, p. 1281; O. Fiss, 'The Supreme Court 1978 Term – Foreword: The Forms of Justice', *Harvard Law Review*, Vol. 93, No. 1, 1979. On the global phenomenon: J. Uzman & G. Boogaard, 'Making It a Better Place: Transnational Public Interest Litigation and the Separation of Powers', *in* H.M.T.D. ten Napel & W.J.M. Voermans (Eds.), *The Powers that Be – Rethinking the Separation of Powers*, Leiden, Leiden University Press, 2015, pp. 295-320.

60 HR 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388 (*Clara Wichmann Stichting*). *See* J. van den Brink & H.M.T.D. ten Napel, 'The Dutch Political Reformed Party (SGP) and Passive Female Suffrage: A Comparison of Three High Court Judgments From the Viewpoint of Democratic Theory', *Merkourios – Utrecht Journal of International and European Law*, Vol. 29, 2013.

61 Rb. The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*).

62 Van Dijk, 1988, *supra* note 42, p. 649.

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 the courts been confronted with the difficult task of demarcating the borders between the judicial and the legislative realm. There were hardly any doctrines of judicial restraint available, particularly not in constitutional law because constitutionalists had, until the 1980s, been preoccupied by discussions about the future of Article 120.[63] No wonder we now find the courts struggling with this new role. But it is not only courts and constitutionalists doing the struggling. Political actors have started to play their part and I now turn to their deliberations.

15.6 The Outgoing Tide: Courts and the Rise of Popular Constitutionalism

The previous section showed the steady transformation of a politically enforced to an, at least partially judicially enforced constitution in the Netherlands. As said, we now see courts struggling with their new role, looking for a proper balance between their new roles as constitutional guardians and judicial restraint. It would be tempting to think that we are currently gearing towards something of an 'End of (judicial) History' in the sense that if the courts find the proper balance, we can all go to sleep. However, if the over 200 years of Dutch constitutional law teach us anything, than it would be that nothing is what it seems under the highly dynamic Dutch Constitution.

The steady judicialization of politics in the Netherlands increasingly evokes criticism from political actors. That is not to say that it is judicial activism of Dutch courts that necessarily has led them to be exposed to critique. Public confidence in the courts, according to empirical research, is still extremely high.[64] It rather seems that the political discontent with judicial interference is part of a larger European, or perhaps even global, trend of criticism of judicialization.[65] The fact that judicial review in the Netherlands is so dependent on the European Convention, means that Dutch courts are closely connected to the European Court of Human Rights, and it is this Strasbourg Court that has had many hits over the last decade.[66] Several European countries are contemplating reforms to lessen the

63 This was observed by E.A. Alkema, 'Gedifferentieerde rechtsvinding door de rechter in veranderende staatkundige verhoudingen', *Nederlands Juristenblad*, 2000, pp. 1053-1058; R. de Lange, *Publiekrechtelijke rechtsvinding*, W.E.J. Tjeenk Willink, Zwolle, 1991.

64 T. van der Meer, 'Vertrouwen in de rechtspraak: Empirische bevindingen', *Rechtstreeks*, No. 1, 2004, pp. 9-56.

65 *See e.g* Hirschl, 2008, *supra* note 55, 889.

66 P. Popelier, *et al.* (Eds.), *Criticism of the European Court of Human Rights*, Intersentia, Antwerp, 2016.

influence of the ECHR and its Court on their respective systems. Among them: the UK, Switzerland and the Netherlands.[67]

One of those reforms concerns the proposal, currently pending in Parliament, to amend Article 94 of the Constitution, basically aiming at depriving the courts of their power to enforce human rights law against the legislature.[68] The chances of success of this proposal are currently slim. Most major parties and institutional actors have been very critical.[69] However, given the steady rise of populism and its discontents with the judiciary as such, it is not unthinkable that a similar proposal would, in the near future again seriously be considered. The tide is currently against judicial review. And it seems that those legal systems where independent judicial review of the political sphere is comparatively less rooted are affected the most. This might explain why populist challenges to the role of the judiciary have had some success in EU Member States such as Hungary and Poland, where judicial independence is a relatively young phenomenon. But it might equally explain why countries such as the UK and the Netherlands, that have a strong tradition of judicial independence but a less long-standing history with rights review, might experience attempts to curb judicial power as well, be it from a different nature.

This raises the question what would be the position of the Dutch courts if Article 94 were to be amended. Would the Dutch courts slavishly return to the position they occupied in the days before 1953? Would the Dutch Constitution once again be politically enforced? That seems highly unlikely. Like in the UK, where the former President of the Supreme Court has already indicated that "human rights are here to stay," the judicial enforcement of human rights is simply to rooted in the Dutch constitutional consciousness.[70] And just as the UK Supreme Court seems to anticipate a possible departure from the European Convention, currently emphasizing the role of the common law as a protector of rights, there have recently been calls in the Netherlands to develop Dutch civil law as an alternative source of fundamental rights.[71] Others, like myself, have argued that the courts might return to using interpretative assumptions in order to bring national law in line with treaty obligations.[72] Within the judiciary, there have even been speculations as to whether such a removal of the judicial power to review would not amount to a violation of the right to an effective remedy pursuant to Article 13 ECHR and should not be set aside itself based

67 *Cf.* S. Lambrecht, 'Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?', *European Public Law*, 2015, pp. 257-283.

68 The so-called Taverne-proposal: *Kamerstukken II* 2011/12, 33 359, No. 1-3.

69 *See* Lambrecht, 2015, *supra* note 67, p. 269.

70 Lord Phillips of Worth Matravers in *The Guardian*, 23 April 2010.

71 R. de Graaff, 'De betekenis van de redelijkheid en billijkheid voor de bescherming van grondrechten', *Themis*, 2016, pp. 202-213.

72 Uzman & Geertjes, 2015, *supra* note 4. *See also* M.L.H. van Houten, 'Rechter en Wetgever: Een Nieuwe Balans', *Themis*, 2001, pp. 3-15.

on Article 94 Const. This resembles somewhat, the doctrine of unamendable constitutional law, which is, at least formally, unknown to Dutch constitutional law.[73]

Whatever the form, it seems clear that the courts and the legal profession would resist such a removal of judicial power. However, they would probably not openly challenge the legislature. Rather, resistance would be of an extremely informal nature.[74] The bottom line is that judicial involvement in the enforcement of constitutional values has taken root in the Dutch Constitution. This process is hardly reflected in the Constitution itself, and it will remain there, regardless of any formal change to the Constitution. Judicial review is here to stay.

15.7 Final Remarks

The Dutch Constitution has a history of over 200 years. This means that it was originally shaped in an era of unfettered optimism in parliamentary and popular democracy. What is more, French domination ensured a great preference for any model featuring a relatively strict separation of powers. This has led to a situation in which the constitution was considered a matter for parliament and not for the courts. The Dutch system was, and still is in some respects – a politically enforced constitution. But the post–World War II rise of international human rights law, coupled with the Dutch monistic tradition and the ambition to be at the forefront of European integration and the development of the international legal order, has opened up a window of opportunities for the courts. This was facilitated by the global rise of American constitutionalism and the accompanying rights discourse. Although at first reluctant, Dutch courts have now firmly established their place among the political actors in implementing constitutional values. This does not mean that Dutch courts are entirely comparable to 'strong' courts such as the U.S. Supreme Court or the German *Bundesverfassungsgericht*. They are still hesitant to enter the political arena and will regularly defer to political evaluation of rights. What is more, their mandate – being derived from human rights law – is limited to rights review. It is still rare for courts to adjudicate between different political actors. Nevertheless, several recent cases have shown that even the heart of the political is not immune from judicial review. It remains to be seen whether the judicialization of politics will persist, or that it will evoke a countermovement. In this respect, courts in the Netherlands are at a crossroads. But whatever happens, they will probably not turn back.

73 *See e.g.* R. Albert, 'Nonconstitutional Amendments', *Canadian Journal of Law & Jurisprudence*, 2009, pp. 5-47.

74 Uzman & Geertjes, 2015, *supra* note 4.