Constitutional adjudication in the era of globalization: The Netherlands in comparative perspective

Besselink, L.F.M.

Published in: European Public Law

Citation for published version (APA):
EUROPEAN PUBLIC LAW
Editor-in-Chief

Professor P J Birkinshaw
Institute of European Public Law
The University of Hull
Hull HU6 7RX
Tel: + (44) 01482 465742
Fax: + (44) 01482 466388
E-mail: P.J.Birkinshaw@hull.ac.uk

Editorial Committee

Professor David Freestone, Law School, University of Hull, Legal Adviser, World Bank

Professor Cosmo Graham, Law School, University of Leicester

Professor Stephen Tierney, Faculty of Law, University of Edinburgh

Professor Mads Andenas, Law School, University of Oslo

Professor Christopher McCrudden, Lincoln College, Oxford

International Editorial

Professor Jean-Bernard Auby, Professor of Public Law, Sciences Po Paris,
Director of the ‘Governance and Public Law’ Center

Professor John Bell, Faculty of Law, University of Cambridge

Professor Andrea Bianchi, Co-Director, Centre for European Law, Kings College London

Professor Iain Cameron, University of Uppsala, Sweden

Professor Mario Chiti, Ordinario di Diritto Amministrativo, University of Florence

Roger Errera, Conseiller d’Etat (hon.)

Professor Walter van Gerven, Professor of Law, University of Leuven, formerly Avocat Général, Court of Justice of the European Communities

Professor Ian Harden, Professor of Public Law and Legal Adviser to the European Ombudsman, Strasbourg

Professor Jeffrey Jowell QC, Faculty of Laws, University College London

Lord Lester of Herne Hill, QC, President of Intervirights, Visiting Professor, University College London

Sven Norberg, former Judge of the EFTA Court and Director at DGIV in the European Commission

Professor David O’Keeffe, Emeritus Professor of European Law, University College London

Professor Dr Michael Potas, Institute of Austrian and European Public Law, Vienna University of Economics and Business, Wien, Austria

Professor Tony Prosser, Professor of Public Law, Department of Law, University of Bristol

Professor Dr Jurgen Schwarze, Director, Institut für Öffentliches Recht, Albert-Ludwigs-Universität, Freiburg

Sir Stephen Sedley, formerly Lord Justice of Appeal, Court of Appeal of England and Wales, Royal Courts of Justice, London

Professor Cass Sunstein, Karl Llewellyn Distinguished Service Professor, University of Chicago Law School

Professor John Temple Lang, formerly Director, DGIV Competition, European Commission

Professor Dr Christiana Timmermans, Erasmus University Rotterdam, former Judge at the European Court of Justice

Yitzhak Zamir, Professor of Public Law, Dean of the Hebrew University of Jerusalem’s Faculty of Law, a former Attorney General of Israel and Judge in the Israeli Supreme Court

His Honour Mr Justice Gerard Hogan, Judge of the High Court of Ireland

Submission Guidelines

The Editors welcome scholarly articles in the area of European Public Law. The subject area is given a broad interpretation and includes EC Law and Public Law, the Public Law of European States and other jurisdictions where relevant, including those jurisdictions which have been influenced by European legal systems, and Comparative Public Law. No particular approach or methodology is favoured, but in order to ensure work of a high academic standard all articles will be refereed by assessors with established reputations in the subject area. Authors will normally have a definite response within two months of submission.

The Editor-in-Chief and his Board welcome all articles or expressions of interest from those who are preparing articles. Articles will normally be between 5,000 and 12,000 words long, double-spaced on A4 paper (or equivalent), with the manuscript to be accompanied by a diskette (IBM compatible) formatted following instructions provided by the publisher. The language of the publication is English, but authors are encouraged to write a headnote in both their own language, where this is not English, and in English for ease of reference.

Shorter articles of between 2,000 to 4,500 words in length are also invited for the “Scrutiny” section. These articles will also be refereed.

By submitting work authors are held to imply that it contains original unpublished material which is not being submitted for publication elsewhere. No liability can be accepted for loss or damage to material submitted.

Authors of feature articles may use the Harvard system of referencing if they so wish.

An address for delivery of proofs must be supplied. Proofs will be sent to authors who undertake to check them and return them to the Editor without delay.

Copyright in all pieces accepted for publication remains with the contributors, and the publishers acquire publication rights. If all, or any part of, a rapport or article is reproduced elsewhere, the author should acknowledge European Public Law as the original place of publication.

Editor-in-Chief

Professor Patrick Birkinshaw
Institute of European Public Law
Law School
University of Hull
Hull HU6 7RX
Tel: 01482 465742
Fax: 01482 466388
E-mail: P.J.Birkinshaw@hull.ac.uk

Book Review Editor

Dr Mike Varney
Institute of European Public Law
Law School
University of Hull
Hull HU6 7RX
Tel: 01482 465725
Fax: 01482 466388
E-mail: M.R.Varney@hull.ac.uk
### Rapports

Constitutional Adjudication in the Era of Globalization: The Netherlands in Comparative Perspective  

*Leonard F.M. Besselink* 231

### Scrutiny

Surprise? Surprise! – Case C-115/09 *(Kohlekraftwerk Lünen)* – A Victory for the Environment and a Loss for Procedural Autonomy of the Member States?  

*Eva Julia Lohse* 249

The Implementation of the European Landscape Convention and Public Participation  

*Gian Franco Cartei* 269

### Articles

European Administrative Law in the Light of the Treaty of Lisbon  

*Jürgen Schwarze* 285

Regions and Subsidiarity in the European Union: A Look at the Role of the Spanish and other Regional Parliaments in the Monitoring of Compliance with the Principle of Subsidiarity  

*Sergio Alonso de León* 305

The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years  

*George Pupashvili* 323
Between Democracy and Nationality: Citizenship Policies in the Lisbon Ruling
Patricia Mindus & Marco Goldoni
351

Possible Developments of Article 298 TFEU: Towards an Open, Efficient and Independent European Administration
Eva Nieto-Garrido
373

Book Reviews
399
Constitutional Adjudication in the Era of Globalization: The Netherlands in Comparative Perspective

Leonard F.M. Besselink*

From the perspective of the globalization of national constitutional orders, the Netherlands constitution has features of a constitutional laboratory. This is particularly true for the constitutional status which international norms enjoy within the national legal order. International law’s objective is increasingly its realization within the domestic legal order, and its effect is increasingly to be located within the national legal orders. ‘The global is local’, as the saying goes. The relative openness of the Netherlands legal order to international norms exposes it to a high degree of globalization, which renders the Netherlands constitution from a certain perspective a very modern one. At the same time, however, doubts may linger on that modernity if one is aware of the fact that it is one of few countries in which no court is competent to review the compatibility of acts of parliament with the Grondwet, its prime constitutional document.

This brief essay is devoted to this apparent paradox, focussing on the issue of constitutional adjudication. It firstly typifies the Netherlands constitutional order and locates it within the British-Scandinavian family of constitutional traditions, which reflects on the position of constitutional adjudication. It next explains how the power of courts to review the compatibility of acts of parliament against directly effective treaty provisions has turned these into sources of national constitutional law, both in theory and in practice. This is contrasted to the prohibition for courts to review acts of parliament against the provisions of the Grondwet, which requires us to determine the scope of that prohibition, just as we describe the scope of the power to review them against treaty provisions. Subsequently, we briefly discuss the prime motive for a pending proposal to abolish the prohibition.

* Professor of European Constitutional Law, University of Utrecht; H.G. Schermers Fellow of the Hague Institute for the Internationalisation of Law; this essay was written during a study leave spent at the Netherlands Institute of Advanced Studies, Wassenaar, The Netherlands, Autumn 2011. It relies on materials presented by the author in a chapter on the Netherlands in Handbuch Ius Publicum Europaeum, Band VI, Verfassungsgerichtsbarkeit, s. 102a, Niederlande, Müller Verlag, Heidelberg 2012.

In conclusion we reflect on the necessity of changing our concepts of constitutional review prevalent in Europe in light of a broadening of sources of constitutional law. At the same time our conclusions lead us to reflect on the paradoxical nature of globalization expressed in the catchphrase ‘the global is local’, and how it plays out in the political mood of the moment as regards the criticism of European courts.

1 THE CONSTITUTIONAL LANDSCAPE: THE NETHERLANDS IN COMPARATIVE PERSPECTIVE

Within Europe, the institution of constitutional review by and large reflects a typology of constitutional traditions. In Europe these traditions can be divided into two types: the revolutionary type and the evolutionary type. Constitutions of the first type, which one can also refer to as the European continental type, tend to take their cue from the French revolutionary ideas in which the constitution is the expression of sovereignty, usually the people’s or nation’s sovereignty with all its overtones of exclusiveness. Often they have been triggered in a single foundational constitutional moment such as a war, a period of dictatorship or totalitarianism which the new constitutional order was aimed to overcome. In this tradition the constitution is to provide a clean slate and pretends to be able to control the future of the political order.

The archetype of the ‘evolutionary’ constitutions is the British constitution. On the whole it reflects long term political developments and tends to have a series of foundational historic experiences at its origin. It claims to codify what is the outcome of a constitutional settlement on particular points after the dust has settled rather than modify and steer the future course of the polity in all its aspects. The focus within this constitutional tradition is more open to practice, and is in that sense ‘pragmatic’, than tends to be the case in the more doctrinal revolutionary tradition. Whereas this revolutionary tradition is widespread on the continent (Germany, Italy, France), the evolutionary constitutional tradition is to be found particularly on the North-Western fringes of Europe. The Netherlands can be ranged in this tradition as well as Scandinavian countries (and arguably the European Union).

---

1 On a global scale, a constitutional typology would require the distinction of more types than the two mentioned. For the US, arguably, the roots of the common law tradition can explain best the particular institutional arrangement of what is there referred to as ‘judicial review’. For Japan and most of the non-European Commonwealth countries, the explanation for their form of judicial constitutional review would be different, as it would be for the rest of the world.

2 Further on this L.M. Besselink, European Constitutionalism beyond Lisbon 261-281 (Jan Wouters et al. eds., Uitgeverij Intersentia 2009).
European continental countries which stand in the tradition of the ‘revolutionary’ constitutions, usually have specialized institutions with an exclusive or ultimate power to review the constitutionality of acts of parliament. This may not come as a surprise, but still needs some explanation. One of the central ideas of the ‘revolutionary’ tradition is that legislation passed by the national parliament expresses the sovereign will of the people. These cannot be set aside by just any court, so the standard account runs. As a consequence, normal courts, that is, those belonging to the judiciary in the classic *triad politica*, are prohibited from reviewing the constitutionality of acts of parliament. Of course, the power of the legislature is moderated and regulated by the constitution which is of superior rank in relation to acts of parliament. But this does not imply that normal courts can exercise what can be viewed as a superior power over the legislature. These courts are a countervailing power which is at best of the same rank as the legislature, but they are usually considered bound by and hence subject to legislation. Hence the Kelsenian model of institutionalising constitutional review in a body, which is – like the constitution itself – set above the *triad politica*.

This model is notoriously absent in the countries belonging to the tradition common to the British-Scandinavian family. Within this family, various situations can be distinguished. In some countries the review of the constitutionality of acts of parliament is withdrawn from the courts generally, that is to say, courts cannot review the constitutionality of acts of parliaments. Such a generalized withdrawal of the power to review the constitutionality of acts of parliament from the courts existed in Finland from 1919 until 2000, and at least until the Human Rights Act 1998 the UK may also be included in this group.

In other countries in this tradition, the courts’ power to review the constitutionality of an act of parliament is restricted, and this in a number of different forms. Firstly, in some countries courts can disapply acts of parliament only in cases of manifest incompatibility with provisions of the national constitution. This was the case in Sweden until 1 January 2011,\(^3\) and is understood to be the practice in Denmark\(^4\) and has led to the characterization of

---

5 Until January 2011 the text of the relevant constitutional instrument read:

§14 If a Court or other public body finds that a provision conflicts with a rule of constitutional law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied.

If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.

In the version as it is in force since 1 Jan. 2011 the last quoted sentence has come to read:

During the examination of a law under the first paragraph, particular attention must be paid to the fact that the Riksdag is the foremost representative body and that the Constitution takes precedence over law.

6 The Norwegian case is less clear-cut, but at least in a range of cases the courts showed deference to the legislature in constitutional cases.
the Scandinavian forms of review as of reticence and deference to the legislature.⁵

Ostensibly, the situation in the Netherlands to this day is like that in Finland before the constitutional reform of 2000 – we delve into this matter further to conclude below that this may well be a misunderstanding.

2 SOURCES OF CONSTITUTIONAL LAW AND CONSTITUTIONAL REVIEW

The issue of what can count as a source of constitutional law is closely related to the concept of constitutional review. The sources of constitutional law are, after all, the benchmark against which the constitutionality of the acts (and omissions) is reviewed. In the continental European tradition the ideal of a single document constitution is the nucleus of defining the sources of constitutional law, from which other sources are derived as ancillaries (even though the existence of unwritten principles and even rules of the constitution is widely acknowledged in these constitutional systems). This, in line with the ‘Westphalian’ paradigm, focuses on national sources as the only truly constitutional ones.

This national focus is present also in the British and Scandinavian tradition, although this is not so much caused by ‘single document’ constitutionalism. Denmark, Norway and Iceland had single documents in which the core of the constitution was contained,⁶ but Finland before 2000 and Sweden to this day have multiple constitutional documents. The cause of the focus on national sources is the fact that these countries are traditionally dualist systems, i.e. international legal sources are in principle outside the national legal system until they have been transformed by an act of incorporation into the national legal system, thus essentially turning them into national law.

---

⁵ The traditional position of the Scandinavian courts in this respect was described in Allan R. Brewer-Carías, Judicial Review in Comparative Law 172–174 (Cambridge U. Press 1989); more recent studies in English which provide considerably more detail and nuance include Jaakko Husa, Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective 209 (Peter Lang 2002); Ragnhildur Helgadóttir, The Influence of American Theories of Judicial Review on Nordic Constitutional Law (Martinus Nijhoff Publishers 2006); Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki, Nordic Law – Between Tradition and Dynamism, 24, xi, 177 (Intersentia 2007); Andreas Follesdal & Marlene Wind (eds.), Nordic Reluctance towards Judicial Review under Siege, 27 Nordic J. Human Rights 131–311 (2009).

⁶ Important constitutional rules have been contained in separate laws, e.g. the rules on the succession of the King in Denmark. The succession to the throne would, in the later middle ages and early modern period, in Europe be considered the very core of the leges constitutionales as they determined the legitimacy of the ruler – which also by present-day standards should be the primary function of a constitution; that this matter could be regulated by an act of parliament is because the matter no longer interferes with the normal exercise of power in a parliamentary system of government, although again this does not remove the substantive constitutional nature of the matter.
This is where the singularity of the Netherlands constitution comes into view: it is not only ‘monist’ in the sense that all public international law is part of the Netherlands legal order from the moment it becomes binding under international law, but also it has constitutional and even supra-constitutional rank in the case of a conflict between legal provisions of national origin and directly effective provisions of international law:

Article 94 Grondwet [Constitution]
Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone.

The ‘statutory regulations’ which may have to be disapplied, include provisions of the Grondwet; so directly effective provisions of international law can overrule national constitutional provisions.

Already this rank may explain why international treaties are counted among sources of Netherlands constitutional law. Their practical importance as a source of constitutional law is further increased by the prohibition for courts to review the compatibility of acts of parliament with the provisions of the Grondwet:

Courts shall not review the constitutionality [grondwettigheid] of acts of parliament and treaties.

This prohibition has meant that in cases in which the compatibility of an act of parliament with a fundamental right contained in the Grondwet is at issue, courts will instead of reviewing it against the Grondwet resort to review against an equivalent provision in a human rights treaty, in particular the European Convention of Human Rights (ECHR) and its Protocols (but whenever the ECHR does not provide a relevant clause, also other human rights treaties). This practice is so widespread that courts resort to the ECHR and other human rights treaties even in cases in which there is no obstacle for judicial review against a fundamental rights provision in the Grondwet – for instance interpretation of an act of parliament in order to make it consistent with a national constitutional right or the review of lower ranking legislative acts – they do not do so, thus eclipsing the Grondwet.

---

7 This is based on case law of the Hoge Raad [Supreme Court] since its judgment of Mar. 3, 1919.
8 It is a point of controversy whether this applies in all cases or only in case of a directly effective provision of a treaty (or of a decision of an international organization based on a treaty) which has been approved with a qualified majority by parliament pursuant to Art. 91(3) Gw, which provides that in case a treaty deviates from De Grondwet it can only be approved by a majority of two thirds of the votes cast.
9 By way of example, we may point to the case law on family law which the Hoge Raad bases on Art. 8 ECHR to broaden provisions of the Civil Code and ‘invent’ rules to arrive at conformity to the ECHR, which it might, at least in a number of cases, just as well have based on Art. 10 Gw, which protects each person’s ‘personal sphere’ (which clearly also encompasses his family life). A recent
3 SCOPE OF THE PROHIBITION

Unlike what is sometimes suggested or assumed – particularly by foreign observers – there is no general prohibition for courts to review acts or omissions of public authorities against the Grondwet. Only acts of parliament (and treaties) cannot be reviewed. All other acts of public authorities can indeed be judicially reviewed against provisions of the Grondwet. So in this regard the prohibition must be understood restrictively. And indeed, before the entry into force of the ECHR and the International Covenant on Civil and Political Rights (ICCPR) for the Netherlands, the Netherlands Supreme Court, Hoge Raad, developed an elaborate case law on the freedom of expression under Article 7 of the Grondwet, mainly concerning municipal bye-laws and national executive legislation restricting this freedom (a line of case law which reflected, interestingly, important doctrines developed in the US Supreme Court’s First Amendment jurisprudence).

The prohibition is in another respect more extensive than Article 120 Grondwet may suggest. It speaks of the prohibition to review acts of parliament against the Grondwet (to judge their grondwettigheid), but the protection of acts of parliament is broader in as much as standard case law is that they cannot be reviewed against unwritten general legal principles, such as the principles of legal certainty or proportionality, either.\footnote{HR 14 april 1989, AB 1989, 207; NJ 1989, 469.}

All other forms of review by courts are allowed. Article 120 Grondwet in Dutch speaks literally of the prohibition ‘to enter into the judgment of’ (‘treedt niet in de beoordeling van’). This seems to prohibit all forms of assessment of the relevant issue of compatibility with provisions of the Grondwet. It is, however, established case law dating back to the nineteenth century that the interpretation of acts of parliament consistent with the provisions of the Grondwet – what the Germans refer to as verfassungskonforme Auslegung – is allowed.\footnote{HR 19 february 1858, Weekblad van het recht, nr 1936.} In one case, the Hoge Raad made clear that under Article 120 Grondwet it was not allowed to review an act of parliament, but nevertheless opened its judgment by stating that it did in fact find the act in conflict with what it called ‘the fundamental legal principle’ of legal certainty, although it found it was unable to attach any consequences to it as a consequence of Article 120 Grondwet; this makes clear that it found itself able to

\footnote{missed opportunity for the Hoge Raad (furthermore: HR) is its judgment of Sept.9 2011, LJN: BQ8097 (accessible through http://rechtspraak.nl), in which by referring to Art.8 ECHR only, it failed both to engage in an interpretation of the Dutch Data Protection Act in conformity with Art. 10 Gw and to reverse its position on the proportionality inherent in the fundamental rights provisions of De Grondwet (though implicitly asked to do so by Parliament when adopting the Halsema-initiative, mentioned below, at first reading).}

make this kind of ‘declaration of incompatibility’, as it would be called in the UK.13

4 SCOPE OF THE POWER TO REVIEW ACTS OF PARLIAMENT AGAINST TREATY PROVISIONS

The power to review acts of parliament against international provisions is limited to provisions ‘which can bind everyone’ (‘een ieder verbinden’). For all intents and purposes this refers to provisions which are ‘directly effective’ in the sense attributed to this term in EU law. Such provisions can, of course, concern any substance matter. These substance matters can range from the imposition of sanctions on individuals and legal persons to the priority of technical standards for the runways for aircraft established by ICAO. This does open up the national legal order to the multifarious effects of globalization. The constitutional meaning of this priority of international law, however, resides in the substance of human rights treaties providing for the protection of classic civil and political rights of individuals against governmental interference. Not only are they directly effective, but more importantly they concern the core of present-day understandings of constitutionalism. As a consequence, the power to review acts of parliament against human rights provisions contained in treaties provides the protection which national constitutions provide in countries with constitutional courts typical of the revolutionary continental European tradition; in the Netherlands the treaty provisions have become core constitutional provisions.

The model of judicial review of acts of parliament is decentralized: each and every court can review an act of parliament against such constitutional norms (of international origin), whereas in the European continental tradition normal courts are prohibited to engage in constitutional review because this adjudication is the privilege of the constitutional court or council. This broadly distributed power of review for ordinary courts means that constitutional review is far from absent: it is a widespread power of each and every court since they have begun making use of it, which is essentially since the early 1980s.

This should not mislead us, however, into thinking that the use made of these powers by courts is such as to constitute a form of absolute and unconditional judicial supremacy (a position that Kelsenian constitutional review bodies are supposed to avoid by being placed outside and above the trias politica).

The case law makes clear that in practice courts tend to be led by the European courts in Strasbourg and Luxembourg as to the intensity of their scrutiny, rather than taking the lead in overriding legislative choice at their own

A major consideration in the case law is the separation of powers, in particular the distinctiveness of the legislature and judiciary when legislative choices resting on policy considerations are concerned.

The extent to which the judiciary respects this aspect of the separation of powers, is illustrated by the judgment of the Hoge Raad of 19 October 1990 in which it was asked to interpret the Civil Code such as to allow same sex marriages by giving an injunction to the relevant officers to cooperate in the notification of an intended marriage and to marry the two persons involved. The ladies wishing to contract a marriage invoked the wording of the relevant provision of the Civil Code, which does not literally exclude the contracting of a marriage between persons of the same sex, and argued that not allowing such a marriage would conflict with Article 23 ICCPR and 12 ECHR as well as anti-discrimination clauses in human rights treaties and the Constitution. The Hoge Raad started out from the premise of its being bound by parliamentary legislation in light of possible literal interpretations of an act of parliament.

Even if later social developments would lend support to the view that the impossibility of a lawful marriage between two women or men would no longer be justified, this would not legitimize an interpretation which deviates from the unequivocal intent of the act of parliament.

As to the appeal to the ICCPR and ECHR the court reasoned in a manner which illustrates the extent to which it sails by the compass of Strasbourg:

In its judgment of 17 October 1986, the European Court of Human Rights has judged that Article 12 ECHR concerns the traditional marriage between persons of different sex. Different from what [appellants] argue, there is insufficient reason to interpret Article 12 ECHR in light of Articles 8 and 14 [ECHR] in a more ‘dynamic’ manner than the ECtHR has done. Since that Court has recently and clearly determined the scope of Article 12, the Hoge Raad is not at liberty to attribute a broader meaning to that treaty provision. Also Article 23 ICCPR must be assumed to concern traditional marriage between persons of different sexes.

The Hoge Raad did concede that certain legal consequences attributed to marriage which are not attributed to a lasting partnership between two persons of the same sex may be insufficiently justified. But this is not the issue in this litigation – an issue which as a rule can only be resolved by the legislature.

14 A recent example in which the Gerechtshof Den Haag [Appeals Court of The Hague] undertook a far-reaching scrutiny of national sanctions measures implementing Security Council Resolution 1737 on sanctions against Iran, under explicit reference to the Kadi judgment of the ECJ, Joined cases C-402/05 P and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 3 Sep. 2008, Reports of Cases 2008, I-06351), is Gerechtshof ’s-Gravenhage, 26 april 2011, LJN: BQ4781. It is hard to imagine a Dutch court having undertaken this review prior to the Kadi judgment.

A further separation of powers restriction of this form of judicial review concerns the sanction to which a review can lead. The language of Article 94 of the Grondwet makes clear that if a conflict is established, the sanction is the disapplication of the national legislative measure at issue. This sanction is distinct from the sanctioning power of constitutional courts elsewhere who do not merely decide on the applicability of a legislative act, but its validity. The Netherlands system concerns the Anwendungsvorrang of the treaty right, while the European continental form of constitutional adjudication is concerned with Geltungsvorrang.

We know, of course, that if a legal provision lends itself only to one single manner of application, its inapplicability in case of conflict with the higher norm is for all intents and purposes practically equivalent to its invalidity: there are no alternatives to its unlawful application, and as a consequence the norm can in no case by applied, which is the same with an invalid norm. Yet, the difference is one of principle.

More importantly, the court practice shows some signs of restraint in going beyond the mere disapplication in case a court concludes to the incompatibility of an act of parliament with an international fundamental right. If the mere disapplication of the national measure will not resolve the matter, courts may nevertheless revert to judicial lawmakering by means of analogous or extensive application of principles or rules contained in the legislation (as has sometimes been done in the sphere of family law in cases of incompatibility with 8 ECHR). But this will typically find a limit in cases in which judicial lawmakering could only be achieved by making significant policy choices which are not self-evident, or otherwise are best left to the legislature. Thus, courts test whether forms of judicial lawmakering (which usually take the shape of extensive, analogous, or teleological interpretation and application of the available legislative rules or legal framework) exceed such limits, and in case those limits are reached, they will abstain from disapplying the national norm and leave the resolution to the legislature.

Although there have been examples of politically controversial highest courts judging acts of parliament to be in conflict with fundamental rights, notably in a number of non-discrimination cases in which Article 26 ICCPR was used as standard of review, there are not a great many of these. Critical assessments can of course legitimately be made, because in nearly all cases informed persons can reasonably hold different opinions as to the compatibility of legislation with

---

[^16]: E.g., HR 1 Dec. 2000 LJN: AA8717 (resolving an unjustified restriction of Art. 8 ECHR by the rule of the civil code that only one curator can be appointed in cases where both parents want to have the care for a mentally handicapped adult son, by appointing both parents as curator, thus analogously applying the rules on common guardianship for parents over a child, does not exceed the limits to judicial lawmakering).
fundamental rights norms. Although no scientifically founded comparative empirical evidence is available, the impression is that the Dutch courts are less reticent when reviewing against international sources than the Scandinavian courts are when these review parliamentary legislation against national constitutional documents. Even so, in the opinion of Dutch constitutional scholarship, it would be an exaggeration to speak of overly activist, or simply activist, courts in this field, since it is argued that courts in the Netherlands take account of the limits pertaining to their position within the trias politica.

5 AMENDING THE PROHIBITION FOR COURTS TO REVIEW THE COMPATIBILITY OF ACTS OF PARLIAMENT WITH THE GRONDWET

What about the prohibition for courts to review acts of parliament in light of their power to review them against treaty provisions?

The prohibition we now find in Article 120 Grondwet has always had its critics, ever since its introduction in 1848. In the course of general constitutional revision leading to the 1983 version of the Grondwet, a series of preparatory and advisory bodies and committees proposed to allow the judicial review of acts of parliament against the civil and political rights contained in the Grondwet. Successive governments rejected this proposal, but some major political parties supported this form of judicial constitutional review. The major liberal party, VVD, was always against it with one very recent exception, but the Christian-Democrat parties that merged into the CDA were consistently in favour of precisely this type of judicial review – though they were to retract from this position by the early 1990s. The Labour Party (PvdA) was internally divided over the issue: the Lower House (Tweede Kamer) political group was initially – that is in the 1960s and 1970s also in favour of review against fundamental rights provisions, but its parliamentary group in the Upper House (Eerste Kamer) was against; by the end of 1980, however, also their group in the Tweede Kamer was against; also in later years, it remained divided over the issue. Politically, there was eventually no majority to abolish or restrict the prohibition of judicial review in the Grondwet of 1983, but

---


19 The matter was unsettled since the 1815 *De Grondwet* gave no indications on this point, but the assumption was that there was no judicial power to review acts of parliament.
the matter was not buried. In the early 1990s, respective governments or members thereof showed sympathy with judicial review of acts of parliament against the fundamental rights provisions of the Grondwet, but they did not pursue the issue, noticing that there was no parliamentary majority for any of the possible reforms.  

In 2002 a bill was proposed by a member of the Lower House, Ms Halsema, to extend Article 120 Grondwet with a second paragraph which allowed courts to disapply provisions of acts of parliament which conflict with fundamental rights provisions of the Grondwet. One major motive for introducing this bill was the fact that courts had the power of review under Article 94 Grondwet and had started to use their review powers.

The initiators of the bill considered it an ‘anomaly’ that courts can review acts of parliament against treaty provisions while not being able to review them against equivalent – even the more protective – provisions in the Grondwet. Clearly, this (by no means new) argument is neither here nor there, as it can simply be inversed, as was done by the eminent liberal constitutionalist P.J. Oud in his textbook of constitutional law in 1970: the power to review acts of parliament against international provisions is anomalous in light of the general prohibition for courts to review such acts. Moreover, the fact that there may be an argument for setting aside the judgment of parliament as regards international provisions in light of the uniform enforcement and application of such provisions, does not logically entail that that judgment should also be set aside when it concerns one’s own national constitution, in particular since none of the provision totally coincide – and even if they would, the juxtaposition of judicial and legislative power, courts and parliament, is neither incoherent nor inherently objectionable in democratic states under the rule of law.

Being as it may, the striking fact remains that the reason for introducing judicial review is viewed as a consequence of internationalization in its present form. Globalization is thus not so much a reason for extending review against international legal norms (that was after all already available since the 1950s), but for
extending review against the national constitutional provisions; globalization impacts locally.

It is questionable, however, whether the bill will actually lead to an amendment as desired by its promoters. The Grondwet can only be amended if it is adopted by two successive Lower Houses (an election must intervene) as well as two votes in the Upper House, while the second time (‘second reading’) a qualified majority is needed of two thirds of the votes cast in each of the Houses. At first reading – which requires a simple majority of the votes cast – the bill amending the Grondwet passed both in the Lower House and in the Upper House, and the bill is now pending its second reading. It should be noticed that already at first reading the political parties were divided both among and within themselves to such an extent that it becomes highly uncertain whether the bill could pass at second reading. Since the first reading both Houses have changed in their composition such that not even a simple majority might be available in either. At first reading in the Lower House, only the Christian-Democrats – from the 1970s until the early 1990s in favour of precisely this type of constitutional review – voted against. The liberal party VVD, traditionally against judicial constitutionality review, had hesitations concerning the decentralized model of review to which adoption of the amendment would lead, but as they considered this a temporary modality, they voted in favour. In the Upper House however, the VVD liberals voted against the bill. In the Upper House, Labour was divided on the merits but voted in favour for tactical reasons, thus leading to the narrowest possible majority vote of thirty-seven against thirty-six. In the newly composed Lower House of 2010, the Christian-Democrats will most probably be joined by the populist right wing party PVV of Wilders (strongly distrusting courts since he was prosecuted for briefly inciting to racial hatred, of which he was acquitted) in their resistance against the bill. Together they do not have a majority, but reportedly the VVD parliamentary group has reconsidered the matter and notified the original initiator that it would no longer support her bill, thus reverting to its traditional position on the matter.23 If this turns out to be true,24 this will mean the end of the attempts at reforming the prohibition of judicial review for the time being.25

---

23 This was the message communicated to the author by an adviser of Ms Halsema, saying that shortly before her departure as MP (January 2011) the VVD leader in the House told her of its retraction.
24 The formal position of the political group of the VVD in the Lower House is that the Bill is at the committee stage and that they are awaiting the answers by the initiators of the Bill before determining their position; email from the spokesman for the parliamentary group on behalf of Stef Blok, VVD leader in the Lower House, to this author (Sept. 29, 2010).
25 The parliamentary spokesman of the Christian-Democrats in the Upper House made clear that they would approach a centralized form of judicial review of acts of parliaments more favourably. Probably the VVD might also look upon that more favourably. This might take the form of a constitutional court, but perhaps it is more probable to revive proposals for a preliminary reference to the Hoge Raad, which would keep the system closer to its constitutional traditions than would otherwise be the case.
6 GLOBALIZATION: INTERNATIONAL AGENCY OR CONSTITUTIONAL ADJUDICATION

We can draw a number of conclusions and reflect on their meaning in the European constitutional context and the political mood of the moment.

International fundamental rights norms as found in human rights treaties have become sources of national constitutional law against which acts of parliament (and other acts of public authorities) are adjudicated by the courts in the Netherlands. This is the combined effect of the supra-legislative status and rank of such international norms and the prohibition for courts to review acts of parliament against the fundamental rights provisions of the Grondwet.

The fact that the prohibition judicially to review acts of parliament against the Grondwet, brings the Netherlands within the family of the British and Scandinavian constitutional traditions (as do some other constitutional features). The openness of the Netherlands legal order to international legal sources distinguishes it from these. Yet, the status of international human rights as sources of national constitutional law is not unique, neither within the British-Scandinavian family of constitutional law, nor in the European continental tradition. The UK has ‘brought home’ the ECHR in the Human Rights Act 1998, which also allocates powers to review against ECHR rights and issue declarations of incompatibility which do, however, not affect the validity of enforceability of the statutes; Norway has provided special status and rank to the ECHR in its Human Rights Act 1999; the Bundesverfassungsgericht has emphasized the special constitutional importance of the ECHR and ECtHR judgments for the interpretation of the provisions of the Grundgesetz itself.

International legal sources have, therefore, become national constitutional sources in European countries of quite different constitutional traditions. Constitutional adjudication can as a consequence no longer be narrowly conceived of as a matter of a constitutional court reviewing acts of public authorities against a national constitution as contained in a document with that name alone: national constitutional sources comprise international documents as the ECHR.

---

27 BVerfG, 2 BvR 1481/04 vom 14 Oct. 2004, Absatz-Nr. 32, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html; in English at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html: 'The text of the Convention and the case law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual’s fundamental rights under the Basic Law – and thus the Convention itself does not desire.' The ECHR (and ECtHR interpretations thereof) is itself, though, not a direct constitutional standard of review in the German legal system and not sufficient ground for a complaint of unconstitutionality (id.).
In attributing this national constitutional meaning to international treaties we can on the one hand acknowledge the truth in the catchphrase ‘the global is local’. At the same time, the paradox is not resolved into total congruity; the international and national are not fully commensurate.

In this it is very important that, at least in the Netherlands, the courts would seem to be engaging in the review of acts against internationally protected fundamental rights not primarily as acting on behalf of the international interest. Their activity reveals all the characteristics of true constitutional adjudication. There is no dédoublement fonctionnel in their activity if this expression were to mean that national courts are acting as international agents: they are not. Their mandate derives primarily from the national legal order, though supporters of notions of the ‘international constitutional law’ doctrine might think otherwise (though it must immediately be conceded that the rapid development of ‘access to courts’ notions has been strongly stimulated by Article 6 ECHR).

This state of affairs also has institutional implications. Constitutional adjudication in our present context is not restricted to Kelsen inspired centralized constitutional courts. As the Bundesverfassungsgericht pointed out in the judgment we referred to, all regular ‘German courts must observe and apply the Convention within the limits of methodically justifiable interpretation.’ So, constitutional adjudication becomes decentralized not only in the Netherlands but also in systems with centralized adjudication by constitutional courts. Clearly, this implies that such constitutional adjudication is not beyond but within the context of separation of powers of the trias politica. This imposes certain limits on the judiciary engaging in constitutional adjudication, of which courts seem to be aware.

This state of affairs explains a constitutional aspect of the populist resentment raging through some of the European states concerning courts and human rights, including the Netherlands and the UK. In the UK, the debate initially rallied around the issue of ‘external’ supervision exercised through the ECtHR in Strasbourg as it was articulated in Lord Hoffmann’s speech at the Judicial Studies Board and later writings. By now, the matter has escalated into serious talks of

---

28 Id.

29 Something similar happened, of course, in the context of EU law, first as a consequence of the ‘Simmenthal’ doctrine developed by the ECJ, but in some countries under the influence of the constitutional court’s restriction of its own jurisdiction, leaving it to the judiciary to determine compatibility with EU law. In the days before the development of solid EC/EU fundamental rights standards, this may be said rarely to have concerned substantive constitutional issues (though also on non-constitutional economic issues, the fact that the judiciary engaged in this review was of constitutional importance).

reform of the Human Rights Act 1998, so that also British courts would be restrained from ‘silly interpretations’ of human rights.\textsuperscript{31} In the Netherlands, the matter was fuelled by a two-page article in a serious national newspaper venting outrage at the manner in which far-fetched political judgments by a court which is ‘intolerant and strangles diversity’, and is ‘a serious infringement of democracy’.\textsuperscript{32} The matter reached the Netherlands Council of Ministers which adopted the text of a green paper of the minister of Foreign Affairs stating that the European Court of Human Rights ‘must not undermine its own authority by handing down judgments on cases that are only tangentially concerned with human rights. This can cause proliferation of case law and undermine support for the Court. It is important to prevent the Court from becoming an automatic fourth Court of Appeal for non-human rights-related cases’.\textsuperscript{33}

These phenomena are the translation of discontents among the constituencies on which political parties and even majorities rely, discontents which are also, if not the same, quite like the discontents of globalization. ‘Outside’ institutions such as the European Court of Human Rights (or sooner or later the European Court of Justice) easily become the object of facile criticism, precisely because they are outside, both in terms of being ‘abroad’ and hence ‘foreign’, and being ‘outside’ in the sense of not part of the democratic system.\textsuperscript{34} This touches at the core of the classic problems of constitutional democracy and constitutional adjudication, which are not amenable to definitive resolution. Being aware of the fact that the paradox of the ‘global’ and the ‘local’ is not resolved, keeps us alert to its effects when it comes to international and European norms becoming national constitutional norms as well.

\textsuperscript{31} A recent incident is that of the catfight over the Home Secretary’s statement at the Conservative Party Conference at the beginning of October 2011 that a court had declared that given his ownership of a cat, a Bolivian migrant’s human rights would be infringed if he were to be expelled. In reality, a judge sitting on the case jokingly responded to the person’s adding their joint possession of a cat as one of many other proofs of the enduring relationship with his girl friend, by saying that ‘the cat need no longer fear having to adapt to Bolivian mice’. Even British politicians are sometimes not very good at understanding jokes.

\textsuperscript{32} Thierry Baudet, Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie, in: NRC Handelsblad, 13–14 Nov. (2010), katern 2 p. 1-2. Unfortunately, the article is marred by a large number of errors of fact, but this did not prevent its having an impact among politicians.


\textsuperscript{34} For an attempt to defend the ECtHR, one which may not convince everyone in all respects, its president J.P. Costa, On the Legitimacy of the European Court of Human Rights’ Judgments, 7 European Constitutional L. Rev. 173 (2011).
Editor-in-Chief

Professor P J Birkinshaw
Institute of European Public Law
The University of Hull
Hull HU6 7RX
Tel: + (44) 01482 465742
Fax: + (44) 01482 466388
E-mail: P.J.Birkinshaw@hull.ac.uk

Editorial Committee

Professor David Freestone, Law School, University of Hull, Legal Adviser, World Bank
Professor Cosmo Graham, Law School, University of Leicester
Professor Stephen Tierney, Faculty of Law, University of Edinburgh
Professor Mads Andenas, Law School, University of Oslo
Professor Christopher McCrudden, Lincoln College, Oxford

International Editorial

Professor Jean-Bernard Auby, Professor of Public Law, Sciences Po Paris,
Director of the ‘Governance and Public Law’ Center
Professor John Bell, Faculty of Law, University of Cambridge
Professor Andrea Biondi, Co-Director, Centre for European Law, Kings College London
Professor Iain Cameron, University of Uppsala, Sweden
Professor Mario Chiti, Ordinario di Diritto Amministrativo, University of Florence
Roger Errera, Conseiller d’Etat (hon.)
Professor Walter van Gerven, Professor of Law, University of Leuven, formerly Avocat Général, Court of Justice of the European Communities
Professor Ian Harden, Professor of Public Law and Legal Adviser to the European Ombudsman, Strasbourg
Professor Jeffrey Jowell QC, Faculty of Laws, University College London
Lord Lester of Herne Hill, QC, President of Interights, Visiting Professor, University College London
Sven Norberg, former Judge of the EFTA Court and Director at DGIV in the European Commission
Professor David O’Keeffe, Emeritus Professor of European Law, University College London
Professor Dr Michael Potoc, Institute of Austrian and European Public Law, Vienna University of Economics and Business, Wien, Austria
Professor Tony Prosser, Professor of Public Law, Department of Law, University of Bristol
Professor Dr Jürgen Schwarze, Director, Institut für Öffentliches Recht, Albert-Ludwigs-Universität, Freiburg
Sir Stephen Sedley, formerly Lord Justice of Appeal, Court of Appeal of England and Wales, Royal Courts of Justice, London
Professor Cass Sunstein, Karl Llewellyn Distinguished Service Professor, University of Chicago Law School
Professor John Temple Lang, formerly Director, DGIV Competition, European Commission
Professor Dr Christiaan Timmermans, Erasmus University Rotterdam, former judge at the European Court of Justice
Yitzhak Zamir, Professor of Public Law, Dean of the Hebrew University of Jerusalem’s Faculty of Law, a former Attorney General of Israel and Judge in the Israeli Supreme Court
His Honour Mr Justice Gerard Hogan, Judge of the High Court of Ireland

Submission Guidelines

The Editors welcome scholarly articles in the area of European Public Law. The subject area is given a broad interpretation and includes EC Law and Public Law, the Public Law of European States and other jurisdictions where relevant, including those jurisdictions which have been influenced by European legal systems, and Comparative Public Law. No particular approach or methodology is favoured, but in order to ensure work of a high academic standard all articles will be refereed by assessors with established reputations in the subject area. Authors will normally have a definite response within two months of submission.

The Editor-in-Chief and his Board welcome all articles or expressions of interest from those who are preparing articles. Articles will normally be between 5,000 and 12,000 words long, double-spaced on A4 paper (or equivalent), with the manuscript to be accompanied by a diskette (IBM compatible) formatted following instructions provided by the publisher. The language of the publication is English, but authors are encouraged to write a headnote in both their own language, where this is not English, and in English for ease of reference.

Shorter articles of between 2,000 to 4,500 words in length are also invited for the "Scrutiny" section. These articles will also be refereed.

By submitting work authors are held to imply that it contains original unpublished material which is not being submitted for publication elsewhere. No liability can be accepted for loss or damage to material submitted.

Authors of feature articles may use the Harvard system of referencing if they so wish.

An address for delivery of proofs must be supplied. Proofs will be sent to authors who undertake to check them and return them to the Editor without delay.

Copyright in all pieces accepted for publication remains with the contributors, and the publishers acquire publication rights. If all, or any part of, a rapport or article is reproduced elsewhere, the author should acknowledge European Public Law as the original place of publication.

Editor-in-Chief
Professor Patrick Birkinshaw
Institute of European Public Law
University of Hull
Hull HU6 7RX
Tel: 01482 465742
Fax: 01482 466388
E-mail: P.J.Birkinshaw@hull.ac.uk

Book Review Editor
Dr Mike Varney
Institute of European Public Law
University of Hull
Hull HU6 7RX
Tel: 01482 465725
Fax: 01482 466388
E-mail: M.R.Varney@hull.ac.uk