Constitutional Review by the Judiciary in the Netherlands

A Matter of Politics, Democracy or Compensating Strategy?

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Introduction

Constitutional review by the judiciary has become a firm feature of many legal systems since the watershed decision by the United States Supreme Court in *Marbury v. Madison* in 1803.[1] Courts across the globe are now regularly called upon to decide the constitutionality, and therefore the applicability or validity, of legislation. Constitutional review is clearly no longer the sole preserve of legislatures. As a matter of fact, many constitutions, especially since the Second World War, contain express provisions that empower the judiciary to effect such review as a safeguard against constitutional neglect or abuse by the legislature. It is then interesting to note that the Netherlands, a jurisdiction that is renowned for its human rights culture, is one of the last remaining European countries to still contain a constitutional provision that bars the judiciary from exercising constitutional review in respect of statutes (by which we mean acts of parliament).

This somewhat controversial position raises important questions and is at present being reconsidered by the Dutch legislature after the tabling in 2002 of a proposal to amend the Dutch Constitution. It is consequently the purpose of this contribution to evaluate the Dutch position in respect of constitutional review. This is done by first explaining the current system of constitutional review in the Netherlands, as well as the proposal to amend the Constitution together with the principal arguments usually advanced against allowing the judiciary to review the constitutionality of statutes. Finally, and most importantly, the possible merits of introducing such review in the Netherlands are considered.

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1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Cf. A. Brewer-Carias, Judicial Review in Comparative Law, 1989; M. Cappelletti, The Judicial Process in Comparative Perspective, 1989; A. Stone Sweet, Governing with Judges: Constitutional Politics in Europe, 2000.

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Constitutional Review by the Judiciary in the Netherlands Today

The debate regarding constitutional review by the judiciary in the Netherlands is an old, yet undecided, one. The uncertainty surrounding the topic has lead to the present situation that is somewhat complicated and contradictory, as we intend to show.

The Constitution of the Netherlands was adopted in 1814 and was revised on a number of occasions since then.[2] Importantly, the revision of 1848 saw constitutional review prohibited by section 115, which stated that "statutes are inviolable".[3] This provision was included at the insistence of the government at the time and was contrary to the opinion of the State Commission entrusted with revising the Constitution, as the latter favoured constitutional review by the judiciary.

Nonetheless, the prohibition became a standard feature of the Dutch Constitution, as J.R. Thorbecke, who chaired the State Commission and was a noted supporter of constitutional review, warned it would be.[4] As a matter of fact, it survived all constitutional revisions since 1848. However, its formulation was changed in the most recent revision in 1983, while not affecting its function. The prohibition is now included in section 120 and provides that "the constitutionality of statutes and treaties shall not be reviewed by the judiciary".[5]

Yet, it may not be deduced from the above that the Dutch judiciary may never review legislation for compatibility with higher norms. This is because the revision of the Constitution in 1953 recognised the power of the judiciary to review legislation for compatibility with treaties. Section 94 states in this regard that "legislative regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or in conflict with resolutions adopted by international institutions".[6]

When read together sections 94 and 120 lead to a rather peculiar situation. On the one hand the judiciary is barred from testing the constitutionality of statutes, but not from reviewing legislation enjoying a lesser status than statutes, as section 120 only applies to statutes in the sense of acts of parliament. For example, the judiciary may review delegated legislation (i.e. legislation not passed by the legislature) for compatibility with the Constitution, but not to the extent that the enabling statute is questioned.[7] Testing the constitutionality of delegated legislation

[2] Cf. J.W. Sap, The Netherlands Constitution 1848-1998. Historical Reflections, 2000.

[3] "De wetten zijn onschendbaar" in Dutch.

[4] J.R. Thorbecke, Bijdrage tot de herziening van de Grondwet, 1921, 60.

[5] "De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen" in Dutch.

[6] "Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties" in Dutch.

[7] M.L.P. van Houten, Meer zicht op wetgeving: rechterlijke toetsing van wetgeving aan de Grondwet en fundamentele rechtsbeginselen, 1997, 80-85.

may then not be used as an excuse to test the constitutionality of the legislation from which it stems. On the other hand however, the judiciary may on the basis of section 94 review all forms of legislation for compatibility with international treaties and resolutions. In practice this usually means that classical rights guaranteed in international treaties are applied, and not socio-economic rights bar a few exceptions, as the latter rights are usually judged to be not directly enforceable.[8]

This chequered situation has been the topic of much debate. Interestingly, a report drafted in 1966 by the Interior Ministry's Section for Constitutional Affairs recommended that the prohibition on constitutional review be partially lifted to allow the judiciary to test legislation in respect of the classical rights guaranteed in the Constitution.[9] It was felt that such rights provided their bearers with greater protection than rights guaranteed in international law, and therefore deserved the benefit of judicial protection – international law was seen as only providing minimum norms, and did therefore not protect the bearers of rights adequately.

The debate regarding the introduction of constitutional review by the judiciary gained momentum with the publication in 1969 of the second report of the State Commission called upon to render advice in respect of the Constitution (and the Electoral Law).[10] The State Commission considered the recommendation by the Interior Ministry's Section for Constitutional Affairs that the prohibition be partially lifted. It took note of the arguments commonly used against constitutional review. For example, the point was raised that constitutional review calls upon the judiciary to make political decisions, instead of entrusting this task to the legislature where it is normally considered to belong.[11] Furthermore, lifting the prohibition would potentially endanger judicial independence, as appointments to the bench could then become the object of political contestation and influence.[12] The point was also considered that judicial review of international treaties presented a different case altogether and could consequently not be used as a base from which to argue for constitutional review. This was founded on the argument that judicial review of international treaties was geared towards engendering respect for minimum norms across a variety of legal systems, whereas constitutional review was much "closer to home" as it were. In other words, constitutional review would amplify the role of the judiciary in the *trias politica* to an unacceptable extent, thereby encroaching on the domain preserved for the legislature. These arguments are very much in line with those that dominated the European continent after the French Revolution and that found favour with numerous Dutch academics, namely that good governance amounts to a clear and rigid separation of

[8] L. Prakke/J.L. de Reede/G.J.M. van der Wissen, Handboek van het Nederlandse staatsrecht, 14 ed., 2001, 238.

[9] Proeve van een nieuwe Grondwet, 1966.

[10] J.L.M.Th. Cals/A.M. Donner, Tweede Rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1969.

[11] Id. at 39.

[12] Id.

powers.[13] Which in this case means a separation between the legislature and judiciary – each to its own.

Nonetheless, the State Commission came to the conclusion, by 11 votes to 6, that constitutional review of classical rights had to be allowed. The point was made that such review was necessary to strengthen the position of the individual in relation to government. Classical rights were judged the proper vehicle for this, as their primary function lies in keeping government intrusion at bay when it comes to personal freedom. However, the successive governments of prime ministers De Jong and Den Uyl supported the minority of the State Commission in opposing the introduction of constitutional review by the judiciary. Political reluctance sealed the fate of reform, and as mentioned, the 1848 prohibition on constitutional review survived the 1983 constitutional revision, albeit with a different formulation.

This did not bring the debate to an end though. In 1988, the President of the District Court in The Hague, sitting in summary proceedings, gave a ruling in a case that achieved a large amount of attention.[14] The case related to three statutes on education, which were amended by the so-called Harmonisation Law. This statute retrospectively limited state funding for students. An application was brought requesting the Court not to apply the statute, as it violated the general principle of legal certainty. It was argued by the applicants that although section 120 prohibited constitutional review by the judiciary, it did not explicitly bar the judiciary from reviewing legislation against (unwritten) general legal principles not included in the Constitution – such as that of legal certainty *in casu*. The Court, however, rejected this argument. Section 120 could thus not be sidelined in this manner.

In addition, the applicants also averred that the Harmonisation Law violated the principle of legal certainty, as guaranteed in section 43(1) of the Statute of the Kingdom of the Netherlands of 1954. The Statute, which acts as a basic law, states that the Kingdom of the Netherlands is composed of three equal partners, namely the Netherlands, the Netherlands Antilles and Aruba. It is distinct to the Constitution, as the latter applies only to the Netherlands as such, and not to the Netherlands Antilles or Aruba. Moreover, the Statute is technically the highest law in the Netherlands. The Statute, however, in contrast to the Constitution, does not explicitly prohibit the judiciary from testing the constitutionality of statutes; neither does it explicitly empower the judiciary to effect such review. The Court judged the absence of a prohibition as reason enough to engage in constitutional review of the afore mentioned Harmonisation Law. It consequently held that the Harmonisation Law did indeed violate the students' rights when tested against the Statute and consequently refused to apply the offending provisions.

[13] Cf. Brewer-Carias, *supra* (note 1), at 252; Cappelletti, *supra* (note 1), at 193-194; C.W. van der Pot, Handboek van het Nederlandse staatsrecht, 6 ed., 1957, 112; P.J. Oud, Het constitutioneel recht van het Koninkrijk der Nederlanden, vol. 2, 2 ed., 1970, 13.

[14] Pres. District Court, 's Gravenhage, 11 August 1988. Nederlands Juristenblad 1988, 1031-1032.

The matter was eventually lodged with the Supreme Court of the Netherlands (Hoge Raad).

The Supreme Court joined the court *a quo* by noting that section 120 could not be interpreted to allow the judicial review of legislation against general legal principles.[15] Contrary to the District Court however, the Dutch Supreme Court took the view that the Constitution excluded any possibility of reviewing legislation in the light of any higher rule whatsoever, bar the exception of international law in section 94 of the Constitution of course. The Court also pointed out that, during the revision of the Constitution in 1983, the legislature discussed the question whether it was desirable to abolish the rule in section 120 prohibiting constitutional review by the judiciary, and that no fundamental objections had been raised against it. The Court went on to conclude that the rule prohibiting constitutional review by the judiciary, including extra-constitutional legal norms, was therefore entirely consistent with the "traditional position" occupied by the courts in the institutional structure of the Dutch state. The ultimate judgment on the meaning of the Constitution should accordingly be entrusted to the democratically-elected legislature. The Supreme Court noted though that the need for civil society to be protected against government increased since 1983, but that it was not for it to exceed its boundaries in this respect. In other words, positive law had to prevail, which meant upholding and applying the prohibition on constitutional review contained in section 120 of the Constitution.

The Supreme Court proceeded to overturn the finding by the court *a quo* that the Harmonisation Law could be tested against the guarantee of legal certainty contained in section 43(1) of the aforementioned Statute. The Court reasoned that although the Constitution contained an express bar to constitutional review by the judiciary, the absence of a similar provision in the Statute could not be interpreted as allowing judicial review by implication. The Court explained that such a turn of events would not accord with the intention embodied in the Statute, neither would it accord with the principle in the Kingdom of the Netherlands of avoiding the judicial review of compliance with constitutional documents. The prohibition on constitutional review by the judiciary in section 120 of the Constitution could thus not be outflanked by testing the contested legislation against the Statute instead.

This decision did revive the debate though in the Netherlands regarding constitutional review by the judiciary. In 1991 the Dutch government presented a policy note to, *inter alia*, the Supreme Court for its consideration.[16] The central question, according to the government, no longer revolved around whether constitutional review had to be introduced, but centred on the form that it had to take. The Supreme Court supported the idea of lifting the prohibition on constitutional review in respect of a number of, mostly classical, rights.[17] The Supreme Court also sup-

[15] Hoge Raad, 14 April 1989. E.M.H. Hirsch Ballin, De Harmonisatiewet: onschendbaarheid van de wet en schendbaarheid van het rechtszekerheidsbeginsel, 38 Ars Aequi (1989), 578.

[16] Nota inzake rechterlijke toetsing, 1991.

[17] Published in: 7 NJCM-bulletin (1992), 243.

ported the idea of deconcentrated judicial review, in other words empowering all judges to carry out constitutional review, instead of reserving this function for a few selected judges or a special constitutional court. However, differences of opinion led to the government not proposing a constitutional amendment.

The government in 1997 again asked the Supreme Court for its opinion on constitutional review, but again failed to act, and in 2002 submitted a policy note to the legislature.[18] This time noting that although much could be said against constitutional review by the judiciary, it nonetheless had a slight preference for the introduction of deconcentrated review. The timing largely coincided with the proposal to amend the Constitution tabled by Ms. Femke Halsema,[19] an opposition member of the Dutch legislature.

In order to amend the Dutch Constitution the proposal must pass two readings.[20] The first reading implies that both houses of the legislature accept the proposal, after which it is reconsidered after a general election. The proposal becomes a constitutional amendment if passed by a two-thirds majority in both houses. At the moment, the lower house of the legislature has accepted the proposal, and it is now being considered by the upper house, after which the first reading will be complete if also accepted by that house.

The exception will then enumerate the sections that are exempted from the prohibition. This will empower the judiciary to review statutes in respect of such exempted sections. The judiciary must then refuse to apply any legislation that violates the exempted sections – much as is currently the case where legislation is reviewed in respect of international law as provided for in section 94 of the Constitution.

The sections proposed for exemption were selected on the basis of their guaranteeing directly enforceable rights. Whether a section guarantees such a right was determined by investigating its formulation, context and legislative history. Almost all the sections contained in the first chapter of the Constitution, which is devoted to fundamental rights, were found to be reviewable and considered worthy of exemption. However, not all sections devoted to socio-economic matters were found to guarantee directly enforceable rights. For instance, section 22(1), which provides that "the authorities shall take steps to promote the health of the population", was not considered to be a directly enforceable right.[21] Sections beside those contained in chapter one were also considered, a number being found worthy of constitutional review.[22] For example, section 114 that provides that "capital punishment may not be imposed" was considered to contain an enforceable right.[23]

[18] Tweede Kamer vergaderjaar 2000-2001, 27, 460, no. 1.

[19] Tweede Kamer vergaderjaar 2001-2002, 28, 331, no. 2. Cf. Tweede Kamer vergaderjaar 2002-2003, 28, 331, no. 9.

[20] S. 137 of the Constitution.

[21] "De overheid treft maatregelen ter bevordering van de volksgezondheid" in Dutch.

[22] Ss. 54(1), (2)(a)-(b), 56, 99, 113(3), 114, 121, 129(1).

[23] "De doodstraf kan niet worden opgelegd" in Dutch.

The proposal also foresees deconcentrated constitutional review by the judiciary, as opposed to centralising such power. One of the main considerations driving this stance was the desire not to politicise the judiciary, as it was felt that centralising review would lead to such politicisation, whereas deconcentrating it would enhance judicial independence.

Although the proposal has passed a few hurdles to date, the question can be put as to its chances of success. Other reform initiatives requiring constitutional amendments floundered at relatively advanced stages, such as the proposal in 2005 to replace appointed mayors by elected mayors. Muted scepticism has then also been aired in legislative debates regarding constitutional review by the judiciary.[24] Sceptics in the Netherlands usually argue that constitutional review will essentially entrust the judiciary with political power, thereby confusing the separation of powers.[25] To this is then often added, most recently by C.B. Schutte, that constitutional review is to be the sole task of the legislature, as the democratically legitimated decision-making body of the state, because judges lack a democratic mandate and should therefore not participate in such review.[26] This essentially amounts to mistrusting the judiciary and instead preferring the legislature as the more reliable and accountable actor when it comes to constitutional matters.

These arguments, as they transpired through the years, form the crux of opposition to constitutional review by the judiciary in the Netherlands. Yet, what mileage do these arguments still enjoy when it comes to a modern democratic *Rechtsstaat* that values the protection of individual freedom? Can it still be said that ideal governance is synonymous with the strict separation of powers, or that entrusting constitutional review to the judiciary is anti-democratic?

The merit of these points will now be considered in order to determine their worth for the current debate in the Netherlands.

Constitutional Review and Democracy

The well-known American judge Learned Hand, although not an opponent of constitutional review by the judiciary as such, was only willing to advocate constitutional review in a very limited form: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I would miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined

[24] Tweede Kamer vergaderjaar 2003-2004, 28, 331, no. 11.

[25] Cf. A.H.M. Dölle/J.W.M. Engels, Constitutionele rechtspraak, 1989, 70-72.

[26] C.B. Schutte, De verwarring van rechtsstaat en rechtersstaat. Kanttekeningen bij constitutionele rechtspraak volgens het voorstel Halsema, Regelmaat (2004), 93, 95-96.

anything; but nevertheless when I go to the polls I have the satisfaction in the sense that we are all engaged in a common venture."[27]

Although this somewhat vague statement on the part of Learned Hand (who actually describes little more than a feeling) is open to a multitude of interpretations, the crux of his argument appears to be twofold. On the one hand he seems to believe that, as the influence exercised by the electorate on court decisions in constitutional matters will always be minimal, there should likewise be little scope for such decisions. He therefore takes the view that constitutional review at least lacks substantive democratic legitimacy. On the other hand, Learned Hand also appears to be claiming that it is unacceptable for the people to be governed by an organ which has not been elected by them. As a consequence, the personal democratic legitimacy of the judges is much less direct than that of the legislative delegates. In Learned Hand's comment two sides of the democratic coin, namely election and accountability, come together. According to this view, the most essential aspect of a democracy is that an elected organ respects the will of the majority of the people.

Another more recent but similar voice against constitutional review is that of the political and legal philosopher Jeremy Waldron, who argues that a scheme of majority rule decision-making by a legislature best accommodates the fact of disagreement in modern society. According to Waldron, since people disagree about what justice and the common good require, or even about which basic moral rights are to be protected in society, majority rule by the legislature enjoys unique authority in modern societies. To quote Waldron on this issue: "The circumstances under which people make judgments about issues like affirmative action, the legalization of abortion, the limits of free speech, the limits of the market, the proper extent of welfare provision, and the role of personal desert in economic justice are exactly those circumstances in which we would expect (…) that reasonable people would differ. (…) [T]he difficulty of these issues – and the multiplicity of intelligences and diversity of perspectives brought to bear on them – are sufficient to explain why reasonable people disagree."[28] And from this it follows that "the problems we face pose themselves urgently for us (…) in the circumstance of disagreement about what would be a just, a moral, or at any rate an appropriate solution. The appeal of majority-decision is that it not only solves the difficulty that this circumstance generates, but it does so in a respectful spirit (…)."[29]

Noting that disagreements about civil and political rights are often decided by constitutional courts, Waldron states that "[i]t is puzzling that some philosophers and jurists treat rights as though they were somehow beyond disagreement, as though they could be dealt with on a different plane – on the solemn plane of constitutional principle far above the hurly-burly of legislatures and political con-

[27] Learned Hand, The Bill of Rights, 1958, 73-74.

[28] J. Waldron, Law and Disagreement, 1999, 112-113.

[29] Id., 118.

troversy and disreputable procedures like voting".[30] As there is disagreement on what justice requires, rights can also not be treated as objectively known truths which can be tested impartially by judges. And this is not just the case because there is disagreement, but also because judges are, like elected politicians, not platonic guardians – i.e. people untouched by interest group pressures, prejudice or ideology. Of course, Waldron would acknowledge that the legislative majority is not always right, but neither are judges. Therefore, the real problem is that there is no impartial, objective method capable of telling us when a parliamentary or judicial judgement is right or wrong. Those who criticise a democratically enacted statute for violating some right are, according to Waldron, usually expressing a partisan view that has already been considered and rejected in the democratic arena. In other words, if we were to authorise judges to invalidate statutes that would in practice amount to authorising them to substitute the view of the majority for the opposing "partisan" view of the minority. By doing this, the principle would be violated that everyone should be accorded equal respect in the procedures by which decisions are made on behalf of the community.

Waldron thus claims that disagreements about civil and political rights should be settled democratically, by which he means by chosen legislators on the basis of majority vote. Legislation then enjoys some sort of privileged authority. Legislative majority decision-making thus respects individuals in two ways. First, it respects their differences of opinion about justice and the common good: it does not require anyone's sincerely held view to be played down or hidden because of the fancied importance of consensus. Second, because the legislature is, through elections, an organ of which we as the people form part. It thus embodies the principle of respect for each person in the processes by which we settle on a view to be adopted as ours even in the face of disagreement.[31] In other words, legislative majority rule counts each person's disagreements as important as well as it counts each person as equal. Could it be more democratic?

It is definitely a fact that the two aspects of democracy Learned Hand mentions, i.e. election and accountability (which by the way cannot be neatly separated from each other), are infringed in a most spectacular fashion when legislation is subjected to constitutional review by judges. It is also the case, as Waldron argues, that it would be awkward to give judges the power to strike down the acts of the legislature. Why would judges be in a better position to argue about rights than an elected legislature? However, the question arises as to whether this is all there is to say about constitutional review.

[30] Id., 12.
[31] Id., 109.

Law and Politics

In effect, the views expressed by Learned Hand and Waldron seem to fit in perfectly with a traditional concept of the *trias politica*, conceived of as the separation of powers, which is usually attributed to Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755).[32] It is supposed by many that Montesquieu advocated with this doctrine that state power be divided into a legislative, an executive and a judicial power and that these three should be kept separate.[33] As a result, each power would be vigilant that the other two powers remain within the bounds of their constitutional authority.

Behind this concept of the *trias politica* as separation of powers, lies a certain assumption regarding the distinction between law and politics; between applying law and creating law as constituting two separate spheres. As a result, judicial adjudication is supposed to be an emphatically non-political activity. The judiciary is expected to apply legislation objectively and impartially as it is passed by the legislature, as if it was some sort of robot. The enactment of legislation as such, on the other hand, is in its essence a political activity, since the legislature, as a democratically elected body, is not bound to seek the same degree of impartiality or neutrality as is incumbent on the judiciary.

However, the assumption that law and politics should and can always be divided is not a very convincing one. In the first place because it is remote from reality: a clear dividing line between the application and the creation of law can simply not be drawn. Secondly, it does not provide a satisfactory present-day picture of what the father of the *trias politica*, namely Montesquieu, sought to achieve.

In regard to the first point, one of the basic assumptions behind the notion that the courts have no creative role to play seems to be that the courts actually have a choice whether to be creative or not, and whether or not to use their potential discretionary powers. Any such claim is untenable in principle because, contrary to prevailing theories, the courts necessarily create law. Interpreting the law also inevitably entails creating it, for the reason that the law is to a certain extent indeterminate in both semantic and normative terms. The courts do engage in law creation, whether we approve of this or not. This means that courts will also make "political" decisions, since by creating law they direct society and impose rules on it. This is a political act, at least if we understand politics as "the authoritative allocation of values in a given society".[34] Those who deny this, confuse an institution's supremacy in law creation with its monopoly in this arena.

[32] Montesquieu, De l'esprit des lois, 1748, especially Section 6 of Book 11. An English translation can be found on: <www.constitution.org>.

[33] Cf. C. Eisenmann, La pensée constitutionnelle de Montesquieu, in: La pensée politique et constitutionnelle de Montesquieu: bicentenaire de L'esprit des lois 1748-1948, 1952, 133-160. Also critically on the idea of *trias politica* as separation of powers: I. Stewart, Montesquieu in England: His "Notes on England", with Commentary and Translation. On: <http://ouclf.iuscomp.org/articles/montesquieu.shtml>.

[34] D. Easton, The Political System, 1953, 129.

In regard to the second point, what Montesquieu desired was not so much the separation of powers. More than anything else, he focused on the principle of "moderate governance" (*gouvernement modéré*), whereby the exercise of power of each separate branch would proceed along different levels. Each of the branches could then keep the other branch sufficiently in balance to avoid arbitrariness and the excessive exercise of state power.[35] So ultimately what is at stake with the *trias politica* is whether adequate guarantees exist for the citizen against the use of excessive power. What is important is not so much the separation, but the balance of powers. Hence, arguments against constitutional review by the judiciary which are based on the separation of powers are not very useful.

Nevertheless, this does not paint the full picture. Significantly, these arguments run parallel to those that are used against the courts playing a creative role in the law-making process. However, constitutional review involves special considerations, since it enables the enactments of an elected legislature to be set aside. Constitutional review thus not only allows the popular will to be circumvented, as is the case where the ordinary courts engage in law creation, but also allows for it to be expressly set aside. Therefore, constitutional review by the judiciary comes close, in a very direct manner, to involving itself in legislative politics. This could prompt the view that, in exercising constitutional review, the courts risk venturing too far into the political arena. The ability for example to assess legislation in the light of the constitutionally guaranteed equality principle, as well as other rights and freedoms, constitutes an express invitation to assess the relevance and proportionality of the political decisions made by the legislature.

This is an argument which has some mileage in it. The question which must therefore be answered is not whether or not courts should be allowed to indulge in a political activity, but whether constitutional review involves the courts too much in politics. The answer to this question cannot be given in abstract terms, because in our view it will depend on the societal context in which constitutional review takes place. This observation goes some way towards invalidating the view of the Dutch Supreme Court, which, as was mentioned earlier in this article, found that a generally applicable prohibition on constitutional review was perfectly consistent with the traditional position occupied by the courts in the institutional system of the Netherlands. This type of abstract approach does not indicate an awareness that the arguments for and against constitutional review are to a large extent relational. This for us means that the question whether constitutional review is necessary or not depends at least to some extent on the manner in which the legislature and judiciary go about their business.

[35] W. Witteveen, Evenwicht van machten, 1991.

The Role of Constitutional Review in the Welfare State: A Relational Approach

It is precisely with this perspective in mind that there appear to be reasons for accepting that today's European welfare states at least provide sufficient scope for constitutional review by the judiciary. This can be illustrated by the fact that present-day courts are, almost involuntarily, having an increasingly important role assigned to them. To put it differently, it has become necessary for the courts to act as a kind of "Montesquiean" counterweight to an increasingly overbearing bureaucratic machinery.[36] This argument is then not surprisingly also advanced by Halsema in justifying her proposal to amend the Dutch Constitution to allow for constitutional review of statutes by the judiciary.[37]

In this context, it is first of all necessary to mention the increasingly intensive legislative and regulatory action on the part of the public authorities. Legislation in many European welfare states is viewed today mainly as an instrument of policy, and as a way of achieving change at social, economic and cultural levels. The rise of the welfare state, as well as various developments in the realms of science and technology, have even compelled the authorities to intervene. The latter thus have come to take on a more active role not only out of choice, but also out of dire necessity. The growth of legislation governing the environment, casual work, the multicultural society, new social risks or biotechnical developments are all the result of this trend. This situation has given rise to new and functionally defined legal disciplines such as consumer protection law, welfare law, education law, media law, public health law, IT law, etc.

It is important to note that this trend also has implications – as is the case virtually everywhere in the Western world – for the quality of the rule-making process. Social justice and technological developments, as well as the large number of detailed rules aimed at specific groups and situations which this entails, give rise to legislative complications. The need for policy-oriented legislation leads to complex chains of rules which usually come at the expense of quality, sound legislative technique and a systematic or coherent approach towards law-making. Instead, nowadays, welfare states have a system of legislation which is constantly evolving and has lost its stability, with all the dangers that this entails in terms of lack of coherence, uncertainties and contradictions. This could threaten the general applicability of legal rules and the equality principle. It is precisely this type of problem that the courts will often be called upon to resolve.

In regard the role of the legislature in this context, it is perhaps a truism to state that the latter also no longer corresponds to the ideal picture of representing the will of the people. It is increasingly the executive which lays down the rules, while the influence exerted by the elected delegates on the rule-making process dimin-

[36] Cf. Cappelletti, *supra* (note 1), at 11-24.

[37] Tweede Kamer vergaderjaar 2002-2003, 28, 331, no. 9.

ishes accordingly. Popular sovereignty is less and less represented exclusively in the legislature. Moreover, in the Netherlands – as is arguably also the case in many democracies – there is in fact a close relationship between the legislature and the executive, as the executive is dependent on the continued confidence of the governing majority in the legislature. This trend demands, in our view, that the role of the courts be reinforced. It is the latter, rather than the legislature, who are increasingly being called upon to assess the legality of state intervention, because the judiciary in this respect is perceived to be a more independent actor than the legislature. This is also related to the fact that, unlike the judiciary, the legislature wears two hats, being both a threat to fundamental rights and their guarantor. The legislature is not only called upon to enact legislation that can limit rights, but is also called upon to protect such rights at the same time. This dual function is a perfect breeding ground for tension and would do well with an additional check. Accordingly, it can even be argued that the judiciary has a certain advantage over the legislature when it comes to constitutional review.

Naturally the increasing demands being made on the courts have given rise to new problems – including those of an organisational nature. One needs only to consider the way in which the courts are being overloaded today. This is at the same time an expression of the fact that citizens and organisations do not appear to see other ways of channelling conflict than by calling upon the judiciary to act as referee. However, it is important to stress that this trend is almost inevitable because of the increasingly prominent dimension assumed by the "bureaucratic machinery" in our society. In these circumstances, it is essential to be able to turn to an independent judiciary.

In essence, what has happened is that the state has evolved from an institution guaranteeing that the law is upheld into what is potentially one of the greatest threats to exercising one's rights. This explains the increasing importance of judicial protection not only against the actions of the executive, but also against those of the legislature. To a considerable extent, the task of a constitutional court might fit in well with this perception: constitutional courts can thus act as referees in clashes of interests. They attempt to control or restrict the negative implications for the citizen caused by the increasingly active role assumed by the legislature.

Let us conclude this section with the following observations. Kortmann, the Dutch constitutional scholar, points out that it cannot be maintained on logical grounds that the courts should have the last word in assessing the constitutionality of legislation – for who in turn shall supervise the judiciary?[38] Why should courts be in a better position to assess the constitutional validity of legislation than the legislature? More particularly, who will protect us against unconstitutional decisions by the courts? This is an argument similar to that which is used, as we saw, by Waldron. But once again, it is impossible to reply to this question in abstract terms. It is definitely the case that the courts are not necessarily in a better position to review constitutional compliance, because that in turn depends on the manner in

[38] C.A.J.M. Kortmann, Constitutioneel recht, 2001, 357.

which they reach their judgments. However, it can at the same time not be maintained for the same logical reasons that it is the legislature that is in the best position to engage in constitutional review. Why should the legislature be trusted more than the judiciary when it comes to upholding fundamental constitutional values?

Other arguments will therefore have to be found to entrust this task to the judiciary or the legislature. It is at this point that it becomes possible to maintain that the judiciary can act as a counterweight against an overbearing legislature. This approach sits well with the perception of the *trias politica* that was set out earlier in this discussion. Thus, constitutional review can best be perceived as a compensating strategy, which can make good an imbalance when it arises in the relationship between the state and its citizens. Nevertheless, the judiciary remains bound by a certain degree of reticence, as it may only act in the wake of the legislature. Therein also resides an essential and permanent difference between these two bodies – the legislature takes the initiative, while the judiciary follows.

Whatever the case may be, the question whether the judiciary should be allowed to engage in constitutional review is posed incorrectly by the logic referred to above. The advantage that constitutional review entails, resides not only in the fact that the courts will possibly be better at performing such review – even though this may or may not be the case – but especially in the fact that constitutional review as such assumes a different, or in any case, an extra dimension. This is an attractive conception of the *trias politica*, as power is exercised over several levels, and as the exercise of power also becomes more visible when this route is followed. This then clearly gives rise to a system of weights and counterweights, checks and balances. As already pointed out, additional checks are not a superfluous luxury in our present time.

Constitutional review as such, finally, can also be regarded as a dialogue, in that a court ruling that declares a statute to be unconstitutional invites the legislature to re-examine the legislation in question. This implies that the underlying purpose of the statute is reviewed, which can act a stimulus for further democratic debate.

The foregoing discussion also rejects to a certain extent the Aristotelian argument that the "many" know more than the "few". In the *Politica*, Aristotle states that "the principle that the multitude ought to be supreme rather than the few is one that is maintained, and, though not free from difficulty, yet seems to contain an element of truth. For the many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively (…)."[39] This is an argument that is also used by Waldron against constitutional review by the judiciary, when he writes that "[w]hat lies behind this is the idea that a number of individuals may bring a diversity of perspectives to bear on the complex issues under consideration, and that they are capable of pooling these perspectives to come up with better decisions than any one of them could make on his own".[40] So Aristotle's conception ar-

[39] Politica. Book III, Chapter 11, 1281b (J.B. Jowett, in: J. Barness (ed.), 1984).

[40] Waldron, *supra* (note 28), at 137.

gues that the diversity of the perspectives presented by the multitude (which with respect to the theme discussed in this article might well be replaced by "legislators") gives rise to a kind of cumulative wisdom, the whole being greater than the sum of its parts. However, it must be pointed out that constitutional review by the judiciary is not intended to reduce the cumulative wisdom of the legislature, since the latter retains the ability to gather together and externalise its collective wisdom. All that is involved is that an additional check is placed on this collective wisdom through the medium of constitutional review by the judiciary. Because of this, the real issue at stake in the debate about constitutional review by the judiciary is not so much about denying democracy, but whether democracy in the Waldronian sense is willing to accept an additional check. Our suggestion is that this should indeed be the case.

To Conclude

Arguments for or against constitutional review of statutes by the judiciary cannot be given in abstract terms. Simply put, which institutions are entrusted with the power of constitutional review is a question that has different answers for different societies.[41] From this point of view, there is then in our opinion reason to believe that constitutional review by the judiciary is to be welcomed in European welfare states as an additional means, next to the legislature, of controlling burgeoning state power. Citizens deserve the added protection of judicial review of legislation when it comes to matters as important as their rights. This does not mean that the judiciary must necessarily take on a confrontational role, but it does mean that its voice must be added in deciding how to channel state power. This is also the case in the Netherlands, a modern society where the legislature would best serve those it represents by realising that a document as important as the Constitution deserves not only the benefit of legislative wisdom, but also of judicial wisdom. The introduction of full constitutional review by the judiciary, as proposed by Halsema, ought therefore to be embraced as a means of strengthening democracy, and not viewed as a move that would undermine parliamentary democracy in the Netherlands.

[41] Cf. T. Cristiano, Waldron on Law and Disagreement, 19 Law and Philosophy (2000), 513, 542.