

This article is published in a peer-reviewed section of the Utrecht Law Review

## The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All

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### 1. Introduction

This article outlines a set of mutually related hypotheses concerning constitutional adjudication in the context of globalization. They focus on how globalization, and Europeanization as a regional variant thereof, impact on constitutional adjudicatory functions of courts.

Central in this contribution is the hypothesis that the continental European model of constitutional adjudication is subject to changes due to the proliferation of constitutional law which goes with globalization. Whereas Americans have previously often thought that their model of constitutional adjudication – ‘judicial review’ – has been spreading in Europe and elsewhere in the world during the 20<sup>th</sup> century, the reality was of course that of a totally different model of constitutional adjudication being widely adopted in Europe: that of what one may call the ‘continental European Kelsenian model’ of constitutional adjudication.<sup>1,2</sup> This Kelsenian model<sup>3</sup> centralizes judicial review of the constitutionality

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1 For the American puzzlement at this reality, see J.E. Ferejohn, ‘Constitutional Review In The Global Context’, 2002 *NYU Journal of Legislation and Public Policy* 6, no. 1, pp. 49-59; A. Stone Sweet, ‘Why Europe Rejected American Judicial Review – And Why It May Not Matter’, 2003 *Michigan Law Review* 101, pp. 2744-2780.

2 ‘European continental constitutional tradition’ is a generalization based on a typology of comparative constitutional law that refers to certain historical and political commonalities, and which distinguishes the ideal types of ‘revolutionary’ and ‘evolutionary’ constitutional traditions. The former is dominant on the European continent, while the latter is represented largely by the UK, the Scandinavian countries, the Netherlands and the EU. On the extent to which this distinction is reflected in institutions of constitutional adjudication, see L.F.M. Besselink, ‘Constitutional Adjudication in the Era of Globalisation: the Netherlands in Comparative Perspective’, 2012 *European Public Law*, no. 2, pp. 231-245.

3 When using the adjective ‘Kelsenian’, I do not intend to suggest that Hans Kelsen himself would agree to the kind of analysis undertaken in this paper, not even with the particular assertions concerning the European continental model of constitutional adjudication. For some more precise articulations on institutional matters, see his *Wesen und Entwicklung der Staatsgerichtsbarkeit*, (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer; Heft 5), 1928/1929, and ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’, 1942 *The Journal of Politics* 4, no. 2, pp. 183-200. Kelsen himself had an important input in the design of the 1920 Austrian Constitution and on the first functioning specialized constitutional court in Europe, which was designed to arbitrate the competences between federal and *Land* government, but at his insistence acquired the competence to adjudicate the constitutionality of Acts of Parliament as well; see T. Öhlinger, *Die Bedeutung Hans Kelsens im Wandel*, <[http://www.demokratiezentrum.org/fileadmin/media/pdf/oehlinger\\_kelsen.pdf](http://www.demokratiezentrum.org/fileadmin/media/pdf/oehlinger_kelsen.pdf)> (last visited 8 March 2013). Perhaps also because Kelsen disliked to speak of ‘powers’ as this would taint the ‘Pure Law Theory’ he propagated (and hence fathered the Austrian constitutional provision which speaks not of ‘all power emanates from the people’ but of ‘all law emanates from the people’), he avoided in his academic legal studies to take a position on the actual position of constitutional adjudication in terms of institutions of the *trias politica*, as this was a matter of practical political choice, not of pure law; he was nevertheless adamant that a specialized constitutional court cannot legally be seen as being ‘above’ the legislature (or executive); his purely legal approach led him to discuss matters law only in terms of the competence to set norms and

of legislative and executive acts in a specialized constitutional court. Because these courts have as one of their main tasks to adjudicate the constitutional boundaries between the various branches of government, as a rule they stand outside the *trias politica*, while the judges of these courts are usually appointed by or with significant input from these three powers.<sup>4</sup>

This contribution hypothesizes that globalization, in the specific form in which it plays out in Europe, leads to a proliferation not only of constitutional law, but also of constitutional adjudication within national orders, which affects, if not undermines, the Kelsenian model. We focus on the institutional implications of the hypothesized changes.

This contribution takes the Netherlands as a case study which inspires and undergirds a number of the hypotheses put forward here.

The structure of this article is as follows.

After some preliminary remarks, we first explain how under the influence of Europeanization and internationalization the concept of what is ‘constitutional’ as in ‘constitutional law’, can no longer be defined by formal criteria only, but has become a more substantive notion encompassing European and international legal materials (Section 3). This proliferation of constitutional law is accompanied by a proliferation of constitutional adjudication beyond constitutional courts, as we can see happening in European countries (Section 4). Whereas constitutional courts were originally thought to be the ultimate arbitrator of constitutional issues, the new situation of dispersed constitutional adjudication changes this radically. It gives rise to various dynamics not only of dialogue but also of competition between courts (Section 5). So far, many studies have been devoted in this context to the dialogical relation between the European Court of Justice (ECJ) and national constitutional courts, but there are other dimensions as well. We focus on the issue of competition, which would seem logically to precede that of dialogue. Competition occurs in three contexts: between European courts (5.1), between European and national courts (5.2) and between national courts (5.3). For each we briefly indicate some recent developments that highlight aspects of competition.

The proliferation of constitutional adjudication to ordinary courts raises issues as to the institutional nature and composition of courts (Section 6). The particular institutional form of the centralized constitutional court was chosen in order to safeguard its legitimacy in the eyes of the other main constitutional organs, as is reflected in their constitutional position and composition (6.1). These institutional requirements are usually not met by ordinary courts, as we describe for the Dutch Council of State (*Raad van State*) and the Supreme Court of the Netherlands (*Hoge Raad*) (6.2).

Finally, we formulate and briefly discuss some more fundamental constitutional questions of democratic legitimacy (Section 7): the mandate at the basis of ‘constitutionalism beyond the state’ as it plays out within the state (7.1), the democratic and populist challenges to which courts which adjudicate it are exposed (7.2) and the implications for the (Dutch) highest courts (7.3).

As this paper is not merely intended for those readers interested in the case study of the Netherlands, and claims to formulate hypotheses independent thereof, Sections 3.2, 5.3 and 6.2 might be skipped by those who are in a hurry or for whom the case of the Netherlands is not a pressing concern. Nevertheless, whenever relevant and possible within the confines of this contribution, we place the various matters in a broader comparative perspective in order to lend support for the relative universalizability of the general hypotheses put forward.

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considered the power of a constitutional court as the power of ‘negative’ legislation. See for instance *Allgemeine Staatslehre*, 1925, p. 307, and pp. 255-261, as well as Chapter IV of *Wesen und Entwicklung der Staatsgerichtsbarkeit*, esp. pp. 54-57; for a political cue see his reply to C. Schmitt in *Wer soll der Hüter der Verfassung sein?*, 1929.

4 A standard work on the various forms and models of constitutional adjudication in a comparative perspective remains A.R. Brewer-Carías, *Judicial Review in Comparative Law*, 1989, though inevitably some of the treatments of national systems are somewhat outdated and miss some of the nuances a national expert might bring to it. Brewer-Carías’ sequel to this study, *Constitutional Protection of Human Rights in Latin America, A Comparative Study of Amparo Proceedings*, 2009, may be taken as a confirmation of the internationalization of constitutional adjudication, as it highlights the *amparo* proceedings in the context of international human rights protection in its regional form; it does not, however, thematize this point.

## 2. Preliminary points

Globalization and Europeanization are closely related. Europeanization, particularly within the framework of the European Union (EU) and the Council of Europe, can rightly be considered a form of globalization. The particularities of the European Union, and their legal and political contexts, however, also create differences with at least some expressions of globalization that are unrelated to European integration.

In particular, the development of the European Union is more strongly the product of political decision-making than certain other forms of globalization and their legal configurations, in particular those which are based on ‘informal’, non-public law or hybrid public/private configurations, for instance in the field of standardization.<sup>5</sup> Nevertheless, I have taken the liberty to consider Europeanization, both in the context of the EU and that of the Council of Europe, in particular the European Convention on Human Rights (ECHR), as instantiations of the broader phenomenon of globalization. After all, it is the hallmark of globalization that social and political action has gone beyond the boundaries and confines of the state, while the European Union provides the clearest example of the exercise of public power ‘beyond the state’.

In the Netherlands, the constitutional system makes no specific distinction between the legal status of European Union law, the ECHR and other treaty law (including decisions by international organizations based on treaties). This means, according to this author, that in principle, international forms of globalization do not have a different legal status from more specifically European forms of globalization.

Although there are no separate constitutional provisions on the European Union and its law, there is a considerable body of constitutional literature in the Netherlands that holds the – viewed from the totality of the constitutional law of the EU Member States – fairly unique view that national constitutional provisions on international law cannot determine the constitutional status of EU law, but only and exclusively EU law itself. This is considered to be a consequence of EU law’s ‘autonomous’ status – a position which is followed by the criminal chamber of the *Hoge Raad*, but which is controversial.<sup>6</sup> At any rate, the matter is of no great practical consequence, because the results of applying either the provisions of the Dutch Constitution, or merely the doctrines of the ECJ on the status and rank of various types of EU law, are identical.<sup>7</sup>

5 There are a number of larger research projects which have this phenomenon as a central theme or as an important component. Here we mention the *Global Administrative Law* project (see <<http://www.iilj.org/GAL/>>; as well as <<http://www.irpa.eu/en/category/gal-section/gal-publications/>>, last visited 8 March 2013), the INLAW project facilitated by the Hague Institute for the Internationalization of Law (see <<http://www.hiil.org/project/informal-international-law-making-and-accountability>>), the Amsterdam Project on The Architecture of Postnational Rulemaking (see <<http://arils.uva.nl/research/research-platforms/item/the-architecture-of-postnational-rulemaking.html>>, last visited 8 March 2013); from a specifically German perspective the project issuing in *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, A. von Bogdandy et al. (eds.), Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 210, 2010.

6 The Dutch Constitution (*Grondwet*), attributes priority to directly effective provisions of treaties and decisions of international organizations over any conflicting national provisions, including those of Acts of Parliament and (at least under certain circumstances) of the *Grondwet* itself; this follows from Art. 94 *Grondwet*. This provision was included precisely with a view to European integration in the 1950s; see among others, J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen*, 2004, p. 4. Further on this issue, L.F.M. Besselink et al., *De Nederlandse Grondwet en de Europese Unie*, 2002; on the case law of the *Hoge Raad*, ‘Het Allerzielen-arrest. Annotatie: Hoge Raad (HR), nr. C03/118HR, LJN: AO8913 (Civiel) en Hoge Raad (HR), nr. 00156/04 E, LJN: AR1797 (Strafkamer), arresten van 1 oktober 2004 en 2 november 2004’, 2005 *SEW Tijdschrift voor Europees en economisch recht*, 53, no. 7/8, pp. 336-339; on earlier constitutional aspects of the case law of the *Raad van State* (the Council of State), L.F.M. Besselink, ‘De zaak-Metten: de Grondwet voorbij’, 1996 *Nederlands Juristenblad* 71, no. 5, pp. 165-172, and L.F.M. Besselink [with the collaboration of Christoph R.A. Swaak], ‘The Netherlands Constitutional Law and European Integration’, 1996 *European Public Law* 2, no. 1, pp. 34-39.

7 In many European countries there is an increasing convergence emerging in the case law and literature on the status of EU law and other international law of constitutional substance. The effect of international and European law within domestic legal orders is no longer merely determined by the coordinates of monism and dualism. Although these concepts may still determine the rank of sources in certain cases of conflict between international and European law and national constitutional and statutory provisions, this in no way exhausts the effect of international and European law in the domestic legal order. For some of the relevant case law, see footnote 21 below. Among the recent literature, see G. Martinico & O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, 2010; G. Martinico & O. Pollicino, *The Interaction Between Europe’s Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, 2012; M. Novakovic (ed.), *Basic Concepts of Public International Law – Monism & Dualism*, 2013 (forthcoming); for a critical assessment of the arguments on interpretive incorporation techniques in the US in a common law comparative perspective, M.A. Waters, ‘Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties’, 2007 *Columbia Law Review* 107, pp. 628-705.

In the following, only public law phenomena are addressed. Although the relationship between public authority and private actors (and private authority) is indeed core constitutional business, it is not discussed here.

Finally, we focus on how certain phenomena of ‘globalization’, in particular also its regional variant of Europeanization, play out locally: ‘the global is local’. Although it may at first sight seem merely pragmatic to focus in this regard on the Netherlands, it will become clear that it provides a case study which lends itself exceptionally well to the purposes of this study, due to some of the particularities of its constitutional system. As we describe in greater detail below, the Netherlands does not have a centralized constitutional court with the monopoly to adjudicate the constitutionality of Acts of Parliament against the document which is called the ‘Constitution’ (*Grondwet*, literally: Basic Law), but *all* courts can adjudicate legislative and executive acts against directly effective international treaty norms and decisions of international organizations (including EU law), at least some of which have substantively constitutional importance and all of which have formal constitutional or even supra-constitutional status.

### **3. The local and the global: sources or substance**

**3.1.** The notion of ‘constitutionality’ has changed from being a category which is determined by its source, i.e. determined formally, to a substantive notion. It is no longer always the source which determines whether the matter is one of constitutional adjudication (i.e. the national constitution or norms directly related thereto or derived therefrom), but more and more the substance of the matter irrespective of the designation of its legal source.

Paradoxically, in the Netherlands this is historically a consequence of the formal status of both the *Grondwet* and the place it assigns to international norms. Since 1848 (confirming the earlier position), it provides that courts cannot adjudicate the compatibility of Acts of Parliament with the provisions of the *Grondwet* (Article 120 *Grondwet*).<sup>8</sup> Since 1953, however, all courts are allowed to review Acts of Parliament against directly effective provisions of treaties and of decisions of international organizations under public international law (Article 94 *Grondwet*). But only since the late 1980s, when courts began actively to review against treaty provisions, has it become clear that this concerns a form of constitutional review. I elaborate on this presently.

**3.2.** The most important fundamental rights issues adjudicated in the Netherlands are nowadays based on the ECHR and ICCPR (International Covenant on Civil and Political Rights) and related international instruments, while fewer and fewer are decided on the basis of the national constitutional provisions, even if these provide equivalent protection. Previously this could be explained by the fact that Acts of Parliament cannot be reviewed against provisions of the Dutch Constitution – this tendency to resort to treaty provisions instead of equivalent national constitutional provisions, due to the prohibition on using the latter as a standard of review, could be observed particularly since the 1980s. But this can no longer be the full explanation, since also in cases in which courts could have applied the technique of ‘consistent interpretation’ (which is certainly allowed if it concerns the interpretation of an Act of Parliament consistent with a provision of the *Grondwet*),<sup>9</sup> resort is had to treaty provisions instead of provisions of the *Grondwet*.<sup>10</sup> No doubt, mere habits slip into the practice. However, the scale at which the international fundamental rights provisions have eclipsed the fundamental rights found in the *Grondwet*

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8 This applies only to Acts of Parliament that apply to the country of the Netherlands within the Kingdom of the Netherlands. Under the constitutions of the countries of Aruba, Curaçao and Sint Maarten, which are autonomous countries within the Kingdom of the Netherlands located in the Caribbean, courts can indeed review Acts of Parliament against the constitutions of these countries; as regards Aruba and Curaçao they can be reviewed against the fundamental rights provisions of their respective constitutions, as regards Sint Maarten against any constitutional provision. The *Hoge Raad* in The Hague acts as the court of cassation for these islands, so in such cases it possesses the constitutional review powers in the cases indicated.

9 The *locus classicus* is HR 19 February 1858, *Weekblad van het recht*, no. 1936.

10 Clamorous examples exist in the field of privacy and family life, which are certainly covered by Art. 10 *Grondwet*, but also in cases which do not concern the assumed disapplication of Acts of Parliament (like the provisions of the Civil Code) and are rarely based on this provision, e.g. 9 September 2011, LJN:BQ8097 (accessible through <<http://rechtspraak.nl>>) concerning an interpretation of the Dutch Data Protection Act consistent with Art. 8 ECHR (which finds its equivalent in Art. 10 *Grondwet*).

may well mean that we have to understand this practice as an expression of what has become a 'legal culture'.

In this respect, the ECHR is used most frequently, but also other human rights treaties are invoked very often, in recent years mainly when it concerns fundamental rights which are not protected under the ECHR, such as provisions in the ICCPR and the International Convention on the Rights of the Child.<sup>11</sup>

The preference of Dutch courts for the ECHR rights over, at treaty level for instance, equivalent ICCPR, and over equivalent national constitutional rights in cases in which these lend themselves to judicial cognizance in certain cases, can be explained by the fact that it is interpreted by the European Court of Human Rights (ECtHR). The very elaborate case law on most ECHR provisions very often provides guidance for a great many cases with which a national court is confronted. This makes life easy for the courts which otherwise have to construct the abstract provisions in light of the specific circumstances of the case. In the case law of the *Hoge Raad*, it has been made clear that it considers itself under the obligation in its own case to comply strictly with the ECtHR interpretations. This national case law has been interpreted to mean that the *Hoge Raad* finds it has no discretion to extend a broader protection to an ECHR right than is accorded by the ECtHR to any particular ECHR right.<sup>12</sup> In this regard, the *Hoge Raad* holds on to the view that such extra protection is to be provided by the legislature, but not by the courts.

3.3. A consequence of reliance on international norms instead of national constitutional norms is that, as a matter of fact, the national constitution in a substantive sense encompasses international (and European) norms. This has various dimensions. Not only is the national legal order replenished with international norms and in that sense national constitutional law becomes international – and hence such norms may be within the remit of international supervision and adjudication – the international (and European) norms of a constitutional nature, like those on human rights, become national – and hence the object of fully national application, interpretation and adjudication. The movement is, so to say, in two directions simultaneously, from national to international and from international to national. This situation creates a national/international complex of constitutional norms within the range of a variety of courts, also at the national level. Given the decentralized nature of review against international norms, all courts in the Netherlands act as constitutional courts, disapplying national (or even international<sup>13</sup>) provisions if these are incompatible with what are substantively constitutional norms.

#### 4. The proliferation of constitutional adjudication

4.1. As the Netherlands reputedly has no constitutional adjudication in the traditional sense, one effect of the increased role of international fundamental rights law and European law, that is more visible elsewhere, would have remained somewhat obscured. This is the proliferation of constitutional adjudication beyond 'constitutional' courts, which in the continental European constitutional tradition, in accordance with the Kelsenian model, are courts exercising the monopoly of constitutional adjudication – a centralized,

11 This is by and large confirmed by a sample search in the database of the case law of the *Hoge Raad* and *Raad van State*, which are both courts of highest instance, although such figures should be used with some caution, due, for instance, to not always consistent abbreviation policies and some shortcomings in the possibilities of the publicly available search engine. The database is the case law at <<http://rechtspraak.nl>>. For the relevant period it publishes all case law of these two courts (and others). Limiting the search for the period of 03-01-2011 to 01-01-2012, to the search term 'EVRM' (i.e. ECHR) in the case law of the *Hoge Raad* yields 407 judgments as a result, whereas the search term 'IVBPR' (i.e. ICCPR) yields 41 judgments (the alternative search term 'verdrag inzake burgerrechten' (i.e. 'Convention on Civil Rights') yields 8 judgments). The same searches for the *Raad van State* yields 164 judgments for the ECHR (EVRM) while 'Convention on Civil ... Rights' (Verdrag inzake burgerrechten) yields 15 judgments (the alternative here is the abbreviation 'IVBPR' (ICCPR) which yields 9 judgments). The Convention on the Rights of the Child yields for the same period for the *Hoge Raad* 10 judgments with the search term 'IVRK' (ICRC) and 5 with the search term 'Rights of the Child'; and for the *Raad van State* 13 judgments with the search term 'IVRK' and 15 judgments with the search term 'Rights of the Child' (all referring to the Convention).

12 There are several judgments which illustrate this, but a classic one is HR 10 August 2001, *NJ* 2002, 278.

13 Courts are deemed competent to resolve conflicts between international norms, as a consequence of HR 10 November 1989, *NJ* 1990, 450, para. 3.4, in which it held that '[t]here is no rule, either (...) in the Constitution or any other rule of the (national) law of the Netherlands, which stands in the way for a Netherlands court to review whether a treaty (...) is in conflict with other treaties or other norms of public international law'. On the issue of the role of courts in reviewing the mutual compatibility of treaty obligations, see J.B. Mus, *Verdragsconflicten voor de Nederlandse rechter - Conflicts of Treaties in Dutch Courts* (with a summary in English), 1996.

extra-triadic model which was chosen to render legitimate the power to void acts of the legislature and to control the acts of the executive and the ordinary judicial power.

4.1.1. This model of centralized adjudication is undermined by EU law as a consequence of the *Simmenthal* revolution:<sup>14</sup> all courts must enforce EU law as superior norms, even if it concerns the setting aside of Acts of Parliament that otherwise is only allowed upon a judgment of the national constitutional court nullifying the act. The case law of the ECJ requires that every national court must set aside any rule of national law which may conflict with EU law. This includes not only the national rules which are themselves substantively in conflict with EU law, but also rules on judicial adjudication which have the effect of withholding from the national court the power to do everything necessary to set aside those national legislative provisions which might prevent Community rules from having full force and effect: these rules on judicial competence also have to be set aside. On ‘withholding’ such powers from national courts, *Simmenthal* is very explicit:

‘This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.’<sup>15</sup>

This ruling revolutionized national constitutional law and in particular constitutional adjudication, precisely on the point of taking away the monopoly of centralized constitutional courts to review the constitutionality of Acts of Parliament. It is true that here an important distinction is to be made between the *voiding* of national Acts of Parliament, and the *disapplication* of an Act of Parliament. The former remains the typical monopoly of a constitutional court, the latter is what is at stake in case of the resolution of a conflict between EU law and national law.<sup>16</sup> But since in continental European constitutional systems with centralized constitutional courts the purpose of the centralization is that courts (and executives) are subjected to legislation unless the constitutional court declares that legislation invalid, the net effect of the *Simmenthal* doctrine is its empowerment of all and any national court to review any kind of public acts, including Acts of Parliament.

Even in countries such as the UK (and Finland until the year 2000) where there was no constitutional court and normal and administrative courts are prohibited from reviewing Acts of Parliament against the national constitution or against any superior norm, courts have acquired powers of European judicial review of parliamentary acts. Where the powers of reviewing Acts of Parliament were restricted in deference to the legislature, such as Denmark and Sweden (presumably until 2011, but arguably still now), such strictures do not exist when the matter comes within the scope of EU law.<sup>17</sup>

Even in the Netherlands, where since the 1950s, exceptionally,<sup>18</sup> courts are allowed to review Acts of Parliament against directly effective treaty provisions and decisions of international organizations, *Simmenthal* clearly overturned the prohibition on reviewing Acts of Parliament against general legal principles, which the standing case law comprises under the prohibition on reviewing the constitutionality of Acts of Parliament:<sup>19</sup> courts must also review legislation within the scope of EU law against general principles of EU law. These general principles of EU law comprise principles of constitutional substance and significance. Until December 2009 (the entry into force of the Lisbon Treaty and the EU Fundamental

14 An analysis of its importance in the key of EU distrust of Member State constitutionalism is G. Davies, ‘The humiliation of the state as a constitutional tactic’, in F. Amtenbrink & P.A.J. van den Berg (eds.), *The Constitutional Integrity of the European Union*, 2010, p. 147 at pp. 159-162.

15 ECJ, Case 106/77, *Simmenthal*, [1978] ECR 629 at paragraphs 21-23.

16 See ECJ, case C-10/97, *IN.GO.CE*, [1998] ECR I-6307. On the effect of rulings of courts and constitutional courts cf. H. Kelsen, *Reine Rechtslehre*, revised edition of 1960, pp. 277-278.

17 See on this A. Follesdal & M. Wind (eds.), ‘Nordic Reluctance towards Judicial Review under Siege’, 2009 *Nordic Journal of Human Rights* 27, pp. 131-311.

18 The introduction of the judicial review of Acts of Parliament against international norms in what is now Art. 94 of the Dutch Constitution was viewed by the initiators of the constitutional amendment as an exception to the general prohibition of such a review in Art. 120 of the Constitution.

19 HR 14 April 1989, no. 13 822, *AB 1989/207, Harmonisatiewet*.

Rights Charter as primary EU law) they certainly comprised the full set of classic fundamental rights protected in EU law, and to this day it includes fundamental principles such as proportionality which must be observed by national legislatures and executives acting within the scope of EU law.

Setting aside national law if it is incompatible with EU law has become a competence of any and all national courts. To the extent that setting aside Acts of Parliament for reason of a conflict with EU law as superior law is understood to be a constitutional power, the net effect is that of a proliferation of constitutional adjudication. Certainly, some parts of EU law can also be considered in a more substantive ‘constitutional’ sense. Thus, Member State authorities acting within the scope of EU law are bound to observe classic fundamental rights as defined in Article 6 EU Treaty, as well as the constitutional market freedoms which have been fundamental to the EU since its inception as the EEC. Such is the power of national courts of any kind or rank that they are able to set aside Acts of Parliament that they deem to be in conflict with such constitutional norms. Constitutional adjudication within the scope of EU law is definitely decentralized.

4.1.2. This proliferation of constitutional adjudication also increases when other forms of European law, notably the ECHR, and possibly other international law, enjoy the kind of constitutional primacy which formally has so far only been claimed by EU law.<sup>20</sup>

The signs of such a tendency can be observed in the context of the ECHR. Even in traditionally dualist countries like Germany and Italy, in which, moreover, the constitutional courts make a distinction between EU law and other international treaty-based law, those same constitutional courts have begun judging that the ECHR and the ECtHR’s case law must be complied with by regular courts.<sup>21</sup> This restricts the remit of national constitutional courts’ jurisdiction in these fields and expands the powers of adjudication of the normal judiciary (and administrative courts) in matters which in a substantive sense can be considered constitutional in nature.

If these hypotheses on the proliferation of constitutional adjudication are correct, the model of decentralized constitutional adjudication, as we find it in the Netherlands, and on a more limited scale also in the UK<sup>22</sup> and the Scandinavian countries, heralds what may be in store for the countries in the European continental constitutional tradition.

## 5. Institutional dimensions of the proliferation of constitutional adjudication

The proliferation of constitutional adjudication can lead not only to forms of dialogue – the ‘happy’ side of it – but also to institutional competition, due to the overlapping jurisdiction of constitutional courts. Such competition can occur in three ways. Firstly, due to an overlap of jurisdiction between European courts, such as the ECJ and the ECtHR; secondly, an overlap across jurisdictions, such as between the ECJ and the national constitutional courts; and thirdly a jurisdictional overlap within national legal orders, such as can occur between constitutional courts and ordinary or administrative courts.

### 5.1. European courts versus European courts

Judicial competition is one possible key to understanding the intensive participation of the ECJ in the negotiations for accession to the ECHR. During the accession negotiations, the ECJ has made increasingly

20 See on this particular point most recently G. Martinico, ‘Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’, 2012 *European Journal of International Law* 23, no. 2, pp. 401–424.

21 E.g. BVerfG, 2 BvR 1481/04 of October 14, 2004, paragraphs No. (1-72); BVerfG, 2 BvR 2365/09 vom 4.5.2011; *Corte costituzionale* judgments nos. 348 and 349 of 2007. The *Corte costituzionale* has indicated in these judgments that legislation must be interpreted by lower national courts in conformity with the ECHR as interpreted by the ECtHR, but in case a conflict cannot be resolved in that manner, the matter is to be adjudicated by the Constitutional Court, which must give priority to the ECHR on the basis of Art. 117(1) Italian Constitution. This is different for EU law, which – briefly – is given direct effect on the basis of a constitutionally legitimated (Art. 11 It. Const) limitation of sovereignty by the creation of a separate legal order of the EU, which places it outside the national framework to which the jurisdiction of the *Corte costituzionale* is restricted. The restriction of regular courts’ competence to ECHR-consistent interpretation should not make us forget that this form of applying the ECHR may at least potentially have a more far-reaching effect than the mere disapplication might have, in as much as consistent interpretation may lead to the creation of new, judge-made law.

22 This regards the powers of courts under the Human Rights Act 1998, which however are somewhat more restrictive in this respect than the Dutch and the Scandinavian decentralized model.

stronger demands for securing what it called its 'prerogatives' within the EU system, at crucial moments in the negotiations and in an unprecedented manner.<sup>23</sup> In particular, it insisted on the inclusion of a new 'prior involvement' procedure, which makes the ECtHR competent to suspend the case before it in order for the ECJ to adjudicate the question of the compatibility of an EU act with the ECHR in case this matter has yet not been before the ECJ.<sup>24</sup>

This procedure clearly diverges from the system of judicial protection at the ECtHR, and does not seem to contribute to the protection of the rights of a plaintiff at the ECtHR. To the contrary, the ECJ itself has taken the position that this mechanism is legally required to protect what it calls its 'prerogative' within the EU legal order.<sup>25</sup> The need to preserve this prerogative hinges on two points, firstly the monopoly of the ECJ to adjudicate on the validity of EU acts, which is typical for constitutional courts, and secondly the monopoly to interpret EU law itself as guaranteed by the preliminary reference procedure (Articles 267 and 263 TFEU and its case law).

Under EU law, national courts of the highest instance must refer the case to the ECJ when it is necessary to decide the case (Article 267 TFEU) – an obligation reinforced under ECtHR case law as well as under national constitutional law in e.g. Germany, where the failure to refer a question to the ECJ is an infringement of Article 6 ECHR and national constitutional provisions (in Germany Article 101 *Grundgesetz*).<sup>26</sup> It is true that courts of lower instance are not under that obligation, and if no appeal is made or can be made against a refusal to refer, the matter will not reach the ECJ. But this is the case also in national legal systems in which, for instance, a right of *Verfassungsbeschwerde* or *amparo* is lacking and lower courts may fail to refer a case to the constitutional court, so that the national constitutional court is not heard on issues which reach the ECtHR, even though it is the national constitutional court's prerogative to adjudicate the validity of the national legislation or to decide on the interpretation of national law. But this has not been deemed sufficient reason to introduce a 'prior involvement' procedure for national constitutional courts. It is difficult to see what makes the ECJ so special in this regard.

A more likely explanation for the ECJ's demand for a 'prior involvement' procedure is the very language of the ECJ's 'prerogative.' The use of this word suggests that the ECJ fears that the ECtHR will tread on issues of EU law which it feels it should have unfettered discretion and full autonomy in deciding. In other words, it fears the ECtHR as a competitor in an area where an overlap of jurisdiction may arise.

## 5.2. European courts versus national constitutional courts

The story of the 'competition' between national constitutional courts and the ECJ has been well documented,<sup>27</sup> and seemed to have reached a kind of equilibrium in which national courts allowed the ECJ space for some of its claims to priority, while the ECJ allowed space for some of the most fundamental and cherished national constitutional values.<sup>28</sup> But this has not removed all frictions.

23 See for a more in-depth analysis of the process and the documents issued by the CJEU and its members (and the President of the ECtHR) and references to the further literature L.F.M. Besselink, 'Should the European Union Ratify the European Convention for Human Rights: Some Remarks on the Relations between the European Court of Human Rights and the European Court of Justice', in A. Follesdal et al. (eds.), *Constituting Europe: the European Court of Human Rights in a national, European and global context*, Cambridge Studies on Human Rights Conventions, 2013, pp. 301-333. For an evaluation of the CJEU's position in the accession negotiations, see also L.F.M. Besselink, 'Gevaarlijk spel: Machtenscheiding en de interventies van het Hof van Justitie bij de toetreding van de EU tot het EVRM', in J.H. Reestman et al. (eds.), *De regels en het spel. Opstellen over recht, filosofie, literatuur en geschiedenis aangeboden aan Tom Eijsbouts*, 2011, pp. 1-15, digitally retrievable at <<http://igitur-archive.library.uu.nl/law/2011-1116-200619/UUindex.html>> (last visited 8 March 2013).

24 Among others see also, A. Torres Perez, 'Too many voices? The prior involvement of the Court of Justice of the European Union', 2013 *European Journal of Human Rights*, forthcoming.

25 Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf)> (last visited 13 June 2012), at pp. 4-5, para. 8.

26 See e.g. *Schweighofer and others v. Austria* (Appl. Nos. 35673/97; 35674/97; 36082/97; 37579/97) Judgment (Third Section), 24 August 1999, not reported; *John v. Germany* (Appl. No. 15073/03) Judgment (Fifth Section), 13 February 2007, not reported; and for a refinement *Ullens De Schooten and Rezabek v. Belgium* (Appl. Nos. 3989/07 and 38353/07) Judgment (Second Section), 20 September 2011, not reported.

27 See the seminal study of M. Claes, *The national courts' mandate in the European Constitution*, 2006 (thesis Maastricht 2004); the French, Italian and German constitutional as well as administrative (and some of the ordinary) courts were among the protagonists counteracting the overriding effects of the supranationalist claims of the CJEU.

28 See for instance BVerfG in the famous *Bananas and Honeywell* judgments, and the Polish Constitutional Tribunal, Judgment of 16 Nov. 2011, SK 45/09, <[www.trybunal.gov.pl/eng/index.htm](http://www.trybunal.gov.pl/eng/index.htm)> (last visited 8 March 2013).



An instance of judicial competition can be read in the *Winner Wetten* judgment of the ECJ.<sup>29</sup> The case concerned the powers of a national constitutional court to resort to ‘prospective overruling’ in cases in which the disapplication of an Act of Parliament which is in conflict with directly effective EU law is temporarily suspended for the sake of legal certainty and in order to prevent a situation in which the legal void would negatively affect public interests.

In this judgment, the ECJ used language deriving from *Simmenthal II* and *Internationale Handelsgesellschaft* and actually suggested – quite contrary to the real situation in Germany as regards the *Bundesverfassungsgericht*’s understanding of the obligations to observe EU law under the *Grundgesetz* – that the national court should and could not be trusted to protect and apply EU law. The language used is in striking contrast with a nearly identical case in which the ECJ came to a solution without retrogression into the strictly hierarchical language of *Internationale Handelsgesellschaft* and *Simmenthal* in the case of *Filipiak*.<sup>30, 31</sup>

### 5.3. National constitutional courts and other courts and councils: the Netherlands

Also in the national context, the relationship between constitutional courts and regular courts, as well as administrative courts, is one which may become more competitive because more courts are dealing with constitutional issues.

Such matters are playing out in the context of classic issues of national constitutionality and EU law primacy, in as much as EU law makes normal courts and administrative courts competent where they are not competent as regards the adjudication of questions of national constitutionality. This is particularly the case when legal issues are concerned that play within the area where jurisdictions overlap, i.e. where an issue is both one of national constitutionality and of compatibility with EU law. France is a good example, witness the manner in which the issue of the normal courts’ obligation to refer *questions prioritaires de constitutionnalité* to the *Conseil constitutionnel* (introduced with the constitutional reform of 2008), and their simultaneous obligation to refer preliminary references directly to the ECJ, has become an instrument of a further deepening of the *guerre des juges*, in particular between the *Conseil constitutionnel* and both the ordinary and administrative courts.<sup>32</sup>

But competition may also arise independently of the route that leads via the ECJ. Within the Netherlands, which lacks a constitutional court of the continental European kind, the question whether it is the *Hoge Raad* (Supreme Court) or the *Raad van State* (Council of State) in its advisory capacity that can be considered the highest constitutional court, would seem no longer to be merely a matter of which of them can be a member of the Conference of European Constitutional Courts (CECC) (before both were barred from membership, initially resolved by taking it in turn). A whiff of competition seems to emerge as to who can be considered a ‘constitutional court’. The contours of these developments towards constitutional adjudication are sketched below, as well as the reasons why institutionally both might disqualify in terms of the continental European model of constitutional adjudication.

#### 5.3.1. Constitutional competition between the Raad van State and the Hoge Raad

Clearly, the *Raad van State* has been taking the stance of a potential constitutional court over the last few years; at times, it seems to present itself as an actual constitutional council endowed with the power of prior constitutionality review. It has made an effort to enhance its stance as a body of constitutional deliberation. Internally, there is now a ‘constitutional council’ (*constitutioneel beraad*) which – as far as is known to the public – is a meeting place for members of the Council to discuss and deliberate

29 Case C-409/06, *Winner Wetten*, [2010] ECR p. I-8015.

30 Case C 314/08, *Filipiak*, [2009] ECR p. I-11049. For a more detailed elaboration, see L.F.M. Besselink, ‘Respecting Constitutional Identity in the EU’, 2012 *CMLRev* 29, pp. 671-694, at pp. 689-693.

31 After this manuscript was closed, the Court handed down Case C-399/11, *Melloni*, a reference by the Spanish constitutional court, in which it does not allow national fundamental rights to provide more protection in the scope of the application of EU law than the EU Charter of Fundamental Rights, thus reasserting the primacy of EU law over constitutional law, including national fundamental rights. This shows that competition is also still rife in core constitutional fields.

32 See A Dyèvre, ‘The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Politics (but Were Afraid to Ask)’, in M. Claes et al. (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures*, 2012, pp. 309-322.

constitutional issues arising in the work of both the advisory and judicial branches of the Council.<sup>33</sup> It has initiated studies which suggest that the Council of State is the body par excellence to consider and decide issues of constitutionality *ex ante*. As the Council of State puts it on its website: 'Contrary to the situation in other countries, it is not usual that the judiciary reviews Acts of Parliament against the *Grondwet*. That is why the Advisory Branch [of the Council of State] undertakes this review.'<sup>34</sup> It concerns a form of *ex ante* quasi *abstrakte Normenkontrolle*.

Similarly, the Supreme Court is in the process of achieving a concentration of jurisdiction over important legal questions, which arguably includes questions of the compatibility of Acts of Parliament with fundamental rights, thus claiming a central role in *ex post* constitutional adjudication in potentially a large number of cases.<sup>35</sup>

In order to grasp this, it is first of all important to understand that in the Netherlands, civil courts are courts of general competence whenever no other court is competent to hear the case. Although it needs to be done carefully, it is not very difficult when an act of legislation is deemed to conflict with higher norms to construct a case in a manner which renders a civil court competent. Basically any issue in which the lawfulness of legislation is contested is in principle within the competence of a civil court, unless a specialized court (such as an administrative court) is competent. An administrative court is generally competent, somewhat too briefly summarized, when it concerns individual and concrete acts of a public authority. Administrative courts are not competent (and the civil court is indeed competent) when a remedy is sought consisting in a court order not to apply a legislative provision which conflicts with a higher norm in the absence of a concrete act of application, and if the case concerns a claim concerning the issuing of the legislative act.

The concentration of jurisdiction in the Supreme Court can result from the new Act on Referral of Preliminary Questions to the *Hoge Raad*, which entered into force in July 2012.<sup>36</sup> This Act can be read in line with similar proposals more exclusively aimed at legal uniformity in the interpretation of treaty provisions of the 1990s. The 1990s proposal was by the Minister of Justice in the framework of the reorganization of the judiciary, in parallel with a proposal to introduce the constitutional review of Acts of Parliament against provisions of the *Grondwet*. This time the initiative came from the *Hoge Raad* itself, again in the broader framework of a revision of the judiciary at the level of cassation in civil law cases. The committee of justices drafting the Report by the *Hoge Raad*, chaired by Justice Hammerstein, focused on the law-making role of the *Hoge Raad*.<sup>37</sup> The committee found it necessary '(...) that provisions be made, particularly for the civil division, to prevent cases involving legal issues on which a landmark judgment of the Supreme Court may reasonably be assumed to be required in the public interest, from failing to reach the Supreme Court or to reach it in time.'<sup>38</sup> In this context it called for 'studying the possibility of introducing a procedure that would enable the courts of fact to request the Supreme Court, in particular the civil division, for preliminary rulings. This would be another way in which cassation would become

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33 See the Introduction by the Vice-President of the *Raad van State*, Tjeenk Willink, in *Verslag van het symposium van de Raad van State op 25 mei 2010: Rol en betekenis van de Grondwet*, p. 8, who describes the role of the *Constitutioneel Beraad* as follows: '[It] has as a task to provide preliminary advisory opinions to the Raad both in its advisory and judicial functions, on questions which arise in those contexts as to the *Grondwet*, the national constitutional principles, the Charter for the Kingdom [*Statuut voor het Koninkrijk*, which regulates the relations between the countries of which the Kingdom is composed], the constitutional law of the EU, the ECHR and other human rights treaties. These preliminary opinions by the 'Constitutional Council' leaves the independent judgment of the *Raad* as advisor and the highest general administrative court completely intact, and has the exclusive purpose of contributing to an increased quality of its official advisory opinions and judgments. (...) The intention is somewhere in the future to publish the most important preliminary opinions of the Constitutional Council, so that they can contribute to the public and political debate on questions of a constitutional nature and thus gain an importance beyond that of the individual official advisory opinions or individual judgments [of the advisory and judicial branches of the Council of State]', *ibid.* pp. 14-15. Also, *ibid.* State Councillor Van Dijk, pp. 45-46.

34 <[http://www.raadvanstate.nl/onze\\_werkwijze/advisering/toetsingskader/juridische\\_toets/](http://www.raadvanstate.nl/onze_werkwijze/advisering/toetsingskader/juridische_toets/)> (last visited 8 March 2013).

35 On what follows, see M. de Visser, 'Veranderingen in de dialoog tussen Nederlandse rechters en het Hof van Justitie', 2012 *Tijdschrift voor constitutioneel recht*, pp. 249-280.

36 *Wet prejudiciële vragen aan de Hoge Raad*, *Staatsblad* 2012, 65.

37 Title in Dutch: 'Versterking van de cassatierechtspraak: Rapport van de commissie normstellende rol Hoge Raad, Den Haag, februari 2008'; available in English under the somewhat inaccurate title 'Improving cassation procedure: Report of the Hammerstein Committee on the Normative Role of the Supreme Court' of February 2008, at <[www.hogeraad.nl](http://www.hogeraad.nl)> or <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/default.aspx>>.

38 Report at p. 2.

possible for cases that at present either do not reach the Supreme Court or do not reach it in time', as it felt itself 'marginalized' if such questions would not reach it.<sup>39</sup>

The subsequently introduced legislation limits the proposal to 'mass claims'. It creates a preliminary reference procedure for cases which concern questions the answer to which is necessary

- 'a. for a multitude of claims based on the same or similar facts or proceed from the same or similar causes, or
- b. for the settlement or termination of numerous other conflicts caused by similar facts, in which the same question arises.'<sup>40</sup>

Such cases may very well concern important constitutional questions concerning the compatibility of Acts of Parliament and other governmental acts in the *Hoge Raad*. Thus, in the past there have been civil law cases brought against the State aiming to prohibit the deployment of cruise missiles in the Netherlands – a case raised by many thousands of citizens. This was fought in all three instances, with judgments which on points of constitutional law diverged greatly.<sup>41</sup> Many class actions have been entertained – albeit it not on this formal ground – involving constitutional issues. In future these constitutional cases will be the exclusive domain of the *Hoge Raad* should a court of lower instance refer them, as is to be expected.

Even without a multitude of actual litigants, it could be argued that the compatibility of a provision of an Act of parliament with an international human rights provision is by definition a question concerning 'numerous other conflicts caused by similar facts, in which the same question arises', particularly when such a provision means that the application of the relevant legislative provision is always (so not only in numerous but in *all* cases) in conflict with a prevailing fundamental rights norm. Such an interpretation is not artificial, since the understanding of the 'multitude of claims' or 'numerous conflicts' is that these criteria are satisfied when the *expectation* is that the same question arises in a significant number of similar cases, which need not to be actually pending or being brought. It is precisely this kind of interpretation – which may not be followed by the *Hoge Raad* as the first case referred to it under the new procedure is still pending at the time of writing – which would open the door to the *Hoge Raad* as a general constitutional court.

The centralization which the new preliminary reference procedure to the *Hoge Raad* creates, applies at this moment therefore, at least potentially, to the type of 'constitutional' disputes consisting in a complaint concerning the lawfulness of an act of legislation which conflicts with directly effective treaty law, such as the provisions of classic human rights treaties. In this respect the *Hoge Raad* exercises constitutional review, which takes the form of an *ex post* quasi-*abstrakte Normenkontrolle*.

Should in the future an abolition (however partial or total) of the prohibition of judicial review of Acts of Parliament be brought about,<sup>42</sup> the preliminary reference procedure would as a matter of fact be concentrated in the *Hoge Raad* to the extent that lower civil courts refer the matter under the new procedure. The situation would be very similar to that in the US (and in European countries such as Norway). This trend towards concentration can presently already occur in all instances of constitutional adjudication on the basis of the *Grondwet* in which no Act of Parliament is reviewed. And in all cases of constitutional adjudication against international and European standards, including the review of Acts of Parliament against directly effective law of international origin, the way to such centralization is now open.

39 Ibid. at p. 3, and p. 48.

40 Art. 392, in Dutch: '**1.** De rechter kan in de procedure op verzoek van een partij of ambtshalve de Hoge Raad een rechtsvraag stellen ter beantwoording bij wijze van prejudiciële beslissing, indien een antwoord op deze vraag nodig is om op de eis of het verzoek te beslissen en rechtstreeks van belang is: **a.** voor een veelheid aan vorderingsrechten die gegrond zijn op dezelfde of soortgelijke feiten en uit dezelfde of soortgelijke samenhangende oorzaken voortkomen, of **b.** voor de beslechting of beëindiging van talrijke andere uit soortgelijke feiten voortvloeiende geschillen, waarin dezelfde vraag zich voordoet.'

41 At first instance Rb. Den Haag, 20 May 1986, AB 1986, 445, 14,475 parties were applicants, in cassation HR 10 November 1989, NJ 1991, 248, with an unspecified number of appellants, but many thousands.

42 See on the pending constitutional amendment, which is at the moment less likely to pass the contribution by De Poorter in this issue, J.C.A. de Poorter, 'Constitutional Review in the Netherlands: A Joint Responsibility', 2013 *Utrecht Law Review* 9, no. 2, pp. 89-105.

## 6. Lack of institutional guarantees

Apart from the more substantive interest of legal certainty, the centralization within the Kelsenian model served at least two institutional interests, which touch upon the legitimacy of constitutional adjudication:

- a. the division and balance of powers between the legislature, the executive and the judiciary;
- b. the composition of constitutional courts.

Developments like those in the Netherlands that we sketch below (6.2) highlight the problems which the decentralized expansion of constitutional adjudication bring about in this regard.

**6.1.** The idea of a centralized constitutional court is to place it outside the *trias politica*, precisely because it has to supervise the constitutional boundaries between constitutional institutions, including those of the judiciary. This reflects institutionally in most continental European centralized constitutional courts being appointed by or with a significant say of all three branches in the appointment of that specialized court's members. Also, it needs to be a specialized court, in the sense that usually the members are required to have special expertise in the field of constitutional law in its various elements, which not unusually has a consequence that members are drawn also from academia.

Clearly, ordinary courts do not usually live up to the requirements for centralized constitutional courts.

**6.2.** This also applies to Dutch courts. Issues concerning the composition of the *Raad van State* and the *Hoge Raad* enter into the picture.

In this regard, the *Raad van State* has all the odds against it to be considered even potentially a constitutional court, even as regards *ex ante* review.

There may be substantive reasons which disqualify the *Raad van State* as a constitutional court. It has a mixed record in assessing the constitutionality of bills on which it gave its advisory opinion to the Government. It still happens that it expresses its view that the bill is constitutional by not raising constitutional issues, which is probably the worst justification for a bill's constitutionality.<sup>43</sup> It lacks a 'forum' function in which input can be given as concerns questions of constitutionality, as is mostly the case with *abstrakte Normenkontrolle* by formal constitutional courts. And it has, rightly, been criticized for its extreme literalism as an approach reserved for interpreting the *Grondwet*, also in cases of prime constitutional importance in a manner which was clearly not the intention of (recent) constitutional amendments.<sup>44</sup> One may, nevertheless, wonder whether such substantive objections should be decisive, since all bodies of constitutional interpretation, including well established constitutional courts, are liable to criticisms as to their procedures, including standing, and case law – academics derive part of their *raison d'être* from developing such criticisms.

43 See amongst others *Jaarverslag Raad van State 1995*, as referred to by Van Dijk in *Verslag van het symposium van de Raad van State op 25 mei 2010: Rol en betekenis van de Grondwet*, p. 33.

44 A striking example is an advisory opinion on the constitutional power to amend the *Grondwet*. The point at issue was Art. 137(4) *Grondwet*, which prescribes the dissolution of the Lower House after an amendment has been passed by a simple majority of the votes in a 'first reading' in both Houses of Parliament. Before 1995, both Houses of Parliament were dissolved and newly elected; but since 1995 only the Lower House. In the previous version the formulation of Art. 137(4) was explicit that 'the new Houses' had to deliberate on the amendment and could adopt it only with two thirds of the vote. Since 1995, the text reads that '[a]fter the new Lower House has assembled, the two Houses of the States General shall consider, at second reading', the amendment. In 2002 the Lower House sat for only eight months, due to a cabinet crisis. The 2002 Lower House was elected on the basis of Art. 137(4) *Grondwet*, but did not have enough time to decide on the then pending constitutional amendments (in part due to negligence on the part of the Government in introducing the amendments in a timely fashion in the 2002 Lower House). The question arose whether the Lower House subsequently elected in 2003 had the power to consider the amendment, or whether it had lapsed *ipso iure*. The *Raad van State* was consulted on the matter and gave as its opinion that although the 1995 version of Art. 137 *Grondwet* neither had the intention to change the rule that it had to be the newly elected House which had to decide on the amendment, nor had the makers of the Constitution had any intention to allow leaving it to a later House to decide under Art. 137 *Grondwet*. It found, nevertheless, that since the literal text did not explicitly exclude it, a later House was competent to decide – thus stating that an unintended literal interpretation prevailed over the intention of a recent constitutional revision (that of 1995). See on the matter, J. Peters, 'Een politiek advies', *Nederlands Juristenblad* 2004, no. 3, pp. 124-125; also, L.F.M. Besselink, 'Ongrondwettige grondwetswijzigingen', in W. Hins et al. (eds.), *Met Recht en Reede: Opstellen aangeboden aan mr. J.L. de Reede*, 2005, pp. 9-18.

From the point of view of the Kelsenian model of constitutional review, however, a major problem arises with regard to the composition of the *Raad van State*. Until 1 September 2010, members of the *Raad van State* were appointed by the Government on the basis of a confidential procedure of application, in which in practice specified persons were invited to apply. Since September 2010, it is compulsory to publish an advertisement for vacancies, which contains a description of the ‘profile’ of the candidates (advertising vacancies had already been the practice since 2006). The Council of State gives a recommendation concerning the candidate to be appointed, while once a year the Vice-President of the Council is to ‘consult’ with the Lower House (*Tweede Kamer*) over ‘the vacancies’ at least once a year, which is generally understood to be in general terms concerning the areas in which particular expertise is sought.<sup>45</sup> The Lower House has no formal powers concerning the person who is eventually appointed. The Government has recently emphasized that it is a governmental discretion to decide on the appointment and that in this matter the Government should follow its own independent judgment, resolutions or views from the Lower House notwithstanding. It stated that a simple majority in the Lower House cannot detract from that discretion.<sup>46</sup> So the Government may listen to Parliament in the course of the appointment of members of the Council of State, but there is no need to follow it. The National Ombudsman found that the appointment of the Vice-President per 1 February 2012 did not live up to the requirements of transparency, since it amounted to the Minister of Justice deciding himself among candidates, which candidate was to be appointed, after approval by the Council of Ministers, by Royal Decree.<sup>47</sup>

Finally, it must be pointed out that for members of the Council of State there is no legal requirement of any knowledge of constitutional law. This is true both for the members of the Advisory Branch and for those of the Judicial Branch.<sup>48</sup> Nevertheless, there is a memorandum, published on the website of the *Raad van State*, dated March 2011, which concerns the qualifications which have to be taken into account in the recruitment and selection of its members. It spells out that for the Advisory Branch, ‘given the importance of constitutional review, top specialists in constitutional law, European law and public international law must always be present among the members.’<sup>49</sup> Among members of the Judicial Branch, the author of the memo – presumably the Vice-President – explains that ‘judges of high level experience in the most important fields of national and European administrative law, and top experts in the fields of administrative law and national, European and international constitutional law’ must be among the members; individual members must have ‘insight in constitutional relations and principles.’<sup>50</sup> While the preconditions for attributing to itself the role of a constitutional council are legally absent, the internal policy aims to create them.

The members of the *Hoge Raad* are appointed by the Government on the basis of a proposal drawn up by the *Hoge Raad* itself and submitted to the Lower House of Parliament, which draws up the definitive nomination to the Government, which then appoints the judges by Royal Decree. In this respect the judicial, executive and legislative powers have at least in theory an input in the appointment. In practice, however, members are recruited on the basis of professional judicial qualities and experience as assessed by their peers, not because of their suitability in the eyes of Parliament or the executive, nor on the basis of any knowledge or expertise of either the Constitution or international human rights law – knowledge of constitutional law is again not a legal requirement for a member of the judiciary, and not for members of the *Hoge Raad* either, and political experience – considered of some importance in the context of

45 Cf. Letter of the Vice-President of the *Raad van State* to the Lower House, *Kamerstukken* 2009/10, 30 585, no. 27.

46 See the answer of the Minister of Justice to the Lower House, *Vergaderjaar* 2011/2012 *Aanhangsel van de Handelingen*, no. 3492; also *Kamerstukken* 2009/10, 30 858, no. E, p. 8.

47 Nationale Ombudsman, *Kroniek van een aangekondigde: Reflectie op transparantie bij politieke benoemingen*, [Chronicle of the person already called: a reflection on political appointments], February 2012, at p. 8.

48 *Besluit beroepsvereisten Raad van State*, Art. 1 in conjunction with Art. 2(4) *Wet op de Raad van State*: for members of the Advisory Branch there are no legal requirements, for the members of the Judicial Branch knowledge of constitutional law is optional.

49 *Notitie kwaliteiten waarmee rekening moet worden gehouden bij werving en selectie van staatsraden en staatsraden in buitengewone dienst*, March 2011, p. 2, retrievable at <[http://www.raadvanstate.nl/publicaties/publicaties/pdf/notitie\\_kwaliteiten.pdf](http://www.raadvanstate.nl/publicaties/publicaties/pdf/notitie_kwaliteiten.pdf)> (last visited 8 March 2013).

50 *Ibid.*, pp. 3 and 4.

constitutional adjudication – is in practice completely absent since the justices in the *Hoge Raad* are supposed to be regular court judges, merely officials within their own branch of government.<sup>51</sup>

There is a recent exception to the rule that the Lower House accepts the candidates proposed by the President of the *Hoge Raad*. This happened when one candidate was removed by the President of the *Hoge Raad* from an eligible place on the list of candidates as a consequence of objections, originally stemming from the populist PVV on which the minority coalition of the day was dependent, but eventually shared by a majority the relevant parliamentary committee (December 2011). The matter was kept behind closed doors in the parliamentary committee until a journalist revealed the story.<sup>52</sup> It led to two accusations that the *Hoge Raad* had given in to political pressure, while the Lower House was accused of political interference with the independence of the judiciary. This seems to confirm a lack of recognition of the constitutional and hence political nature of the position of the highest court of the ordinary judiciary, and of the institutional implications of this.

## 7. Political dimensions of constitutions and constitutional adjudication: globalization and its discontents

Globalization and its consequences for courts merit attention also in terms of the theme ‘of the powers of the courts and the powers of the people’ – an issue that touches upon aspects of what in the US has been called the ‘countermajoritarian difficulty’. It is not so much that a *querelles des juges* might worsen, but perhaps more importantly the legitimacy of constitutional adjudication may be at risk in a political context in which both European and national courts become targets of populist resentment. The backlash which the European Court of Human Rights is suffering may take relatively circumscribed forms, such as those of the critique of that institution by Lord Hoffman in a succession of public utterances,<sup>53</sup> but this has quickly spilt over in his own national political circle into a criticism of any *British* court interpreting and applying the European Convention on Human Rights. It is still food for thought when we read that once the UK had signed the ECHR and was soon the first in the docket for an alleged infringement of its rights in Cyprus, a British official began a minute he drafted by explaining that ‘the Council of Europe has perpetrated a Convention of Human Rights (...)’.<sup>54</sup>

### 7.1. Whence constitutional powers?

The Kelsenian constitutional court is devised to express the overarching role of the constitution to which all three powers of the *trias politica* are bound, and which delineates their mutual relations. This continental model of constitutional adjudication is based on the idea of a constitutive power on which the constitution depends, and that founds the constitutional order and the powers within it.

The new, substantive concept of ‘constitutional’ law, however, cannot easily be linked to this. The body of law incorporated in treaties, customary law, decisions of international organizations and conventional practices is not directly founded in an act of a *pouvoir constituant* in the classic sense, that is to say, a *pouvoir constituant* which somehow assumes the territorially determined ‘state’ as the political community which it designs, founds and carries. Of course, the foundation of the European Union in its original forms of the Coal and Steel, Atomic Energy and Economic Communities, together with the Council of Europe, took place at least in part within the framework of the idea of setting up a new order in (Western) Europe after the devastations of the World Wars, and the wars of the previous centuries. The founding fathers can be named, and their views were visionary. Yet, their idea was also to *overcome* the state and the tragedies it caused. The idea of ‘supranationalism’ was intended as a conscious overcoming of the nationalism of states.

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51 Art. 2 *Besluit rechterlijke ambtenaren*.

52 It can be found on the website of the national daily newspaper *NRC Handelsblad*, at <<http://www.nrc.nl/rechtenbestuur/2011/12/17/hoede-pvv-eeen-raadsheer-uit-de-hoge-raad-weerde/>> (last visited 8 March 2013).

53 E.g., <<http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009>> (last visited 8 March 2013). See also his Foreword in M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*, 2011, pp. 7-8.

54 See A.W.B. Simpson, *The European Convention of Human Rights and the End of Empire*, 2001, p. 13.

It is, of course, unclear whether this could still be the motivating power behind European integration for the original Member States and their populations. The last wave of accessions mainly involved Middle and Eastern European states, whose motives were indeed linked to doing away with authoritarianism and dictatorship, but not those of the First and Second World War. For these states and their populations, becoming part of Europe was becoming part of a tradition in which political government was to be in accordance with the preferences of the population of the state, not those of powers that dictated them for the people. For the new Middle and Eastern European Member States, after all, their contrasting experience involved at least to a significant extent the tacit or explicit *fiat* of powers residing elsewhere; for them regaining sovereignty was as central as it was to regain liberty. This is, at least on the surface of it, a different inspiration.

For broader global formations of governance, those of a more universal remit and particularly those legal configurations of a more limited ‘functional’ nature,<sup>55</sup> the inspirational motives are even more disparate. An international *legal* order can be conceived of within international relations. But the contours of that legal order can hardly be determined in terms of a political community sustained by its citizens, as is the idea with the legal orders of (democratic) states. Much rather the international legal order is still predominantly identified with the system of public international law as primarily sustained by states, even though individuals, other private parties and (minority) groups have an increasing role to play in it.

## 7.2. Courts and the people

The specialized nature of constitutional courts of the Kelsenian model implies a theoretical reconciliation beyond the inherent tension between legislature and judiciary, in as much as such a constitutional court is in a sense ‘above’ the constitutional institutions of the legislature and the judiciary, adjudicating their respective acts and mutual boundaries. It could therefore be considered not to stand inherently in tension with the democratic constitutional institutions, in particular with Parliament, as is the case for the judiciary.

This view is open to challenge. Indeed, the makers of the constitution provide for fundamental rules to govern the political system on a stable, long-term basis. This is in a sense different from the legislature, which legislates only for the duration of Parliament, i.e. until a new Parliament is elected. Yet, the constitution as a ‘living instrument’ is to function within time, not beyond it. Its interpretation needs to take account of this. It is here that it is unclear why the term of the justices sitting in a constitutional court, provide a better outlook than that of the members of the legislature. Although constitutional court justices in the continental European constitutional courts are not appointed for life and have a legitimacy which at least for some of them refer to that of the Parliament (or a chamber thereof) that appointed them, there remains a touch of constitutional professionalism which on the one hand saves them from the suspicion of being ‘political’, but which at the same time can be turned into the suspicion of lacking a democratic mandate of a strength equal to that of parliaments.

At any rate, whatever guarantees for the mandate of specialized constitutional courts and their judges may exist, these do not in equal manner exist for the normal judiciary. Its interpretation of the ‘constitutional’ norms are typically judicial ones, to which they are bound in the same manner as the legislature is, with the difference that it is not Parliament that has the last word on the meaning of the norms that bind them, but the judiciary, while it is the judiciary itself that interprets the rules to which the judiciary is bound.

Of course, the constitutional quality of the political culture plays an enormous role in moderating the risks which this tension between the legislature and the judiciary entails, as well as the ‘technical’ quality of the argumentation used in constitutional judgments.<sup>56</sup> Deference to the legislature may be part of counter-balancing and off-setting the disadvantages of decentralized constitutional adjudication as compared to centralized constitutional review.<sup>57</sup> But this does not altogether take away the greater

55 See the text at footnote 5 above and the materials mentioned in that footnote.

56 On this aspect see D. Grimm, ‘Constitutional Adjudication and Democracy’, 1999 *Israel Law Review* 33, pp. 193-215.

57 In Denmark and in Sweden until January 2011, the criterion was that Acts of Parliament could only be disapplied for reason of unconstitutionality in cases of a manifest conflict with constitutional provisions. In the Netherlands, there was a debate on the degree of

democratic challenge to which the normal judiciary as well as administrative courts engaging in constitutional adjudication are exposed to.

In short, neglecting the institutional consequences of the erosion of the Kelsenian model, so I hypothesize, may jeopardize the legitimacy of constitutional adjudication.

### **7.3. National courts and their mandate: national or international?**

This background increases the need to reflect on the position of national courts in a globalized context: is their mandate international, global and universal, or national and hence democratic (i.e. taking into account local preferences)? Is it an agent of a cosmopolitan and universal order of law or of a democratic political community?

National courts in the Netherlands, in particular the *Hoge Raad*, seem to consider themselves as having an international human rights mandate, just as they think of themselves as having a European mandate when adjudicating on the basis of the ECHR and EU law.<sup>58</sup> As the president of the *Hoge Raad* frequently puts it in his informal presentations at conferences and in public, the *Hoge Raad* is not, in French, *un court constitutionnel* but a *court conventionnel*, not a 'constitutional court' but a 'conventional court'.

The *Hoge Raad* emphasizes that this is so because the Dutch Constitution has given it that role.<sup>59</sup> This implies that this highest national court perceives itself as an agent of an international and European order, so ordered on the basis of the national constitution, thus expressing the composite nature of the constitutional order in which courts, in particular constitutional courts, are operating.<sup>60</sup>

When this court, however, would subsequently find reason in international or European law to overrule the national constitution itself, it would seem that this agency becomes constitutionally an international or European agent, which threatens to be at the expense of its particular national institutional origin. In a sense, the democratic mandate they could say they derive from the national constitution itself dissolves. Indeed, with regard to EU law it would seem that the criminal division of the *Hoge Raad* has in an *obiter dictum* precisely done that in a judgment we referred to above in Section 2. In this judgment it stated that EU law cannot derive any effect in national law from the provisions of the *Grondwet* (which were indubitably intended to render EU law effective within the national legal order), but only and exclusively from the founding treaties and cannot therefore be invoked in court in relevant cases.<sup>61</sup>

## **8. Conclusion**

For the purpose of this contribution, an important aspect of globalization is its essential feature of playing out locally. This is captured nicely in the phrase 'the global is local'. This justifies looking at particular national courts and national systems of adjudication in order to determine how 'the global' operates locally.

One feature is that globalization is hypothesized as implying a certain 'proliferation' of constitutional law beyond the single document notions prevalent in continental Europe (and the US and Latin America), and with it a proliferation of constitutional adjudication beyond the Kelsenian model of centralized special constitutional courts, which have predominated in continental Europe.

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deference which the courts, and especially the Supreme Court (*Hoge Raad*), owes to the legislature. This has remained largely unresolved and continues to attract controversy. See the contribution by Hans Gribnau in this issue, H. Gribnau, 'Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study', 2013 *Utrecht Law Review* 9, no. 2, pp. 52-74.

58 *Hoge Raad der Nederlanden, Verslag over 2009-2010* [Annual Report *Hoge Raad*]; available in English at <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/default.aspx>> (last visited 8 March 2013).

59 *Ibid.*, p. 7, rendered in English as follows: 'However, the courts have no alternative to monism for the time being. They have the constitutional task of applying international law in specific cases, even if that sometimes means excluding the application of national law. In this way the national courts also act as quasi-constitutional courts.'

60 See L.F.M. Besselink, *A Composite European Constitution*, 2007.

61 HR 2 November 2004, the so-called *All Souls* judgment; see for an analysis the literature cited in footnote 6 above.



It is precisely this proliferation that will make the American model of decentralized constitutional review by courts that are part of the judiciary more relevant to Europe than it has ever been. With it, the near perennial controversies which have accompanied American-style judicial review since *Marbury v. Madison* enter into the picture in the European context. But this happens in a context that is different from the American one.<sup>62</sup> The most eminent difference being the relative closure of the US towards international law and its relative aloofness from regional forms of legal cooperation and integration in the field of human rights and economic integration which are central to understanding the European constitutional development.

New questions arise. Among them is the need to reflect on the position of the national courts in a globalized context: are their institutional characteristics sufficiently bold to live up to the task of constitutional review, in light of their position as regular courts? Is their mandate international and global and universal, or national and hence democratic? Are national courts an agent of a cosmopolitan and universal order of law or of a democratic political community? How does this reflect on the manner they can and will take into account local preferences?

Such questions express the composite nature of the constitutional order in which constitutional adjudication takes places, an order which is no longer merely composed of national law from which it derives its original mandate, but increasingly so of regional, international and global law. It would seem that retaining the legitimacy of constitutional adjudication requires a delicate balance between the various parts of which the law is composed, and taking into account the democratic quality of the mandates of these various component parts.

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62 This is not to say that US courts are not confronted with globalization issues and the (substantively) constitutional aspects thereof. The Alien Tort Statute and similar instruments confront courts as the forum of global action and global law precisely on such fundamentally constitutional issues as human rights, and the US courts are a laboratory for issues involving private actors wielding public power. It is not, however, steered by public law actors as is the case in Europe, where European integration is a consequence of conscious political decision-making.