

Editorial

Dutch Constitutional Law in a Globalizing World

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In an era of the ‘globalization of constitutional law’, characterized by trends such as a revival of formal constitution-making and the rise of constitutional review as a ‘must have’ for constitutional democracies, the case of the constitutional order of the Netherlands stands out. In an apparent contrast, the country is known for having a monist legal order that is open to external influences, yet is one of the last bulwarks to maintain a prohibition on constitutional review by the judiciary. This means that while the courts are prohibited from applying the Constitution to any Act of Parliament, they are enjoined to review every Act of Parliament for compatibility with provisions of international law that are ‘binding on everyone’. The doctrine of monism is so deeply rooted in the country’s legal culture that all national law, including the Constitution, is seen as being hierarchically inferior to international law.¹ This attachment to monism also explains why the Netherlands has not been confronted with constitutional headaches as to the relationship between (national) constitutional law and European Union law to the extent that many other European jurisdictions, such as the United Kingdom and Germany, have. After all, the stance that binding provisions of international law automatically – i.e. *as international law*, without further domestic implementation – become part of the Dutch legal order is well internalized. As ingrained as monism is to Dutch legal practice and culture, so too is the bar on constitutional review that has been present in the Constitution (*Grondwet*) ever since 1848, having survived every constitutional revision to date. This feature of the country’s constitutional law is as important to understanding the national legal order as monism is to understanding the country’s place in Europe and beyond. The bar on review is central to studying the role and nature of the Constitution, its interpretation as well as the relationship between the courts and the legislature.

Interestingly, not only the bar on constitutional review is regulated in the Constitution; so too is the doctrine of monism, providing both ‘golden rules’ with a constitutional foundation. While Article 120 of the Constitution prohibits the courts from ruling on the constitutionality of Acts of Parliament, Article 93 provides that provisions of treaties and of decisions by international organizations that can bind everyone in view of their content become binding after publication. Article 94 adds to this by codifying the position – pre-existing in unwritten constitutional law – that any legislation must be disappplied in

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1 M.C. Burkens et al., *Beginnelsen van de democratische rechtsstaat*, 2012, p. 91. The doctrine of the ‘automatic’ domestic effect of international law was laid down by the Dutch Supreme Court (*Hoge Raad*) in 1919 in *Grenstraktaat Aken*, HR 3 March 1919, *NJ* 1919, 317.

so far as such legislation conflicts with binding international law.² In recent years both the amendment or abolition of Article 120 and the desired scope of Article 94 have been the object of intense political and academic debate.³ This raises a number of questions, such as why the possibility of review has not been introduced to date and whether the Constitution is capable of being judicially reviewed. However, as the written Constitution is rather difficult to amend, change has to come from doctrine, practice and informal mechanisms. Building on previous publications about Dutch constitutional law in English,⁴ the contributions to this special issue of the *Utrecht Law Review* explore different facets of the paradox of an open constitutional order with a reluctance to make the Constitution as such judicially enforceable. The various articles provide insights into the national and international factors that influence the constitutional order of the Netherlands, thereby helping to test assumptions in the international literature regarding the universality of certain constitutional principles and mechanisms. The contributions were discussed during a workshop held at Tilburg University on 14 September 2012 and some contributions, such as those by Van der Schyff, Mak and De Poorter, are based in part on presentations delivered at the annual conference of the Association of Constitutional Law of the Netherlands that took place on 3 December 2010.⁵

Gerhard van der Schyff is the first author to tackle the evergreen problem of Dutch constitutional law as to whether constitutional review by the judiciary should be introduced or not. While the merits of this question have, and still are, hotly debated, little attention has been paid to whether the Constitution is also ripe for review should the prohibition on review in Article 120 of the Constitution be lifted or amended. Van der Schyff focuses in particular on the formulation of the various specific limitation provisions in the first chapter of the Constitution, its bill of rights, as most proposals to introduce constitutional review usually argue for a (partial) lifting of the ban with respect to applying fundamental rights. The view is defended that the current approach is not entirely adequate and that it should be remedied by introducing a general limitation provision that regulates not only the formal but also the substantive criteria in justifying interferences with the protective scopes of rights. In this regard the report in 2010 by the State Commission on Constitutional Reform (*Staatscommissie Grondwet*) is supported in the contribution, albeit in a qualified manner, as disagreement exists as to the optimal formulation of such a general provision to ensure a meaningful dialogue between the legislature and the courts in deciding on the acceptable extent to which rights may be limited.⁶

While Van der Schyff focuses on the implications of following the global trend to introduce constitutional review by the judiciary, Leonard Besselink explores how Europeanization, as a subspecies of globalization, affects the conduct and organization of judicial review in the Netherlands. Given the effect of Article 94 of the Constitution, which regulates treaty review, and the fact that the courts in the Netherlands apply European Union law on account of the law's inherent monism, the important question is posed as to what the real mandate of courts in the country is. Do the courts in the Netherlands enjoy a national, international or European mandate, and to what extent do they possess these different mandates?⁷ The contribution shows that the role of the courts in a legal system such as that in the Netherlands can in essence undermine a national democratic mandate by overruling or refusing to apply the Constitution

2 For an overview of the position in terms of Arts. 120 and 94 of the Constitution, see J. Uzman, 'The Dutch Supreme Court: A Reluctant Positive Legislator', in A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators: A Comparative Law Study*, 2011, p. 645.

3 For the most recent legislative proposal to amend the bar in Art. 120 of the Constitution, see *Kamerstukken II*, 2001/02, 28 331, no. 2. The bill is commonly referred to as the 'Halsema bill', in recognition of Femke Halsema, the Member of Parliament who tabled the bill.

4 See e.g., C. Ryngaert, 'The Role of Human Rights in the Dutch Legal Order', in R. Arnold (ed.), *The Universalism of Human Rights*, 16 *IUS Gentium*, 2012, p. 237; L.F.M. Besselink, *Constitutional Law of the Netherlands*, 2004; C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *The Kingdom of the Netherlands: An Introduction to Dutch Constitutional Law*, 2007; G. van der Schyff, 'Constitutional review by the judiciary in the Netherlands: A bridge too far?', 2010 *German Law Journal* 11, pp. 275-290; M. Adams & G. van der Schyff, 'Constitutional review by the judiciary in the Netherlands: A matter of politics, democracy or compensating strategy?', 2006 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 66, p. 399; G. van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, The Netherlands and South Africa*, 2010.

5 For a collection of the proceedings in Dutch, see A. Kristic et al. (eds.), *Functie en betekenis van de Grondwet: een dialogisch perspectief*, 2011.

6 *Rapport Staatscommissie Grondwet*, 2010.

7 On the topic of courts' mandates, see also M. Claes, *The National Courts' Mandates in the European Constitution*, 2006.

in giving effect to superior supranational legal norms, raising a host of questions. Besselink also shows that the requirements of the European constitutional constellation are such that ordinary national courts increasingly fulfil a decidedly constitutional role, even though courts such as the Supreme Court (*Hoge Raad*) and the Council of State (*Raad van State*) in the Netherlands do not qualify as typical constitutional benches on a traditional reading. Extrapolating the experience of the Netherlands, or rather putting the Dutch case forward as evidence, the general claim is also defended that the centralized organization of constitutional review, which is so typical of many European jurisdictions, is increasingly coming under pressure given the necessary decentralized elements that are occasioned by the fact that EU law requires all courts to give effect to the primacy of such law.

Globalization obviously has many faces. While Besselink focuses on how Europeanization impacts on the mandate of national courts, Elaine Mak explores the equally important question of courts, across jurisdictions, learning from each other by comparing points of law.⁸ Courts in many civil law systems have traditionally been wary of comparison, probably because of the fact that the law as a codified source encouraged its application to be viewed as an exercise in syllogism and deduction and not so much as something that is also influenced and shaped by judicial interpretation. In her contribution, Mak notes that such an insular and technical attitude is increasingly something of the past because of the influence of globalization. She examines the changing practices of the highest courts in the Netherlands, in particular the Supreme Court and the Council of State in this regard. On the basis of an empirical study she clarifies how Dutch judges perceive the usefulness of legal comparison and how foreign law is used in deliberations and judgments. The constitutional implications of the changing practices of the courts are also analyzed in light of three aspects of the constitutional normative framework for judicial decision-making, namely the democratic justification of judicial decisions, legal traditions and the nature of cases as well as the effectiveness and efficiency of judicial decision-making. The contribution concludes by highlighting legal comparison as a source of legal interpretation in the Netherlands, but based only on the persuasive nature of foreign material, while still respecting Dutch law as the primary basis for court rulings.

Globalization is by its very nature not self-contained, as the concept's very existence depends on the interaction or even the merger of various components to form a global approach or entity. The contribution of Hans Gribnau nicely illustrates the global effect on the local in this respect. Gribnau investigates the consequence of the bar on the constitutional review of Acts of Parliament by the judiciary in Article 120 of the Constitution using equality in tax law as a case study. Gribnau illustrates the phenomenon that because of this bar, the courts turn to international law and in particular Article 26 of the International Covenant on Civil and Political Rights in ensuring that tax law is administered on a basis that respects equality. Equality, in tax law cases in the Netherlands, is an international value that is protected by the national courts, at the expense even of constitutional guarantees of equality one might be tempted to conclude. Although international law might be a source for equal protection, Gribnau's analysis of the case law shows that the courts in the country are at times too reticent in giving full effect to equality as a norm of higher law.⁹ At times the courts only point to a protection deficit, while refusing to order a legal remedy, or only warn the state that the courts will undertake remedial action if the state does not protect equality in a more substantive sense. While globalization creates an opportunity to turn to the international legal order to solve a national problem, the distance perceived by the national courts from such international norms might fuel an, at times, unnecessary reticence in protecting a value such as equality.

The role that treaty review in Article 94 of the Constitution plays as a means through which to compensate the bar on constitutional review in Article 120 is also to be found in the contribution of Nick Efthymiou and Joke de Wit. While Hans Gribnau, although not uncritical, lauds the Supreme Court

8 Compare also E. Mak, 'Why do Dutch and UK Judges Cite Foreign Law?', 2011 *Cambridge Law Journal* 70, p. 420.

9 In this regard, see Gribnau's reference to HR (Supreme Court) 12 July 2002, BNB 2002/399-400, among cases.

for protecting equality via the international law route and advocates an attitude which is even more open to such influence, Efthymiou and De Wit show that political winds question and even threaten the open character of the Constitution of the Netherlands to international law. Academic voices calling for national courts to fulfil a greater role in treaty review by taking ownership of the norms that they apply, are matched by calls from some Members of Parliament calling for the country's monist disposition to international law to be traded in for dualism.¹⁰ In other words, international norms should in the dualist view first be incorporated into national law through an Act of Parliament before the courts are competent to apply such norms, much like the position in Germany and the United Kingdom. Were this to happen, a consequence would be to place a national parliamentary check on the effect to be given to international law in the national legal order, thereby checking the country's open attitude to international law and globalization by implication. The question posed by Leonard Besselink as to the mandate of Dutch courts would become somewhat less complicated if the courts' national role would be stressed in this manner. The question, though, is whether replacing monism with dualism would deliver an acceptable constitutional fit in the Netherlands, as the country's constitutional tradition usually perceives of the 'national' as but a component of the country's composite legal order.

On the institutional front, the question can be posed how the courts should be structured were the bullet to be bitten and constitutional review of Acts of Parliament by the judiciary would be introduced in the Netherlands. In his contribution Jurgen de Poorter examines this question against the background of the role of the Council of State in giving advice to Parliament on constitutional matters. De Poorter concludes that a constitutional court in the Netherlands is attractive for many reasons, but that caution is also called for.¹¹ He links the introduction of such a court to engaging in a dialogue with the political branches in the form of the legislature and the executive, but reminds us that the equality of the partners should be respected in order for such a dialogue to be meaningful. For example, if the legitimacy of the legislature and the executive is reduced, the pressure on the judiciary to offer a counterweight to this reduction will increase. This is an understandable reaction but it should not be allowed to lead to a distraction from the real problem of securing democratic legitimacy in the first place. De Poorter also notes that such an imbalance might damage the legitimacy of the judiciary by over-exercising its review function. To avoid such a scenario from developing the legislature must invest sufficiently in guaranteeing the constitutional quality of the laws it enacts. One way in which this can be achieved is to establish a special parliamentary committee to rule on the constitutionality or conformity of proposed legislation with treaties, similar to the British Joint Committee on Human Rights.

Looking beyond the development of the constitutional role of the judiciary, the primacy of the legislature is another salient feature under pressure in the Dutch constitutional landscape. This feature is closely related to the fact that courts in the country have been prohibited from conducting constitutional review since the nineteenth century. In his contribution Rob van Gestel argues that there is ample reason to reconsider the current constitutional embedding of the idea of the primacy of the national legislature given the influence of globalizing trends, especially in the context of the European Union. This need for rethinking is brought about by the fact that framework laws are on the rise both at the European and the national level and threaten to overstretch the 'transmission belt theory' on delegation. This normative theory stipulates that the legitimacy of secondary legislation, agency rule-making, self-regulation and co-regulation needs to be linked to parliamentary involvement. As European and national legislation are becoming more and more intertwined, determining whether the centre of gravity for democratic legitimacy should lie with the European Union, the national parliament or perhaps with a more institutionalised cooperation between the European Parliament and national parliaments becomes increasingly difficult. Moreover, law-making by executive bodies, independent administrative agencies

10 For the most debated call for the introduction of dualism, see S. Blok et al., 'Verdragen mogen niet langer rechtstreeks werken', *NRC Handelsblad*, 23 February 2012, p. 17.

11 On this topic, see also M. de Visser, 'Veranderingen in de dialoog tussen Nederlandse rechters en het Hof van Justitie?', 2012 *Tijdschrift voor Constitutioneel Recht* 3, p. 249; G. van der Schyff, 'Structuring the Judiciary to Conduct Constitutional Review in the Netherlands: A Comparative and European Perspective', 2012 *European Journal of Law Reform* 14, p. 467.

and private rule makers both at the national and the EU level has taken such a high flight that one may wonder whether or not it threatens democracy and hence the primacy of the Dutch legislature. As an answer to these developments Van Gestel argues the case for three ways which could accommodate the primacy of the legislature, and so respect its democratic legitimacy. First, the idea of constituting a European Senate is aired, which would be designed to increase the influence of national legislatures at the European level.¹² Second, the idea to accept the increase in delegated legislation but to subject such legislation to clear procedural rules in combination with judicial review is explored. The final idea aired by Van Gestel is to rely more on substantive framework legislation but with conditions for private rule-making. The contribution clearly shows that although on the increase, Europeanizing the legislative process does not have to mean, and should probably not mean, that national democratic legitimacy is to be left by the wayside.

The final contribution, by Anne Meuwese and Marnix Snel, deals with a theoretical device often employed to grasp the increasing interaction between legal orders and actors brought about by the globalization of law: constitutional ‘dialogue’. They present a structured overview of the large, diverse and growing literature dealing with this subject.¹³ Special attention is paid to newer applications of ‘constitutional dialogues’, to communications between actors beyond courts and legislatures. Engaging the citizen in public decision-making is an increasingly important – if still often implicit – aim in dialogue theories. The contribution offers some handles regarding different uses of ‘constitutional dialogue’ for anyone who considers making use of this device. Also in Dutch constitutional debates, ‘dialogue’ is an attractive solution when formal changes seem too rigorous or counter-productive, but one that we need to get concrete about.

The Dutch constitutional order has long provided a salient case study of a system open to external influences coupled with the anomaly of a prohibition of constitutional review. Now that globalization puts pressure on classical institutions and traditional constitutional mechanisms, heightened debates on the right balance between international or even ‘global’ public law and ‘domestic’ constitutional law turn the constitutional reality of the Netherlands into an even more valuable test case. The contributions to this special issue each tackle a specific challenge to the Dutch constitutional order and propose options for going forward in adapting a dual-faceted Constitution to an increasingly complex, interdependent and integrated world.

12 For instance, Van Gestel discusses the proposal by G. van der Schyff & G.J. Leenknecht, ‘The Case for a European Senate. A Model for the Representation of National Parliaments in the European Union’, 2007 *Zeitschrift für öffentliches Recht*, p. 237.

13 For example, reference is made to the work of T.R.S. Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’, 2003 *Oxford Journal of Legal Studies* 23, p. 563; C. Bateup, ‘The Dialogic Promise – Assessing the Normative Potential of Theories of Constitutional Dialogue’, 2006 *Brooklyn Law Review* 71, p. 1109, among many other authors.