Developments

Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?

*By Gerhard van der Schyff**

A. Exception to the Rule

One could be forgiven for thinking that constitutional review by the judiciary is invariably part of modern constitutionalism. Gone are the days that constitutions contained provisions that prevented the courts from testing the constitutionality of legislation, such as section 59 of South Africa's now repealed Constitution of 1961 that forbade the courts from inquiring into or pronouncing on the validity of legislation. It has come to be accepted in many quarters that a constitution presupposes judicial review in some form or another in gauging the integrity of legislation, instead of only relying on legislative wisdom as before. An attitude that echoes the views expressed in *Marbury v. Madison* by Chief Justice Marshall of the United States Supreme Court, that by its very nature a written constitution implies judicial control.[1] However, the Constitution of the Netherlands proves to be an exception in this regard, as section 120 states emphatically that:

> The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.[2]

This provision is quite remarkable, as it places the Netherlands as one of the last liberal democracies to insist that the courts desist from reviewing the constitutionality of acts of

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[1] *Marbury v. Madison*, 5 U.S. 137 (1803): "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundations of all written constitutions." See also the thorough treatments by Charles F. Abernathy, *The Lost European Aspirations of U.S. Constitutional Law*, 4 GERMAN LAW JOURNAL 595 (2003); Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United states and Europe*, 5 GERMAN LAW JOURNAL 685 (2004). Both pieces available at: http://www.germanlawjournal.com.

[2] "De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen" in Dutch. To read the Constitution in English, consult the website of the Ministry of the Interior and Kingdom Relations at: http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.

parliament.[3] This state of affairs immediately raises questions about what the bar in section 120 entails, as well as what the prospects of its continued existence are. The current article aims to explain and evaluate the bar on constitutional review in the Netherlands and critically reflect on it given its exceptional tenacity to survive. In what follows, the context of the bar on constitutional review will be explained, as well as its relation to the Charter of the Kingdom that regulates relations between the mainland and the Kingdom's Caribbean parts, before moving on to courts' duty to conduct treaty review and the prospect of changing the current constitutional configuration as it relates to constitutional review.

B. Prophetic Words

The Netherlands Constitution was adopted in 1814, but it was not until the revision of 1848 and the inclusion of fundamental rights that the question of the courts' role regarding such new rights became a bone of contention, one that ultimately led to the inclusion of the bar on constitutional review.[4] Until then the Constitution was silent on the courts' powers of review, as was the case with the later Belgian Constitution where the strict separation of powers was felt to be so obvious that it was considered unnecessary to expressly bar constitutional review, as it would be "unthinkable" that a court might try its hand at such a thing.[5] However, in the Netherlands clarity was valued over implication in settling the issue of constitutional review.

The inclusion of the bar in the Netherlands Constitution in 1848 led the statesman Thorbecke, who also chaired the commission responsible for the constitutional revision, to remark that adopting the bar on review would politically speaking be easier to accomplish than to one day undo again.[6] These words have indeed proved prophetic, as the bar on the constitutional review of acts of parliaments has become one of the mainstays of the Dutch constitutional order, having survived numerous constitutional revisions since 1848 and especially the grand revision of 1983.[7]

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[3] The website edited by Arne Mavčič, http://www.concourts.net, collects information on judicial constitutional review. In his most recent table, dating from 2004, he identifies five countries which have not adopted any form of judicial constitutional review, of which the Netherlands is one.

[4] See C.A.J.M. KORTMANN, CONSTITUTIONEEL RECHT 374-381 (2005).

[5] R. LEYSEN & J. SMETS, TOETSING VAN DE WET AAN DE GRONDWET 7 (1991).

[6] For a thorough historical analysis, see P.B. CLITEUR, CONSTITUTIONELE TOETSING 27-118 (1991).

[7] See Maurice Adams & Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Matter of Politics, Democracy or Compensating Strategy?*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 399 (2006).

The provision is quite clear about its purpose: it is intended to make the review of acts of parliament impossible on constitutional grounds. This has been interpreted by the courts as not only referring to the substantive quality of acts of parliament in light of the bill of rights in the first chapter of the Constitution, but also relates to formal aspects of the Constitution such as the legislative procedure. The Supreme Court of the Netherlands in the *Van den Bergh* decision made this quite clear.[8] The matter concerned a former member of parliament who objected to the reduction of his pension rights, as he claimed that the constitutionally prescribed legislative procedure was not followed in adopting the law that limited his pension. The act of parliament had to be adopted by a two-thirds majority, but it was never voted on by one of the houses of parliament, which agreed to it without putting the bill to the vote. The Court reiterated its earlier position, first adopted in 1912, that the bar on constitutional review meant that a court could only ascertain *whether* the legislature had enacted a bill into law; but it could not question *how* it enacted that law.[9] Constitutional review was consequently made impossible by virtue of the bar in the Constitution. Not only does the bar pertain to testing the formal quality of enacted law, but it obviously also bars courts from constitutionally reviewing a bill before it passes into law.[10] In other words, section 120 excludes the possibility of prior review in addition to *ex post* review.

The ambit of section 120 of the Constitution is so wide that it extends to the Charter of the Kingdom of 1953 as well, a document hierarchically superior to the Constitution and which regulates the political and institutional relations between the Netherlands and the territories in the Caribbean which also form part of the Kingdom.[11] The Supreme Court interpreted the bar in this way even though the Charter is itself silent about whether it may be judicially reviewed or not. The reason for this sweeping interpretation of the reach of section 120, according to the Court, was that the bar on constitutional review was so fundamental to the Dutch constitutional order that it had to include all forms of national higher law. This included not only the Charter of the Kingdom in addition to the Constitution, but also unwritten principles of higher law, such as the principle that government action is to be proportional to the aim pursued.[12] Otherwise, the Court

[8] Hoge Raad, 27 January 1961, *NJ* 1963, 248 (*Van den Bergh*). See LEONARD F.M. BESSELINK, CONSTITUTIONAL LAW OF THE NETHERLANDS: AN INTRODUCTION WITH TEXTS, CASES AND MATERIALS 91-94 (2004).

[9] Hoge Raad, 25 November 1912, *W.,* 9419.

[10] *E.g.* in Gerechtshof 's-Gravenhage, 27 September 1990, *AB* 1991, 85 the applicants requested the court to review a bill that still had to be considered by the upper house of parliament. The court refused by basing itself on the strict separation of powers between the legislature and judiciary.

[11] Hoge Raad, 14 April 1989, *AB* 1989, 207 (*Harmonization Act*), para. 4.6. On the Charter, see CONSTANTIJN A.J.M. KORTMANN & PAUL P.T. BOVEND'EERT, DUTCH CONSTITUTIONAL LAW 28-34 (2000); CONSTITUTIONELE TOETSING IN DE NEDERLANDSE ANTILLEN, JA OF NEE? (A.B. van Rijn ed., 1995).

[12] *Id.*, para. 3.1.

reasoned, the bar in section 120 would become worthless, as it would be usurped at every turn by such unwritten principles and the Charter.

To date, an exception to the bar in section 120 is recognized. According to the *contra legem* doctrine, a court may only ever refuse to apply an act of parliament where its strict application occasions harsh consequences that were not intended by the legislature.[13] In other words, if on the face of it an enactment purports to infringe protected rights, which was not intended by the legislature, a court may refuse to recognize such an act. Useful examples of this are to be found in tax law, where courts sometimes rule that by following the strict letter of the law, protected rights will be infringed in ways neither foreseen nor intended by the legislature when the legislation was enacted.[14]

This state of affairs is, understandably, only prevalent in a small number of cases, as a particular limitation of someone's rights is usually intended by the legislature and not simply an unhappy side-effect of such legislation. One could even debate the question of whether the *contra legem* doctrine is indeed an exception to section 120. It does not allow a court to disregard the will of parliament and follow the Constitution, but instead allows the courts to make a distinction between the true legislative will and unfortunate formulations in acts of parliament. In other words, the *contra legem* doctrine can never be used to set aside the legislature's will as expressed in an act of parliament. If this were possible it would amount to constitutional review, thereby undermining section 120. The doctrine can only be used where an overly literal reading of an enactment does not capture the legislature's real intention in enacting a particular piece of legislation and violates protected rights simultaneously.

What is not covered by the long reach of section 120 of the Constitution are laws with a lower status than that of an act of parliament.[15] This is deduced from the simple fact that section 120 is only aimed at "acts of parliament" and not at laws in general. This means that laws in the shape of provincial and local ordinances, as well as executive legislation, may be reviewed for constitutionality. However, constitutional review by the judiciary of such laws is only possible to the extent that an act of parliament is not reviewed in the process.[16] For instance, where legislative authority is delegated to the executive, a court

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[13] Hoge Raad, 12 April 1978, *NJ* 1979, 533; Hoge Raad, 15 July 1988, *RvdW* 1988, 133.

[14] Hoge Raad, 12 April 1978, *NJ* 1979, 533. See also the explanation in *Harmonization Act* judgment (note 11), para. 3.4.

[15] See A.W. Hins, *Constitutionele toetsing, proportionaliteit, Verhältnismässigkeit*, *in* PROPORTIONALITEIT IN HET PUBLIEKRECHT, 61, 66 (Aernout J. Nieuwenhuis, Ben J. Schueler & Carla M. Zoethout eds., 2005).

[16] Rechtbank 's Gravenhage of 18 January 1995; E.C.M. Jurgens, *Wetgever heeft laatste woord over uitleg van Grondwet*, REGELMAAT, 68-69 (1995). Arguing for full judicial scrutiny of delegated legislation irrespective of the parent act, see G. Leenknegt, *Hoe lang is de arm van artikel 120 Gr.w.?*, REGELMAAT 65 (1995).

may not review the resultant legislation if it would mean that the parameters set by the parent act were reviewed as well. This would circumvent the bar on such review. The case is different where a particular authority does not need to rely on a parent act of parliament to legislate on a particular topic. In such matters, the courts are not bound by the bar on review in section 120, but can subject the law in question to the full might of the Constitution. This state of affairs will usually arise in respect of those provincial and local ordinances that are based on direct constitutional authority, and that are not dependent on the legislature having to empower a province or municipality to legislate on a given topic. However, as the Netherlands is a particularly centralized state in comparison to many other countries, the pervasive effect of its legislature on the laws of other authorities in the country must not be underestimated.

C. Exploring Treaty Review

From the above discussion, one might be tempted to deduce that the legal order of the Netherlands resembles parliamentary sovereignty in that its legislature is free to legislate as it sees fit. However, this comparison would be incorrect. Parliamentary sovereignty, at least as it is classically understood in the United Kingdom, entails that an act of parliament is the highest form of law possible. This denies the idea of higher law that seeks to control ordinary enactments.[17] Legal thought in the Netherlands does not hesitate to recognize a hierarchy of legal norms, thereby accepting the idea of higher law.[18] The fact that the Constitution is entrenched, as its provisions can only be changed by a special procedure and legislative majority, adds weight to its higher legal status.

Instead the question centers on who should ultimately interpret instruments of higher law - the legislature or the judiciary? In the case of the constitutionality of acts of parliament this question is answered in favor of the legislature on the basis of section 120 of the Constitution, as seen above. Had the Netherlands been a dualist system as far as the effect of international law is concerned the matter would have ended here, as the legislature would have had to incorporate the provisions of treaties first in order for domestic courts to enforce them.[19] This is what happened with selected rights from the European Convention of Human Rights that were incorporated into British law as "Convention rights" by the United Kingdom Human Rights Act of 1998. However, the legal order of the Netherlands is characterized by monism, meaning there exists unity and not division

[17] ENGLISH PUBLIC LAW, 44 (David Feldman ed., 2004).

[18] M.C. BURKENS, H.R.B.M. KUMMELING, B.P. VERMEULEN & R.J.G.M. WIDDERSHOVEN, BEGINSELEN VAN DE DEMOCRATISCHE RECHTSSTAAT 89-91 (2006).

[19] *Id.*, 329-331.

between national and international law; both these sources of law together form one legal order.[20] The effect is not only that international legal norms form part of the Dutch legal order without the need for incorporation, but also that such norms are hierarchically superior to national legal norms.

Logically this opens the question as to whether courts may review the compatibility of acts of parliament against the requirements of treaties and other forms of international law. To this, the answer is not negative as in the case of constitutional review but positive. The effect of section 120 of the Constitution is to override the customary rule in the Netherlands that lower norms of law may always be reviewed against the dictates of higher norms of law, but as this provision is only aimed at the constitutionality of acts of parliament, it leaves the possibility of treaty review intact. Far from gainsaying the treaty review of acts of parliament, the Constitution actually affirms such review in section 94, which reads as follows:

> 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.[21]

The purpose of this provision is to allow for treaty review in those cases where international norms of law are clear and comprehensive enough to be enforced by courts in the Netherlands without the need for the legislature to give further meaning to such norms.[22] In practice this is usually taken to mean that domestic courts must enforce civil and political rights given by international law, whereas comparable socio-economic rights first need to be given more flesh by the legislature in order for such claims to be capable of judicial enforcement.[23] Legislative action in this context is not intended to incorporate socio-economic rights, as such rights are already applicable to the Dutch legal order, but is aimed at making such rights workable judicial tools.

This reluctant attitude to reviewing socio-economic rights as opposed to civil and political rights might be considered dated by some standards. For example, South African courts, which are often praised for leading the way in the enforcement of socio-economic rights, do not shy away from applying such rights by taking into account the difference in context

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[20] *Id.* 329-331.

[21] "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.

[22] J.M. DE MEIJ & I.C. VAN DER VLIES, INLEIDING TOT HET STAATSRECHT EN HET BESTUURSRECHT 195-196 (2000).

[23] BURKENS (note 18), 340-341.

between civil and political rights on the one hand and socio-economic rights on the other, instead of considering the one category justiciable and the other not.[24] It seems therefore that the Netherlands is rooted in reluctance not only when it comes to the very question of judicial review, but also on the nature of the rights to be applied once the principle of review is accepted.

D. Enter the Halsema Proposal

That treaties may be reviewed while the Constitution may not, has led to considerable debate in the Netherlands.[25] Calls can be heard from time to time for this contradiction to be cleared away by also entrusting the Constitution's enforcement to the judiciary and not simply to the political process. For example, the Interior Ministry recommended in 1966 that the prohibition on the constitutional review be partially lifted to allow the judiciary to test acts of parliament in respect of the civil and political rights guaranteed in the Constitution.[26] It was argued that constitutional review next to treaty review would add an extra dimension to the judicial protection of people's rights in the Netherlands. The debate was further fuelled by the second report in 1969 of the State Commission on the Constitution and the Electoral Law.[27] In spite of some of its members objecting and the usual skepticism being put forward, the State Commission came to the conclusion that judicial review of civil and political rights contained in the Constitution had to be allowed. It was argued that such review would be useful in strengthening the position of the individual in relation to the government. Civil and political rights were deemed the proper instrument for this, as their primary function lies in keeping government intrusion at bay when it comes to individual and collective freedom. However, successive governments refused to support the State Commission in opposing the introduction of constitutional review by the judiciary.[28] Political reluctance put an end to thoughts on reform, and as

[24] See *City Council of Pretoria v. Walker*, 1998 2 SA 363 (CC); *Government of the RSA v. Grootboom*, 2001 1 SA 46 (CC); Rassie Malherbe, *The development of socio-economic rights in South Africa*, 60 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 111 (2005).

[25] See CONSTITUTIONELE RECHTSPRAAK, 51-52 (A.H.M. Dölle & J.W.M. Engels eds., 1989); P.B. Cliteur, *Argumenten voor en tegen constitutionele toetsing*, NEDERLANDS JURISTENBLAD 1369 (1989); C.B. Schutte, *De verwarring van rechtsstaat en rechtersstaat. Kanttekeningen bij constitutionele rechtspraak volgens het voorstel-Halsema*, REGELMAAT 93 (2004); R.J.B. Schutgens, *Het voorstel-Halsema en de toelaatbaarheid van de wet*, REGELMAAT 12 (2007); Maurice Adams & Gerhard van der Schyff, *Grondwettigheidstoetsing door de rechter als "list van de rijke"? Methodologische en andere vragen bij processen van rechtsverandering*, 45 TIJDSCHRIFT VOOR PRIVAATRECHT 913 (2008).

[26] Ministry of the Interior, Proeve van een nieuwe Grondwet (1966).

[27] J.L.M.Th. Cals & A.M. Donner, Tweede Rapport van de Staatscommissie van advies inzake de Grondwet en de kieswet (1969).

[28] C. Flinterman, *Het rechterlijk toetsingsrecht*, *in* VERHALEN OVER DE GRONDWET, 142, 144 (A.W. Heringa, C.H.A. Litjens & R.E. de Winter eds., 1993) refers to this reluctance as a fear of getting one's feet wet.

mentioned above, the prohibition on constitutional review survived the grand revision of the Constitution in 1983.

This however, did not put an end to the matter. The Supreme Court reiterated in 1989 that the "traditional position" of the judiciary in the legal order of the Netherlands saw the bench barred from constitutional review. Nonetheless, the Supreme Court hinted that the legislature might have to reconsider section 120 of the Constitution.[29] A few years later, the government even went so far as to accept the introduction of constitutional review by the judiciary in theory and added that the only question to settle centered on the form that such review should take.[30] In other words, the bar in section 120 had to be lifted, or at least modified, turning attention to how this had to be achieved. However, as happened so often in the past, any possibility of reform quickly lost its political momentum.

The question only gained any real currency in 2002, when in response to the government's hesitancy to initiate reform, an opposition member of parliament – Femke Halsema of the Green party - tabled a private bill with the aim of amending the bar on constitutional review in section 120 of the Constitution.[31] The bill, which has since become known as the Halsema Proposal, is still under consideration seven years after having been tabled. This time lapse can be ascribed at least in part to the difficult procedure for amending the Constitution, which is considered below.

The Proposal selects mostly civil and political rights for judicial review while excluding provisions that guarantee socio-economic rights. Accordingly, all civil and political rights contained in the bill of rights in the first chapter of the Constitution are exempted, while provisions such as section 22(1), which provides that "the authorities shall take steps to promote the health of the population", will not be exempted from the bar on constitutional review were the Proposal to be successful.[32] It is also noteworthy that the Proposal does not intend the courts to review compliance with operational aspects of the Constitution as it only focuses on fundamental rights. This means that matters such as the functioning of the legislature or the manner by which judges are appointed and dismissed are still outside the scope of judicial review. The Proposal also foresees the decentralized

[29] *Harmonization Act* judgment (note 11), para. 3.4, 4.2.

[30] Government Publication, Nota inzake rechterlijke toetsing (1991).

[31] *Parliamentary Proceedings II* 2001-2002, 28, 331, no. 2; *Parliamentary Proceedings*, 2002-2003, 28, 331, no. 9.

[32] S. 22(1) of the Constitution reads: "De overheid treft maatregelen ter bevordering van de volksgezondheid" in Dutch. Other provisions than those in the bill of rights are also earmarked for exemption (s. 54(1), (2)(a)-(b), 56, 99, 113(3), 114, 121, 129(1)) on account of the fact that they guarantee enforceable civil and political rights, such as s. 121, which provides that trials must be held in public and judgments also passed in public.

review of the Constitution, just as in the case of treaty review where every court is empowered to check whether legislation accords with binding international law.[33]

The idea was clearly that such review had to mirror as much as possible the situation as it applies to treaty review, not only because of the focus on civil and political rights but also considering the courts selected to conduct constitutional review. One could argue that by concentrating on similar modes of review, the Proposal hopes to appeal to legislators who might be skeptical of far-reaching constitutional change. This leads to the question of the Proposal's chances of success.

As hinted to, amending the Dutch Constitution is quite complicated. First a bill to amend a constitutional provision must be accepted in both houses of parliament by a simple majority. Following this, a second reading must take place during which each house must adopt the bill again, but this time with a two-thirds majority. The second reading may also only take place after a general election of the lower house of parliament. The idea is that two parliaments must consider the necessity of amending the Constitution before any change can take place. This means that even though there might be widespread agreement on the need for an amendment, the process must first await the gaze of a new parliament. This almost always means that a bill is considered for quite a number of years before it succeeds in amending the Constitution.[34]

At present the Halsema Proposal has been read once in both houses of parliament. The second reading is scheduled following the next general election, which will probably take place in early 2011. Although the Proposal passed without too much fuss in the lower house, it did encounter substantial skepticism in the upper house where it passed in 2008 by a majority of a single vote.[35] During the vote in this house, the government also withdrew its support for the bill. Where the bill could previously count on sympathy from the coalition parties, this was no longer the case. This situation, if repeated during the second reading, would mean the bill's dismal failure. But why such skepticism if the principle of treaty review is a generally accepted feature of the country's legal order?

E. Constitutional Review After All, or Enduring Skepticism?

Political reluctance on the topic of constitutional review by the judiciary in the Netherlands might seem somewhat baffling at first given the acceptance of treaty review. One could argue that treaty review should also logically lead to constitutional review as the idea of

[33] *Parliamentary Proceedings II*, 2002-2003, 28, 331, no. 9, 16-18.

[34] For some examples, see M.M. Bense, *Aandacht voor recente grondwetswijzigingen*, REGELMAAT 89 (2002).

[35] Adams & Van der Schyff (note 25), 916-917.

judicial review is clearly accepted.[36] In other words, the barrier to allowing judicial review has already been overcome by means of treaty review. This should make the adoption of constitutional review the next logical step, yet persistent hesitation remains in taking this step.

This hesitation can be understood by comparing the conditions of constitutional change over time in the United States of America and more recently in South Africa with the current situation surrounding constitutional review in the Netherlands. Of particular interest in this regard is the work of the legal theorist Bruce Ackerman, who has gone to great lengths in explaining constitutional change in the United States of America from a historical perspective.[37] The initial purpose of Ackerman's work was to explain fundamental constitutional change that came about but which could not be traced to the amendment procedure of the American Constitution, something to which he attached particular normative weight in explaining why the law generated during such events enjoyed the status of higher law.[38] However, the current purpose in referring to his analysis is not to explain constitutional change as independent of formal amendment procedures, but rather to emphasize the difference between the forces of revolution and evolution in effecting change to constitutional law, in an attempt to better understand the dynamics that apply to such change.

Central to understanding change for Ackerman are what has generally come to be referred to as "constitutional moments".[39] Constitutional moments are brief and rare events of popular mobilization during which ordinary politics are displaced by constitutional politics. This means that a political community takes a long term view of the state of society and its institutions instead of only conducting business as usual, the consequence of which is that constitutional change becomes possible during such moments. The emphasis during these moments rests not so much on material change, although that can obviously be a by-product, but instead falls on securing formal change in that the structure governing the

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[36] For one ne of the arguments on which the Halsema Proposal also relies, see Gerhard van der Schyff, *Rethinking the Justification for Constitutional Review of Legislation in the Netherlands: A Critique of the "Treaty Argument" and Thoughts on the Way Forward*, *in* EUROPA EN DE TOEKOMST VAN DE NATIONALE WETGEVER, 129 (R.A.J. van Gestel & J. van Schooten eds., 2008).

[37] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). At such moments in the constitutional history, he points to the foundation of the United States, the Civil War and the New Deal. See also Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STANFORD LAW REVIEW 759 (1992); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONSTITUTIONAL COMMENTARY 115 (1994).

[38] Mark Tushnet, *Potentially Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm*, *in* ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE, JEAN MONNET WORKING PAPER 5/04, 1, 2 (J.H.H. Weiler & C. Eisgruber, eds., 2004). Available at: http://www.jeanmonnetprogram.org/papers/04/040501-04.html.

[39] For a succinct exposition, see Neil Walker, *The Legacy of Europe's Constitutional Moment*, 11 CONSTELLATIONS 368 (2004); Neil Walker, *After the Constitutional Moment*, paper 32/03 The Federal Trust, 1, 3 (2003).

conduct of ordinary politics is altered. Neil Walker characterizes the change created during such moments as being of "considerable constitutional significance" and not "merely ephemeral or transient".[40] In this regard Ackerman speaks of "revolution on a human scale" that succeeds in rejecting and replacing current beliefs or practices.[41] According to his analysis of American constitutional history, such revolutions in the country have not only been peaceful, but a conscious effort at breaking with the past that is usually not steered by elites but by a groundswell that makes itself felt.[42] However, for a revolution to take place one also requires some speed, otherwise one might rather speak of an evolutionary process.[43] But what accounts for speed? Drawing lessons from far-reaching change in American history, Ackerman identifies what he calls the "ten-year" test.[44] A test which is explained quite cleverly as someone who asks informed constitutional lawyers about how they estimate that constitutional law will develop along an evolutionary course over the next ten years. Their predictions are then matched against the reality ten years later to determine if evolutionary or revolutionary change had taken place.[45] The less secure the prediction turns out to be the greater the likelihood that a revolution has changed the constitutional landscape.

As a modern-day example of a revolution that meets many of the aspects identified by Ackerman, one can undoubtedly point to South Africa. The country clearly experienced a constitutional moment during the 1990s with the advent of its new constitutional dispensation.[46] The late justice Mahomed of the country's Constitutional Court captured the moment as follows in *S. v. Makwanyane*:

> In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is

[40] Walker, *Legacy*, *id.*, 369.

[41] Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE LAW JOURNAL 2279, 2282-2283 (1999): "Call it *revolution on a human scale* and define it as a self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in area or another of social life."

[42] *Id.*, 2285.

[43] *Id.*, 2287-2288.

[44] *Id.*, 2287.

[45] *Id.*, 2287. As examples Ackerman refers to the expansion of federal power between 1781 and 1791, as well as the abolition of slavery between 1860 and 1870.

[46] Sharing this view, see András Sajó, *Constitution without the Constitutional Moment: A View from the New Member States*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 243 (2005).

> defensible and represents a decisive break from, and a ringing rejection of that past (...). The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.[47]

Enough momentum could be generated to change South Africa from an order based on parliamentary sovereignty and a racially restricted democracy into an order based on judicially enforced constitutional supremacy and universal suffrage. The country's constitutional epiphany made a new reality possible, one embracing extensive judicial review encompassing the entire Constitution, from civil and political and socio-economic rights to all operative provisions.[48] Moreover, reform was not only driven by various elites vying for power, but was very much the product of popular discontent that could no longer be appeased but had to be addressed in order to stave off even greater unrest. This popular enthusiasm was also characterized by the speed of events. For example, in 1989 one of the foremost constitutional lawyers and proponents of change, Albie Sachs, dismissed the idea of allowing the judicial review of legislation as ultimately not satisfying the needs of the situation, only to be converted to the idea three years later and eventually even carried on to serve on the bench of the newly-created Constitutional Court.[49] Clearly, a sense of urgency gripped the country, but also a sense of fluidity as the exact nature of the country's constitutional future was not cast in stone, while at the same time many experienced a feeling that a line had been crossed from where return was no longer an option.

The Netherlands on the other hand is arguably nowhere near such a constitutional moment and the potential for change it may hold. This is because the country has been characterized by a long and stable tradition of parliamentary democracy with a particular

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[47] *S. v. Makwanyane*, 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), par. 262. Similarly *S. v. Mhlungu*, 1995 3 SA 867 (CC), 1995 7 BCLR 793 (CC), para. 111 where the Court explained that: "[t]he introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching existing common law rights, such as might happen if Britain adopted a bill of rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction." See also Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 590 (2003).

[48] As s. 8(1) of the Constitution of South Africa (1996) declares that: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[49] Contrast Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 12 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 289, 294 (1988-1989) (where judicial review is characterized as "racist" as it would serve white interests more than achieve transformation) with ALBIE SACHS, HUMAN RIGHTS IN SOUTH AFRICA (1992) (where it was argued that a judicial bill of rights offered an opportunity to realize democratic ideals instead of being a brake on the process). See also Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything so that Everything Would Remain the Same"*, 32 ISRAEL LAW REVIEW 251, 278-279 (1998).

concern for protecting people's rights.[50] Democracy in the country also focuses on reaching a consensus and decision-makers pride themselves on factoring as many perspectives to a matter as possible. As Andeweg and Irwin explain:

> Newspapers routinely refer to *harmonie model*, *overleg economie* (deliberative economy), or *polder model*; citizens are more likely to recognize referrals to employers associations and trade unions as 'the social partners' than as 'pressure groups'; the word 'compromise' has no negative connotation; and the untranslatable *maatschappelijk draagvlak* (literally: societal weight-bearing surface) is a household term to connote the need for government policies to have widespread support from organized interests and citizens. [51]

The result is an open democracy, which is relatively inclusive of and sensitive to people's needs thereby discouraging imminent or sudden change, especially in the form of a watershed constitutional moment. Such democratic maturity is accentuated by the fact that the country consistently scores high in the annual Press Freedom Index conducted by the non-governmental organization *Reporters Without Borders*, an indication that is not compatible with a system that suppresses free thought and its expression which are essential to a healthy democracy.[52]

As to the fruits of the country's democracy, one can point to the Netherlands' persistent high ranking on the United Nations' Human Development Index (HDI) which gauges matters such as educational, social and economic well being in the world.[53] The importance of this can be deduced from the fact that the rights relating to the matters gauged by the HDI are generally not the topic of even treaty review in the Netherlands, as such review relates only to civil and political rights. The HDI however relies heavily on socio-economic rights being protected. This means that important socio-economic

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[50] Erhard Blankenburg, *Warum brauchen wir kein Verfassungsgericht? Die niederländische Diskussion im Licht der deutschen Erfahrung*, *in* MIGRATIERECHT EN RECHTSSOCIOLOGIE: GEBUNDELD IN KEES'STUDIES, 303, 310 (Anita Böcker et al., 2008) writes that: "In the Netherlands the idea of 'democracy' is not often associated with a 'dictatorship of the majority' (…) but one associates democracy more easily with the protection of minorities and pluralism." Author's translation of: "In der niederländischen Diskussion wird der Begriff der 'Demokratie' selten mit einer 'Diktatur der Mehrheit' assoziiert (…) sondern man assoziiert mit Demokratie viel eher den Schutz von Minderheiten und die Pluralität von Souveränitäten."

[51] RUDY B. ANDEWEG & GALEN A. IRWIN, GOVERNANCE AND POLITICS OF THE NETHERLANDS 148 (2002).

[52] *E.g.* in 2008 the Netherlands occupied the 16th place in a ranking of 173 countries. Available at: http://www.rsf.org/en-classement794-2008.html.

[53] *E.g.* in 2008 the Netherlands occupied the 6th place in a ranking of 179 countries. Available at: http://hdr.undp.org/en/statistics/.

advancements in the Netherlands have solely been the product of the political process and not of the judicial review of higher law.[54]

On this basis, the Netherlands could probably be characterized as an example of "grass roots constitutionalism" in that the shape and legitimacy of the country's constitutional order is in general not derived from the popular will as expressed through specific constitutional moments, but instead rests on the stability, efficacy and outcomes of the government's regular everyday operation.[55] As long as the government delivers the goods as it were by providing for people's needs and protecting their rights, people will feel little need to question, or even care, about the exact nature and workings of the country's constitutional structures, thereby lessening their appetite for reform. Similarly, the legal theorist W.J. Witteveen notes that because even at the best of times "normal" politics in the Netherlands are not particularly concerned with matters of a constitutional nature, as compared to America for example, any thought of far-reaching reform remains just that.[56]

Despite obvious differences it is undoubtedly safe to say that democracy in the Netherlands probably resembles that of the United Kingdom more than that of the United States or South Africa. This is because liberty in the Netherlands, as in the United Kingdom, is not so much achieved through and guaranteed by normative constraints on the political process, but very much through the political process itself.[57] Applied to the topic of expanding judicial review, the fact that democratic structures in the Netherlands function quite well and are generally respectful of people's rights, diminishes the likelihood that ordinary politics will be supplanted by constitutional politics anytime soon to allow for constitutional review.

Moreover, when constitutional reform does take place in the Netherlands, it is, again similar to the United Kingdom, very much inductive and incremental in its approach, something which is also intended by the constitutional order and very much at odds with abrupt constitutional moments. As C.W. de Vries explained, the purpose of the Dutch Constitution was not to create a definite framework as much as it was intended to allow a

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[54] Making the same point, P.W.C. AKKERMANS, C.J. BAX & L.F.M. VERHEY, GRONDRECHTEN 36 (2005).

[55] See Grażyna Skapska, *Paradigm Lost? The Constitutional Process in Poland and the Hope of "Grass-roots Constitutionalism"*, *in* THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE 149 (Martin Krygier & Adam Czarnota eds., 1999); Tushnet (note 38), 6.

[56] W.J. Witteveen, *Hamilton, Koopmans en Ackerman over constitutionele toetsing*, REGELMAAT 177 182 (2006).

[57] Some commentators have so much faith in the political process in the Netherlands that they even favor that the Constitution be abolished so that it can resemble the British constitution, such as E.C.M. Jurgens, *Geen eed op de Grondwet! Een pleidooi om de geschreven constitutie sober te houden*, REGELMAAT 68, 69 (2002). Interestingly, in his analysis F.H. van der Burg, *Heeft Nederland een Grondwet?*, NEDERLANDS TIJDSCHRIFT VOOR BESTUURSRECHT 157 (1990) reaches the conclusion that very little separates the written Dutch Constitution from the unwritten British constitution.

constitutional system to develop according to its own pace.[58] If anything, experience with treaty review confirms this. Treaty review, certainly as it is conducted today, is the product of a gradual process that saw the importance of rights guaranteed at international law increase over many years and is not the result of rapid and fundamental change.[59] As a consequence, a definitive constitutional moment would be very difficult to pinpoint along the way as the courts have gradually gained greater confidence in enforcing such rights over time. Such judicial restraint, although less pronounced, is still very much present as regards judicial activity, serving to confirm the central role to be played by the legislature in factoring in people's rights in enacting legislation.[60] Put differently, the institutional balance between the legislature and judiciary rests on an understanding that political wisdom should usually be preferred over legal reasoning in matters of constitutional importance. This preference obviously fuels reluctance in wanting to add constitutional review to the courts' existing powers of review, especially in the absence of an exceptional reason, and not merely on the basis of the logic that treaty review is already allowed.[61]

Overcoming such an ingrained reluctance to tampering with the constitutional dispensation puts the proponents of the Halsema Proposal in quite a difficult position. This is accentuated by the fact that unlike treaty review, which developed incrementally from its grounding in customary constitutional law, a two-thirds majority in parliament must be willing to support the idea of constitutional review in order for section 120 of the Constitution to be amended. This is a difficult position that results in a paradox, because in trying to make the case for constitutional review its closeness to treaty review has to be stressed, as does the Halsema Proposal, in order to satisfy an establishment that in the absence of a real constitutional moment values continuity over change.[62] This move

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[58] In his foreword to J.R. STELLINGA, DE GRONDWET SYSTEMATISCH GERANGSCHIKT (1950).

[59] See Evert Alkema, *The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order*, *in* THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS, 1 (Rick Lawson & Matthijs de Blois eds., vol. III, 1994) who charts this evolution.

[60] *E.g.* Hoge Raad, 16 May 1986, *NJ* 1987, 251, where the Supreme Court stressed that courts had to be careful of value judgments as this has to be left to the legislature. It continued by opining that the courts must be "terughoudend" or reluctant to exercise their powers of review.

[61] On this, see Gerhard van der Schyff, *Rethinking the Justification for Constitutional Review of Legislation in the Netherlands*, *in* EUROPA EN DE TOEKOMST VAN DE NATIONALE WETGEVER: LIBER AMICORUM PHILIP EIJLANDER 129 (R.A.J. van Gestel & J. van Schooten eds., 2008); Gerhard van der Schyff, *Waarom het wetsvoorstel Halsema tekort schiet: Mythes rondom het verdragsargument*, NEDERLANDS JURISTENBLAD 2408 (2009); Jit Peters & Geerten Boogaard, *De myhes van Van der Schyff over het initiatiefwetsvoorstel-Halsema*, NEDERLANDS JURISTENBLAD 2628 (2009); Joseph Fleuren, *Waarom het voorstel-Halsema superieur is*, NEDERLANDS JURISTENBLAD 2630 (2009); Gerhard van der Schyff, *Over een interpretatierichtsnoer en mythes*, NEDERLANDS JURISTENBLAD 2632 (2009).

[62] Why else would the Halsema Proposal resemble treaty review in so many ways? For example, supporting the review of civil and political rights, as opposed to socio-economic rights, as well as favoring decentralized review by the courts.

diminishes the added value of the Proposal as it is considered by some commentators as more of the same and hence not worth the effort of a laborious constitutional amendment.[63]

If anything, this discussion suggests that constitutional review in the Netherlands is still long in the making. The Halsema Proposal might fail to convince the skeptics of constitutional review while simultaneously alienating the supporters of such review because of the Proposal's perceived timidity. Whichever side one chooses to support, the situation in the Netherlands can be seen as evidence of a constitutional order that is beset by so few political problems that it can afford itself the luxury of even debating the need for constitutional review, instead of having to resort to this instrument out of dire need.

[63] See the doubts of P.A.M. Mevis, *Constitutioneel toetsingsrecht: Zuinigheid in plaats van revolutie*, 32 DELINKT EN DELINKWENT 933 (2002) who criticizes the Halsema Proposal for being too "stingy" instead of bringing about a "revolution".