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12 The curious case of the Netherlands – reflections on the question whether the dismantling of democracy and the rule of law can be stopped by courts of law

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The Netherlands Constitution [*Grondwet*] prohibits courts from reviewing the compatibility of provisions of acts of parliament with provisions of the Constitution. Article 120 of the Netherlands Constitution provides:

> No court shall assess the compatibility of acts of Parliament and treaties with the *Grondwet* [Dutch: *grondwettigheid*].

Does this prohibition limit the possibilities to stop the dismantling of democracy and the rule of law as we see it happen across the world, and might it very well also occur in the Netherlands, although this is not yet imminent?

Answering this question requires, firstly, a recapitulation of the possibilities of courts to engage in constitutional adjudication, and secondly it requires a reflection on the possibilities of courts to intervene in favour of democracy under the rule of law. I do this under two headings: can Dutch courts, in the absence of a constitutional court in the traditional European sense, stop a dismantling of democracy and the rule of law? Could any constitutional court stop a dismantling of democracy and the rule of law?[1]

1 My views on judicial review of constitutionality of parliamentary legislation have always leaned towards the preservation of art. 120 Dutch Constitution since I began writing about the topic in 1991; see, e.g., L.F.M. Besselink, *Constitutionele toetsing in internationaal perspectief*, (in:) "Ars Aequi" 2003, vol. 52, no. 2, pp.89–95, https://dspace.library.uu.nl/bitstream/handle/1874/19327/besselink_03_constitutionele_toetsing.pdf;sequence=1, where I critically discussed the arguments adduced in the then pending proposal for constitutional amendment to abolish the prohibition of judicial review of acts of parliament as far as review against classic fundamental rights provisions of the Constitution are concerned. These views have subsequently been deepened by the reading of relevant works by M. Tushnet, *Richard Bellamy's Political Constitutionalism* (although he has somewhat moderated some of his views on judicial review in recent work), and of course J. Waldron's *The Core of the Case against Judicial Review*, that originally appeared in "Yale Law Journal" 2005–2006, vol. 115, p. 1346, as will be apparent from what follows. I limit myself here to saying that, although I agree on the main thrift of their arguments on judicial review, I do not share them necessarily in all respects.

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12.1 Prohibition of review of constitutionality in the narrow sense; full powers of review against human rights treaties

It is a common misperception that in the Netherlands there is no constitutional adjudication by courts. Far from it, all and any court can engage in constitutional adjudication, with one exception: they are not allowed to set aside acts of parliament that allegedly infringe the provisions of the constitutional document called the *Grondwet* (hereinafter: Constitution). This prohibition of review of acts of parliament against provisions of the Constitution, I call the prohibition of 'constitutionality review in the narrow sense'. But in the Dutch legal order there are many more constitutional norms than those of the Constitution only; the *bloc de constitutionnalité* is considerably larger than the Constitution only.

The multi-document constitution of the Netherlands comprises, in hierarchical order:

- directly effective provisions of treaties and decisions of international organisations that are binding on the Kingdom (or within the Kingdom: the Netherlands), particularly those of constitutional substance like the human rights, or regulating the powers of legislature, executive and courts;
- the Charter for the Kingdom (*Statuut voor het Koninkrijk*; it essentially determines the relations between the Netherlands and the other autonomous countries of the Kingdom in the Caribbean);[2]
- the Constitution (or better: Basic Law, *Grondwet*);
- legislation and other regulations and measures implementing the Constitution.[3]

Moreover, there are important unwritten constitutional rules. One of them is the rule of no-confidence which is the core of the parliamentary system, and another the rule that public international law that is binding on the Kingdom is automatically part of the Netherlands legal order (monism). Note that the

2 That the Charter for the Kingdom is hierarchically subordinate to directly effective international law has been submitted several times by the government, but is disputed by some scholars. This is relevant for the topic of this paper, in as much as art. 43 of the Charter stipulates 'the realization of fundamental human rights and freedoms, legal certainty and good governance' as a constitutional duty of each of the countries to observe; if this to be assumed to be a higher norm than international law, this would act as an absolute requirement of constitutionalism that overrides international obligations within the legal order of the Kingdom. This has so far only been a theoretical debate.

> 2. The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.

3 Arguably the latter category is of the same or similar rank as the *Grondwet*, but both the doctrine and the case law are underdeveloped and inconclusive. This author holds to the view that this type of constitutional implementing legislation cannot be considered part of the *Grondwet* and is therefore not within the scope of the prohibition of constitutional review in the narrow sense.

rule which grants *primacy* of directly effective provisions of international law over law of national origin and intends courts to enforce this primacy is contained in a provision of the Constitution (art. 94).

When art. 120 of the Constitution prohibits the review of acts of parliament against the provisions of the *Grondwet*, then this also delineates the scope of the restriction of courts' powers of review.[4] There is only one extension of the prohibition to review under the standing case law of the Supreme Court (*Hoge Raad*), which holds that courts are not allowed to review acts of parliament against *unwritten general principles* of law either. All other governmental rules, regulations and decisions can be reviewed against the provisions of the Constitution. Moreover, already since the second half of the 19th century, the Supreme Court has engaged in the judicial technique of interpreting acts of parliament consistent with provisions of the *Grondwet* (*Verfassungskonforme Auslegug*). In principle, there would seem to be the possibility of a mere judicial declaration of incompatibility of an act of parliament's provisions with a provision of the Constitution, short of disapplying the relevant legislative provisions for reason of such incompatibility – although in practice this has occurred only once during the 20th century.[5]

Most importantly, all courts can review acts of parliament against directly effective international provisions (art. 94 Constitution),[6] and they have done so regularly since the 1980s. Very often treaty provisions are invoked in court. To give an impression: a search in the database of the Netherlands judiciary

4 For a full treatment of the matter, see L.F.M. Besselink, *Constitutional Adjudication in the Netherlands*, (in:) A. von Bogdandy, P. Huber, Ch. Grabenwarter (eds.), *The Max Planck Handbooks in European Public Law*, vol. III, *Constitutional Adjudication: Institutions*, Oxford University Press, https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198726418.001.0001/oso-9780198726418-chapter-11; DOI:10.1093/oso/9780198726418.003.0011; this is an updated version of 48.Verfassungsgerichtsbarkeit in den Niederlanden. In: Handbuch Ius Publicum Europaeum, von Bogdandy/ Grabenwarter/ Huber (Hg.), Bd VI Verfassungsgerichtsbarkeit in Europa: Institutionen [C.F. Müller] pp. 357-411. ISBN 978-3-8114-6006-5, Open Access at: https://pure.uva.nl/ws/files/2743962/172593_Verfassungsgerichtsbarkeit_in_den_Niederlanden_Handbuch_Ius_Publicum_Europaeum_VI.pdf.

5 Hoge Raad (burgerlijke kamer) 14 April 1989, *Nederlandse Jurisprudentie* 1989/469 (*Harmonsatiewet*). Unlike the prohibition for courts to review against the provisions of the Constitution, which is very controversial and has been subject to regular attempts to abolish it, the prohibition to review acts of parliament against unwritten general principles is far less controversial. As a justification for this prohibition mostly legal uncertainty as to what a general principle of law should entail is adduced as a justification. The *Hoge Raad* in the judgment referred to gave as other major arguments the intention of the makers of the 1983 Constitution not to change the broad scope of 'inviolability of acts of parliament', as the prohibition was formulated prior to 1983, as well as the 'constitutional tradition' of 'non-review' of parliamentary legislation.

6 'No legislative provision in force within the Kingdom shall be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law that are binding on everyone.'

on the acronym <EVRM>, which is the Dutch acronym for the European Convention of Human Rights, leads to no less than 43,495 judgments which include this acronym in the period from the year 2000 to 2021 (included), on a total of 584,025 judgments in the data base for those years.[7] On this counting, the ECHR is invoked in 7.5 per cent of all the judgments registered. Nevertheless, the judicial disapplication of acts of parliament is quite rare and occurs merely in a handful of cases: numerical counts – although these might be incomplete – have not reached beyond 20 judgments.[8] As in most other jurisdictions, in the majority of cases of constitutional adjudication courts conclude compatibility with constitutional provisions.

Directly effective treaties of constitutional substance, in particular human rights treaties, are indeed part of the *national*, Dutch constitution. Let us not forget that general public international law is neutral on the question whether treaties to which a state is a party, is or is not to be incorporated automatically or through an act of parliament (or the executive), and if so on what conditions and with what consequence for their enforceability through whichever national organs of the state. The Dutch option for monism is an autonomous Dutch constitutional decision to give priority to directly effective international provisions over law of national origin and have courts enforce this (curiously and different from the situation in most European countries, customary international law is inferior vis-à-vis national legislation). Dutch courts reviewing any act of public authority against directly effective human rights treaties – human rights being classically a constitutional matter – is therefore an authentic form of constitutional adjudication.

Although international human rights treaties are part of the national constitutional law of the Netherlands, on the basis of the purely national choice of granting them judicially enforceable primacy (if they are directly effective in nature), the fact that those treaty rights are of international origin remains a difference for the justification of granting them the status of a benchmark of judicial review that extends to acts of parliament. However strong their constitutional nature may be from a national point of view, the major argument for distinguishing review against human rights treaties, from judicial review of constitutionality in the narrow sense (review against provisions of the Constitution) lies in the commitment undertaken towards other states to respect directly effective treaty provisions, *a fortiori* when it concerns international commitment to observe human rights. It is this element of international

7 www.rechtspraak.nl. Search key <EVRM>, selected for the date of the judgment in the years 2000 to 2021 (2021 included); only judgments selected (not advocate-general opinions); search repeated several times in August 2022.

8 M. Claes, A.W. Heringa, M. van der Sluis, M. Stremler, *Rechtsvergelijkend onderzoek constitutionele toetsing*, University of Maastricht, Maastricht 2021, p. 65, footnote 73, mentions 11 cases, but only looked at the highest courts. If we also look at lower courts' judgments the number is somewhat higher.

accountability and responsibility that is totally absent as regards constitutional review in the narrow sense.

This differentiation between the justification of judicial review against human rights treaties and against the Constitution is often overlooked, because in practice the rights provisions of the Constitution mostly have an equivalent in the many human rights treaties to which the Netherlands is a party.[9] This leads to the common misunderstanding that review against treaties and against the Constitution makes little difference. That said, human rights treaties, not least the European Convention on Human Rights, fill many of the gaps that the prohibition of art. 120 of the Constitution may otherwise create.

Why then this exception? What is the constitutional significance of the prohibition to review acts of parliament against the provisions of the Constitution?[10]

12.2 Constitutional adjudication and the separation of powers

12.2.1 The legislature as guarantor of the Constitution

The specific prohibition for *courts* to engage in establishing the constitutionality of acts of parliaments, and more precisely the prohibition to set aside provisions of acts of parliament for an alleged incompatibility with provisions of the Constitution, entails that the guarantor of the constitutionality of acts of parliament is the legislature itself. This highlights the separation of powers framework in which we have to understand constitutional adjudication: the prohibition of art. 120 of the Dutch Constitution is directed at courts and clearly indicates that it is not the courts but the legislature itself that has to be the guarantor of the constitutionality of the laws it makes.

Of course, one may wonder whether in the Netherlands parliament takes up its role in scrutinising the compatibility of bills with the Constitution. This is an empirical question on which little empirical research has been done. What we can say about this, is that both the Lower House, but more particularly the Upper House tend to have a look at the issue of the constitutionality of bills. In this respect they look as much to international treaties, the ECHR and EU law, as to the Constitution. But there is not the systematic scrutiny comparable to the work of the Finnish *Perustuslakivaliokunta*. This is to be lamented, and much improvement is possible. But it would go too far to say that parliament and government totally disregard their role as guarantors of the constitutionality of laws. And certainly it would be wrong to say that they would take their task more seriously if there had been a constitutional court

9 There are some differences between human rights treaties and the Constitutional rights. The most important is that the Constitution requires a basis in an *act of parliament* before constitutional rights can be restricted. This formal requirement, which guarantees the democratic legitimacy of restricting rights, is generally absent in human rights treaties.

10 As we mentioned, this prohibition extends also to unwritten general principles of law, see text at footnote 6.

of the German, Italian or French type, or a semi-decentralised system like the Portuguese. It might just as well be that parliament may take its task (even) less seriously if there is a court to act as a back up. For the Netherlands this, however, is entirely hypothetical only.

12.2.2 The variety of solutions to the separation and balancing of powers issue

The separation and balance of powers is premised on the 18th century idea that power should never end up being absolute and that the exercise of public power should therefore never be concentrated in one person, institution or public office.[11] This requires a separation between the various powers, that is to say, an amount of independence from each other in the exercise of their respective tasks. The actual amount of independence determines the relationship between those powers. Judicial review of the constitutionality of acts of parliament would seem to place the judiciary over the legislature, thus upsetting the intuition not only that the judiciary must necessarily be subject to the law which – to a large extent – is set by the legislature, but also the intuition that within the always delicate balance between the powers of the *trias politica* in a well-functioning democratic state under the rule of law the legislature in principle should enjoy primacy. In the context of judicial review, in Europe the solution was found by placing the court to adjudicate issues on the exercise of power by the various branches of government, which of course includes the judiciary, *outside* the *trias politica* and should be located in a separate constitutional court, the issue of separation of powers being itself a matter of interpretation of the constitutional rules and principles. This solution of type of constitutional adjudication is associated with the name of Kelsen, and hence has been called the *Kelsenian* type of constitutional court.

Although in many European countries this solution was accepted in the course of the 20th century, it has by no means been generally accepted in Europe either. We find mixed types in for instance Estonia, and somewhat differently in the non-exclusive power of the Portuguese *Tribunal Constitucional*, and the diffuse system of court review in Greece and the Nordic countries. In

11 In the country of which students were told that the separation of powers is most strictly institutionalised in the Constitution, the 45th President of the United States famously claimed 'I have an Article II [of the Constitution] where I have the right to do whatever I want as a President'; for a compilation these assertions in the context of investigative powers of the Justice Department and the public prosecution see https://youtu.be/sl_gO3uOds8. In the context of his powers over state governors, the claim is that '[w]hen somebody is president of the United States, the authority is total', (13 April 2020), see https://www.youtube.com/watch?v=r3QXrQDTDYo. For a general discussion of the more nuanced constitutional doctrine of a strongly unitary executive, as an ongoing issue of American constitutional law to this day, see e.g., L. Lessig, C.R. Sunstein, *The President and the Administration*, "Columbia Law Review" 1994, vol. 94, pp. 1–123.

the Netherlands the adjudication of the compatibility with human rights treaties, which are a major source of Dutch constitutional law, is decentralised and to that extent constitutional adjudication is like in Greece and the Nordic countries.

The choice to leave the ultimate authority to assess the compatibility with the provisions of the Constitution ('constitutionality in the narrow sense') to the legislature in the Netherlands, the UK and Switzerland, must be viewed as a national choice in balancing powers and is in principle legitimate, and has in these countries never been considered to conflict with the idea of a democratic state under the rule of law. Quite to the contrary, these states have overall been considered to be states with reasonably well functioning democratic systems of government with equally well-functioning judicial systems.

Saying this is of course not to say that these systems are flawless either from the perspective of democracy, nor of that of the rule of law. As regards democracy in the UK, with England traditionally viewed as the mother of all parliaments and hence as parenting parliamentary systems of government that have become dominant in Europe, the examples may be the British Prime Minister's advice the Queen to shut down ('prorogue') Parliament in order to avoid it discussing the terms on which the UK was to leave the European Union. At the same time, this very case proves the possibility of courts, though it is extremely rare, to intervene in favour of democracy[12] – courts are mostly considered to be 'counter-majoritarian', about which I make a remark below. The UK and its 'winner takes all' principle of representative democracy (the 'power hoarding arch type' of government as Anthony King called it[13]) has in recent years also proven to be exposed to rampant corruption as became obvious under prime minister Boris Johnson.[14] These cases of political corruption have eroded public trust in democratic government, and in the absence of hard law, courts have not been able to play a significant role in countering it.

As to the rule of law, we mention the Netherlands highest administrative court, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak Raad van State*), which legitimated in its case law from before October 2019[15] allowed the quasi-punitive recovery from over 24,000 families of child day care support that was administered in the form of

12 The UK Supreme Court had to intervene against this excess of power in *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant)* (Scotland), 24 September 2019 (Miller-II).

13 A. King, *Does the United Kingdom Still Have a Constitution?*, The Hamlyn Lectures, 52nd Series, Sweet & Maxwell, London 2001.

14 See for a summing up of cases https://www.theguardian.com/politics/2022/jul/08/boris-johnson-no-confidence-vote-partygate and https://www.theguardian.com/politics/2022/jul/09/scandalous-legacy-as-johnson-heads-for-the-exit-many-issues-remain-unresolved.

15 In two judgments of 23 October 2019, ECLI:NL:RVS:2019:3536 and ECLI:NL:RVS:2019:3536, the *Afdeling bestuursrechtspraak*, on in part different grounds, reverted its earlier case law.

fiscal bonuses. This practice of quasi-punitive recovery meant that persons who made even minor administrative mistakes like missing signatures, or failed to pay their own yearly contribution of sometimes no more than a few hundred Euros or less, or did not do so in time, had to refund tens of thousands of Euros for the actual full cost of day care that had been provided on the basis of the imperfect or incomplete file – the full cost being a sum of money which they could not pay in the first place, which is why they received the fiscal bonus. The group of citizens included hundreds of cases based on ethnic profiling.[16] The statistics show that the benefits affair particularly affected many single-parent families, many families with a migrant background, many families with a low income, many families on social assistance and many families with low or negative assets.[17] In many cases (figures vary between 1115[18] and 1675[19] cases), parents subsequently lost parental authority over their children due to their being registered as fraudsters, impoverishment and similar problems they ended up in. The parliamentary investigation committee concluded in its report that in this whole affair

> the fundamental principles of the rule of law have been infringed. This reproach does not only regard the executive, more specifically the Tax Administration, but also the legislature and the judiciary … Without wishing to express an opinion on individual court rulings, the Committee observes that for years also the administrative courts have made an essential contribution to maintaining a rock hard implementation of the regulations on childcare benefits that do not follow from the law. In doing so, the administrative courts have neglected their important function of (legal) protection of individual citizens.[20]

An important *caveat* is therefore in place. But I suppose we may still conclude that also countries where legislatures, and not constitutional or ordinary courts, are the ultimate guarantor of the constitution, like Switzerland, the

16 See letter of the State Secretary of Fiscal Affairs 30 May 2022, Parliamentary Documents (*Kamerstukken*), Tweede Kamer (*Lower House*), 31 066, nr 2030.

17 Central Office for Statistics (*Centraal Bureau voor de Statistiek*), 28 June 2022, https://www.cbs.nl/nl-nl/maatwerk/2022/26/kenmerken-van-gedupeerde-gezinnen-toeslagenaffaire; see also Ministry of Justice https://www.inspectie-jenv.nl/actueel/nieuws/2022/06/28/toeslagenaffaire-trof-vooral-eenoudergezinnen.

18 Central Office for Statistics (*Centraal Bureau voor de Statistiek*) October 2021, see https://www.cbs.nl/-/media/_excel/2021/47/samenloop_jeugdbescherming_jeugdhulp_kinderopvangtoeslagenaffaire_nieuw.xlsx.

19 Central Office for Statistics (*Centraal Bureau voor de Statistiek*), 11 May 2022, https://www.cbs.nl/nl-nl/maatwerk/2022/19/actualisatie-uithuisplaatsingen-toeslagenaffaire-2015-t-m-2021.

20 Parliamentary hearing committee, Final Report, *Ongehoord onrecht*, p. 7–8, http://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf.

United Kingdom and the Netherlands, can be reasonably well-functioning democratic states under the rule of law. The three examples I just presented from the UK and the Netherlands have also exposed that these systems are still in principle able to correct what has gone terribly wrong within these countries. If I am right in this, this implies that democracy under the rule of law is not dependent on the existence of a constitutional court.

12.3 Democracy and the rule of law

The diversity of arrangements in constitutional adjudication in Europe and elsewhere reveals the delicacy of distinguishing, separating and balancing powers – its relation to the tension within the concept of democracy under the rule of law (*demokratische Rechtsstaat*, *demokratyczne państwo prawa*): who determines the law, with what democratic legitimacy and in which cases?

The tension between democracy and the rule of law is tangible in particular when the parliamentary legislature is taken as the institutional embodiment of democracy and the courts the embodiment of the rule of law, two branches of government that are essentially independent from one another.

This way of viewing the separation of powers is a bit of a caricature. There is always some truth in caricatures. But the details of the picture may give a distorted view of reality. There are at least three elements we have to bear in mind to keep a clear view concerning courts and democracy.

Firstly, it is incorrect to say that courts have no democratic legitimacy. The interpretation of the meaning of the law itself is to a large extent as democratic as that law itself is democratic. Precisely in democracies under the rule of law, the law is to a large extent – though certainly not exclusively – determined by parliamentary legislation. Moreover, the courts' mandate to interpret and apply the law is at any rate as democratic as the laws that give them that mandate. So when courts carry out their constitutional duty to review act of parliament or other acts of public authorities against constitutional norms, this task is as democratically legitimate as those who have established those constitutional norms are democratically legitimate.[21] It is precisely this type of democratic legitimacy of adjudication, derived from the democracy of law, which can justify that courts are indeed separate, independent, from legislatures.

Secondly, this acknowledgment of the democratic legitimacy of courts can yet not detract from the fact that the democratic legitimacy of duly elected and representative parliaments,[22] at least in a democratic system that overall

21 For reasons of space, I here leave aside what is referred to as the 'Jeffersonian objection' that long-dead generations cannot govern us today, and that no generation has a right to bind another. This point is made anew by, e.g., J. Colon-Rios, *Weak constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, London-New York-Routledge 2012.

22 With duly elected parliaments, I mean parliaments in free and fair elections with a secret ballot after a fair, open and lawful campaign on the basis of an as level as possible playing field. In the US it is quite clear that the role of money – legitimated by the Supreme Court – has

functions reasonably well, is both different from and stronger than that of courts. This explains why the very country that is the cradle of judicial review, the United States, is also the country where this very power of constitutional review has remained the object of much controversy among constitutional lawyers, and not only them. The United States has become one of the few countries where citizens make an intensive use the democratic right to demonstrate not only before the White House and Congress but also virtually permanently and prominently before the building of the Supreme Court. To demonstrate is of course making use of a right that is exquisitely democratic. And yet, a situation in which a court's case law leads to permanent demonstrations, is not a situation that chimes with European understandings of the separation of powers and the role of courts in it.

This brings me to a third point to keep in mind. It is true that ordinarily courts decide by a majority on the bench or jury (although ordinary courts in many countries in Europe – and some constitutional courts – generally decide by consensus, and so is the first aim of most cases of trial by jury). But this is not the essence of the idea that impartiality of court judgments and judicial independence. Judicial independence and impartiality require courts to establish the meaning of the law by different principles from those of democratic majoritarian decision-making in the other branches of government. Hence, in the American debates on judicial review, with the typically American tendency to exaggerate, the emphasis has been on the 'counter-majoritarian' nature of constitutional adjudication; this may be a caricature if we were to apply it to all forms of constitutional adjudication by courts in Europe (and even for all the case law over time in the US).

These considerations form part of the groundwork for considering the general question of whether courts can stop the dismantling of democracy and the rule of law. But before we enter into a further reflection on this general question, I first make some more practical remarks about whether in a situation like the Dutch, where courts cannot review the compatibility of parliamentary acts with the provisions of the Constitution.

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played a disproportionate role in elections to the point of making the open democratic nature of elections highly doubtful. The attempts at corruption of the electoral process at presidential elections by the 45th President of the US, as well as the changes in state electoral law brought about by one of the two major parties in a significant number of states, make it difficult to think of the USA as a democracy any longer. The criteria of 'representative parliaments' in my view exclude situations in which large sections of society are factually excluded from representation. Indeed, there are very many borderline cases, and the more specific criteria can legitimately differ from country to country, but gerrymandered districts can make parliaments unrepresentative if they are used to exclude forms of opposition from representation in parliament and infringe the very idea of the equal vote.

12.4 Can courts stop a dismantling of democracy and the rule of law? The Dutch case

As we mentioned, in many cases where Dutch courts cannot review acts of parliaments against provisions of the Constitution, they can do so against directly effective treaty provisions, like those contained in the European Convention of Human Rights and other classic human rights treaties. So the aspect of the protection of human rights as a barrier to dismantling democracy under the rule of law can be effective even in the Netherlands. This extends also to democracy itself in as much as art. 3 of the first Protocol to the ECHR (the right to free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature) is involved, as well as the attendant provisions on free speech, freedom of demonstration, of association, of religion, protection against inhuman and degrading treatment, the right to life, privacy and other democracy related rights and freedoms – the 'thicker' rule of law rights. As to the rights and freedoms that are more associated with the rule of law in a thinner sense, a very important right is that of access to justice as protected by art. 6 ECHR (and its equivalents in other human rights treaties). In particular, Dutch courts take precedents in the case law of the European Court of Human rights in particular cases as a quite strict ground for judgment. They do this so much so that also in cases that do not involve acts of parliament but administrative decisions and regulations – i.e., when the prohibition of art. 120 of the Constitution is not in play – these function as the major constitutional benchmark.

The other 'external' source of protection derives from EU law. Democracy, as such, in particular electoral rights are limited mainly to European citizenship contexts, although arguably they are better protected in the case law of the European Court of Justice than in the European Court of Human Rights.[23] There is also, of course, the ever further developing rule of law case law on (mainly) judicial independence under art. 19 TEU, in sync with the European Court of Human Rights. This focus on judicial independence is

23 A good example of this are the *Eman and Sevinger* preliminary rulings in which Dutch citizens living in the Caribbean parts of the Kingdom won the right to vote in European Parliament elections, as the ECJ found that although these territories do not fall under EU law (see art. 355 and Annex II TFEU) their exclusion was unjustified discrimination in as much as Dutch citizens living in any other territory were not excluded from this right to vote, see ECJ, Case C-300/04, 12 September 2006. For an analysis of the larger set of judgments on electoral rights, including a brief comparison with the ECtHR case law, see L.F.M. Besselink, *Colonial Voting Rights*, [Case Note to] *Case C-145/04, Spain v. United Kingdom, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, Eman and Sevinger, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, Oslin Benito Sevinger and Michiel Godfried Eman (Sevinger and Eman)*, "Common Market Law Review" 2008, vol. 45, pp. 787–813, Open Access https://dspace.library.uu.nl/handle/1874/27001.

to be associated with a 'thinner', more lawyerly understanding of the rule of law concept. It does not extend into the broader issues of political rights and freedoms or other aspects of the separation and balancing of powers in the member states, issues and aspects that must be associated with a 'thick' rule of law understanding that also encompasses political democracy.[24]

Notwithstanding the fact that the case law of the Court of Justice relates judicial independence under art. 19 TEU to the founding values that are common to the member states and the Union specified in art. 2 TEU, the Court has not been able to go beyond this particular legal and lawyerly issue of judicial independence. This is notwithstanding the consensus in the literature that art. 2 TEU is not limited to the 'scope of EU law' in the ordinary sense of powers on substantive matters conferred on the Union, but, as the enforcement mechanism of art. 7 TEU makes clear, any action of member states that relates to – more specifically action that threatens or infringes – the foundational values which the Union and the member states hold in common. I understand very well why the Court of Justice has not gone so far as to base itself on art. 2 TEU itself, at any rate so far. Firstly, 'values' are not 'rules' and not even 'principles', let alone 'legal rules' or 'legal principles'. The predecessor to the present version of art. 2 TEU spoke of 'principles', but in the Lisbon version of the TEU this has been changed to 'values'. And the actual summing up of the values mentioned in art. 2 is such that they easily clash in concrete cases, supposing that we know their exact meaning in such concrete cases. More importantly, the enforcement of art. 2 is explicitly regulated through the specific mechanism of art. 7 TEU, which seems to rule out their enforcement in the cases covered by this political mechanism through the ordinary proceedings at the Court of Justice. Regretfully, the political mechanism has so far failed to deliver, precisely through political manoeuvring of member states, not least the member states that are the object of grave doubts – to put it quite mildly – as to their compliance with the values of art. 2 TEU.

In sum, one may say that the rule of law in the thinner sense, comprising judicial independence and access to justice, is indeed protected through the sources of Dutch constitutional law that derive from international and European treaties. 'Thicker' understandings of the rule of law comprising democracy, separation of powers, and social rights which essentially hinge on considerations of distributive justice, are not strongly and prominently protected by courts. In cases in which democracy under the rule of law in a thicker sense are being systematically undermined by the powers that be, may not be stopped by courts of law in the Netherlands, simply because courts have less to say when it comes to the political elements of the state, which are traditionally left to politics. My sense is that this is not only true of the Netherlands,

24 For the distinction between 'thinner' and 'thicker' understandings of the rule of law see B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, chapter 7; see also Lord T. Bingham, *The Rule of Law*, London 2011, p. 61.

but more universally in democracies under the rule of law, precisely because they are democracies under the rule of law the preconditions of which are not within the powers of courts to maintain. In the next section I provide some further reflections on this.

12.5 Could *any* constitutional court stop a dismantling of democracy and the rule of law?

No doubt the role of constitutional courts in upholding the rule of law is in democracies, which have taken their particular form in and through constitutional law, of utmost importance. This is not the same as saying that courts with constitutional jurisdiction are actually capable of stopping the dismantling of democracy and the rule of law. This has various explanations, some of which go beyond the specifically legal questions of the jurisdiction of courts and institutional arrangements within democratic states under the rule of law.

One reason of those more structural explanations is that law is an inherently political phenomenon. Parliament and the executive determine to a large extent the law, thus making it a product of politics. Also the constitution itself is a political product. When political agendas aim to change the constitution and its arrangements, both the constitution's and the law's subordination to politics are conspicuous. This is so under ordinary political circumstances, that is to say, when more or less fundamental changes do not place the relevant political order outside the category of democracies under the rule of law. For instance, in case a strictly parliamentary system is changed into a semi-presidential system of government (or the other way round), or an electoral system of proportional representation changes to a majoritarian system, these are changes which have profound consequences for the political system, but they do not in themselves imply it is no longer a democracy under the rule of law. Constitutional law and parliamentary legislation as major sources of the law are equally subordinate to politics under circumstances that are revolutionary, that is to say, aimed at changing the very foundations of democracy and the rule of law. Revolutions that lead to constitutional change usually do not bring about those changes in full accordance with the ordinary rules for constitutional amendment; or even if they are followed, it often occurs after the rules of constitutional amendment themselves are changed with the ultimate aim to enable the radical transformation of the constitutional order.

When, as a consequence of political agendas to dismantle democracy under the rule of law, the institutions of political democracy and the rule of law can no longer be said to be reasonably well functioning, it may also be the case that the judicial institutions can no longer be said to be reasonably well functioning. If the political system is backsliding, courts will sooner or later also be backsliding, and this is precisely what we see happening, and not by accident, in European countries like Hungary and Poland.

This implies that constitutional backsliding cannot be reversed by the courts and the law once the dismantling is becoming successful. Only in the

borderland of not yet having been achieved could the law and the courts play some role in reversing the course towards a system that can no longer be considered a democracy under the rule of law as it has been understood in late 20th century European countries.

12.6 Implications

The arguments presented in the previous section have the important implication that constitutional 'backsliding' is firstly a political problem. What we lawyers think of as a 'rule of law' problem, is – if we rightly distinguish between 'rule of law' and democracy – in reality a problem of political democracy. Courts have proven to be better at protecting the specifically legal aspects of the rule of law, such as judicial independence and certain forms of access to justice, than in protecting democracy. Courts are also relatively good in protecting the rights of individuals, including and classic political rights if called upon to do so, but they are, for quite obvious reasons, reticent in adjudicating social rights and generally quite impotent in the face of issues of distributive justice which are typically drivers of popular and populistic resentment. Even in a country like South Africa, with a strong constitutional court that is also prepared to adjudicate social rights, this has in no way stopped the further steep growth of the abyss between the poor and the rich.

The conclusion I draw from this is that the dismantling of democracy and the rule of law can best be addressed not as a legal problem but as a political problem. It can better be addressed by political institutions rather than courts. Saying that the threat to democracy under the rule of law which we can perceive in all EU member states can only effectively be addressed by politics, is not to deny the deep roots of the problem and difficulty in addressing these. In many ways, democracy can only function on the basis of an ethical commitment to values that are necessary for its orderly operation. Among these are openness, the willingness to engage and resign and commit to the outcome of public decision-making (whether in elections or in court judgments) also if one disagrees with it, and the preparedness to concede to the better argument and to compromise for the sake of the public interest. Clearly the *ethos* of narcissism of a whole league of leaders in Western states – and beyond – threatens to derail into corruption in the literal sense of the breakdown of the general good into self-seeking self-interest in the accumulation and maintenance of power.[25]

25 I described some aspects of this in L.F.M. Besselink, *On Some of the Pre-Conditions for Democracy under the Rule of Law*, (in:) J. Urbanik, A. Bodnar (eds.), Περψένοντας τους Βαρβάρους. *Law in a Time of Constitutional Crisis: Studies Offered to Mirosław Wyrzykowski*, Warszawa: C.H. Beck 2021, pp. 83–92, https://hdl.handle.net/11245.1/210bfcab-0c1c-4de5-830b-fbefd34fe1a2; and on democracy and representational claims *Talking about European Democracy*, "European Constitutional Law Review" 2017, vol. 13, iss. 2, pp. 207–220. doi:10.1017/S1574019617000128; https://www.cambridge.org/core/journals/european-constitutional-law-review/article/talking-about-european-democracy/C1B1E92CE91F11EFC0B0765A264B5AF0#, pp. 210 ff.

Courts do not exist to adjudicate the democratic ethos of those in office, they are essential in the situation of what I described above as the 'borderland' between an authentic democracy under the rule of law and being in a state of illiberal authoritarianism and corrupted constitutional institutions. We have to look not only to court powers to review parliamentary legislation against constitutional norms of national, European and international origin, but also to a more appropriately intensive review of administrative action against such constitutional norms to avoid a derailing of democracy. This is particularly urgent given the highly increased executive dominance also in parliamentary systems of government in Europe, an increase that is at least in part also fostered by processes of Europeanisation. Once the judiciary, not only that part of the judiciary with the jurisdiction to assess the constitutionality of laws, has become itself infected and undermined, it is too late to stop the dismantling of democracy and the rule of law. In such a situation it may require a democratic revolution to turn back to a situation of democracy and rule of law.

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