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When is a Bill of Rights Fit for Judicial Review? The Limitation of Rights Regime in the Netherlands Considered

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1. Beyond constitutional review

The Constitution (*Grondwet*) of the Netherlands bucks the global trend among liberal democracies as it still contains a provision, which was first inserted in 1848, that bars the courts from reviewing the constitutionality of Acts of Parliament. While constitutional review by the judiciary is forbidden by Article 120 of the Constitution, Article 94 recognises the courts' power to review Acts of Parliament for their compliance with binding international law.¹ Debate on this perceived anomaly and evergreen topic of Dutch constitutional theory has received renewed attention since the Halsema bill was tabled in 2002, the aim of which is to amend the Constitution to allow for judicial review of mostly classic rights.² The bill has passed its first reading in both Houses of Parliament and may now be read again after the general election of 2012.³ If it should pass its second reading with a two-thirds majority the judicial review of Acts of Parliament for compliance with constitutional rights will become a reality in the Netherlands and end its constitutional exceptionalism in this regard. In essence, the Netherlands might be on the eve of radical constitutional reform. As the merits of allowing the judicial application of rights to Acts of Parliament has been canvassed extensively elsewhere, this contribution will not address the question here.⁴

Instead, the question may be posed whether the rights guaranteed in the Dutch Constitution are up to the task of being judicially reviewed at all. In other words, must judicial review be facilitated by further changes to the Constitution, apart from simply lifting the bar on review as the Halsema bill foresees? This question can be approached by studying the formulation of the rights to be reviewed in order to decide whether they are formulated for optimal review.⁵ However, the suitability for review can

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1 Art. 120 of the Dutch Constitution states: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts', while Art. 94 states: 'Statutory 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 of resolutions by international institutions.' On treaty review, see J.M. de Meij & I.C. van der Vlies, *Inleiding tot het staatsrecht en het bestuursrecht*, 2000, pp. 195-196.

2 *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.

3 As a matter of fact the bill could already have been read for a second time after the 2010 general election (a general election of the House of Representatives (*Tweede Kamer*) must take place between the first and second readings of a bill wishing to amend the Constitution successfully).

4 Cf. 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, 'Waarom het wetsvoorstel Halsema tekort schiet: Mythes rondom het verdragsargument', 2009 *Nederlands Juristenblad*, p. 2408; C.A.J.M. Kortmann, *Constitutioneel recht*, 2005, pp. 374-381; L.F.M. Besselink, *Constitutional Law of the Netherlands: An Introduction With Texts, Cases and Materials*, 2004, pp. 91-94; P.B. Cliteur, *Constitutionele toetsing*, 1991, pp. 27-118; L. Prakke et al., *Toetsing*, 1992.

5 For proposals on reformulating the right to freedom of expression in Art. 7 of the Dutch Constitution, see G. Leenknecht, 'The Protection

also be studied by focusing on the limitation regime. This boils down to addressing the question relating to the circumstances under which rights can be limited and whether the current regime is fit for any meaningful judicial review. The current limitation regime was after all drafted with the bar on judicial review still firmly in place.

It is exactly this question, namely the suitability of the limitation regime in the Dutch Constitution, which this contribution will address. This will be attempted by first taking a closer look at what is meant by the limitation of a right in a theoretical sense, before undertaking an exposition and critical evaluation of the Dutch position in the light of this analysis. The contribution will conclude by critically considering whether the proposals in the 2010 Report by the State Commission on Constitutional Reform (*Staatscommissie Grondwet*) are sufficient to repair shortcomings in the constitutional limitation clauses with a view to judicial review.

2. On limitation

Analysing the limitation of a right supposes a scope of protection and a limit to that scope. This may seem straightforward, but this might give rise to confusion if one is not clear on what is meant by the terms ‘scope’ and ‘limit’. The description of the *content* of a right under a bill of rights, and thus the extent of its guaranteed protection, is sometimes viewed as a *limit* of sorts.⁶ The non-extension or non-inclusion of protection under a bill is equated with a limit in other words. This approach to defining a limit deal with the non-inclusion in a bill of rights as a synonym for limiting a right by not protecting it to the full by inclusion in the bill. Robert Alexy includes this definition of a limit in his grand classification of limits to rights.⁷ Non-protection is referred to as immediate limits as opposed to mediate limits which are the limitation of rights once they have been guaranteed in a bill of rights.

A benefit of such a wide definition of a limit is that it takes account of natural law rights by deeming the non-protection of such rights as a limit in itself. Paul Cliteur for example explains that from a natural law point of view the American Declaration of Independence can be viewed as a ‘limited summary’ as far as natural law is concerned which came to be remedied by the adoption of the Constitution in 1787 and the First Amendment in 1791 which rendered more protection to people’s rights.⁸

An understanding of the terms scope and limit therefore depends very much on whether rights are treated as pre-existing claims to a bill of rights or not, which in turn influences the definition of a limit.

A generous definition of the scope of a right, as envisaged by Alexy, does not resolve the fact, though, that one ends up dealing with two very different conceptions of what really amounts to a limit. Such a grand theory of limits fails to reconcile the tension between instance and continuity. Establishing a limit to a guaranteed or positive right is very different to deciding what has to be protected by inclusion in a bill. The first action focuses on whether a right may be applied in a particular instance, while the second action focuses on whether a right will be formally recognised at all over an indefinite period of time. One could also typify this tension as one between the extent to which positive law is willing to recognise natural law. The focus here rests on provisions contained in bills of rights that aim to determine when limits may be set to the rights guaranteed by such a bill. The intention is not to question the initial protection of a right, but its limitation according to specially dictated terms. Protection is therefore not treated as interchangeable with limitation. This focus is also in accordance with current theory on the Dutch Constitution, which views it solely as the product of positivism devoid of natural law claims.⁹

In what follows the limitation of rights in terms of the Dutch Constitution will be evaluated against the definition of a limit developed above in order to determine whether the introduction of constitutional review by the judiciary might warrant any changes to the limitation regime.

of Fundamental Rights in a Digital Age’, in E. Hondius & C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, 2002, p. 325.

6 H. Guradze, *Die Europäische Menschenrechtskonvention*, 1968, pp. 24-25; I.M. Rautenbach & E.F.J. Malherbe, *Constitutional Law*, 2010, pp. 328-329.

7 R. Alexy, *A Theory of Constitutional Rights*, 2002, p. 185.

8 P.B. Cliteur, *Rechtstheorie: De filosofie van mensenrechten*, 1997, pp. 21-22.

9 M.C. Burkens et al., *Beginselen van de democratische rechtsstaat*, 2012, p. 127.

3. Evaluating the limitation regime of the Dutch Constitution

3.1. A one-stage and two-stage analysis

The discussion has thus far focused on elaborating on the meaning of the terms scope and limit in relation to rights. Although increasingly uncommon, a bill of rights may in general or in part eschew the very idea of limits. One then deals with the idea of illimitable rights or one-stage rights.¹⁰ In other words, a right as guaranteed by a bill may not be subject to external interferences. Such rights can be termed one-stage rights as a second or limitation stage is not allowed after the scope of protection has been determined. While a limitation provision allows for a factual interference with a right to be legally justified, the absence of such a provision would mean that all actions or inactions that disturb its protection must be taken to violate the right. Simply put, the definite protection afforded by a right is not understood as the arrived at product once any applicable limits have been subtracted from its scope. Instead, a right's definite protection is only taken to mean the sum of its scope.

Most rights contained in Chapter 1 of the Dutch Constitution, its bill of rights, may be however be limited and are therefore two-stage rights. Unlike, for example the South African bill of rights, the Dutch Constitution does not contain a general limitation provision. Instead each right has its own limitation provision attached to it. Article 8 is typical in this regard, by stating the right to freedom of association followed by the conditions under which it may be limited.¹¹ However, not all rights have limitation provisions. Exceptions include Articles 1, 3 and 5 that guarantee, respectively, the right to equal treatment, the right of equal appointment to the civil service and the right of petition. Not all rights are contained in Chapter 1 though, as Article 114 which forbids the death penalty, can also be viewed as guaranteeing an enforceable right. Interestingly, this right, too, is not qualified by a limitation provision. The effect of these one-stage rights is that discriminatory treatment may not be justified, nor may someone be denied from delivering a petition or ever be executed by the state.

However, care should be taken not to typify such rights as extending absolute protection.¹² The reason is that one-stage rights still need to be interpreted in order to determine the exact extent of the protection they afford. Interpretation is a living exercise that can result in the boundaries of a right's scope being adjusted over time to allow for new circumstances to be factored in setting the threshold of protection that a right guarantees.¹³ The more a right is open to balancing the less attractive it ultimately becomes to guarantee it without the possibility to limit its scope. This is because one is essentially busy limiting a principle in the face of other principles and not so much applying a bright-line rule. As constitutional adjudication is very much a question of balancing principles, it quickly becomes clear why most modern bills of rights usually opt to guarantee rights in a two-stage rather than a one-stage fashion. In contrast, it could be argued that the logic of one-stage rights becomes more convincing the more a right is formulated as a rule than a principle and the more it is applicable in vertical rather than horizontal relationships. The argument would then be that vertical relationships, namely those where the state exercises its public authority against private parties, are less open to the problem of competing rights having to be balanced against each other, in contrast to horizontal relationships where one party might claim that their right to freedom of expression should not be limited by another party's right to freedom of religion. However, the value of this argument in defence of one-stage rights is quickly put into perspective by reality. Even the European Court of Human Rights, for example, which only entertains

10 G. van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights*, 2005, pp. 11-27.

11 Art. 8 reads: 'The right of association shall be recognised. This right may be restricted by Act of Parliament in the interest of public order.'

12 Alexy, *supra* note 7, pp. 195-196 explains similarly: '[T]he absoluteness of (...) protection remains a matter of the relation between different principles. (...) [This is because] the certainty of protection is so high [in some matters] that under ordinary circumstances we can talk about absolute protection. But the relativized basis of this protection must not be lost from sight. (...) The impression that the core can be identified directly without balancing interests, or known intuitively, derives from the certainty with which we are able to relate principles in [some cases]. (...) The result is that the guarantee of essential core (...) does not contain any further control on the limitability of constitutional rights beyond that already contained in the principle of proportionality.'

13 ECtHR, *Selmouni v. France* of 28 July 1999, *Reports and Judgments and Decisions*, 1999-V, par. 101: '[H]aving regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (...), the Court considers that certain acts which were classified as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future.' Cf. M.K. Addo & N. Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?', 1998 *European Journal of International Law* 9, p. 510.

vertical claims, is increasingly confronted with the spectre of the horizontal application of rights, albeit in an indirect way. For example, in *Öllinger v. Austria*, the authorities were confronted by two protests planned at the same time and place and chose to prohibit the one in the other's interest by balancing the parties' rights of freedom of assembly against each other, the merits of which were reviewed by the Strasbourg Court to decide if the Austrian decision could stand or not.¹⁴

This complex situation is mirrored in Dutch constitutional law. It becomes apparent that the constitutional prohibition on discrimination is particularly relative when one looks at the Act on Equal Treatment (*Algemene wet gelijke behandeling*), which is intended to give flesh to the right to equal treatment.¹⁵ Apart from a number of specific exceptions, such as for religious bodies in Article 3, Article 2 of the Act states in no uncertain terms that the prohibition is not applicable where any difference in treatment was in pursuit of a legitimate aim and necessary under the circumstances.¹⁶ This acknowledges the balancing exercises that need to take place in order to decide if an act amounts to an unjustified difference in treatment. Given the reality of the situation, it would have been wiser to frame this right in the Constitution as a two-stage rather than a one-stage right. It might be easier to cast a rule-like prohibition in a classic vertical relationship as a one-stage right, such as that on the death penalty, but doing the same in the context of a provision that guarantees a principle which is particularly ripe for balancing, especially in horizontal relationships, proves to be decidedly difficult and undesirable. This realisation was also the main reason for the drafters of South Africa's interim, and later the final Constitution, to abandon the idea of guaranteeing illimitable rights and make all rights in the bill of rights subject to limitation.¹⁷

The current limitation regime in the Dutch Constitution presents no particular hindrance to judicial review as most rights are guaranteed in a two-stage fashion. This allows for competing claims to be weighed against each other during the limitation phase without having to complete this exercise under the guise of simply interpreting a right's illimitable scope. The fact that the Constitution is expressly intended to apply to horizontal and not only vertical relationships makes the two-stage approach all the wiser.¹⁸ For example, in order to ensure the uniformity of review, thought should also be given to casting the prohibition on unequal treatment in Article 1 as a positive right to equality which could be limited. The same applies to other one-stage rights, such as the right to deliver a petition. However, the clear rule-like formulation prohibiting the death penalty might best be left as a one-stage right unless it were to be formulated as the right to life. The prohibition on the death penalty could then be included expressly in the scope of the right, while leaving its other elements open to limitation.

As explained, rights in the Constitution are at present not regulated by a general limitation provision. This is a pity, as a general limitation provision could set common standards according to which all rights may be limited, thereby strengthening the desired two-stage approach and symbolising the interconnectedness of all rights when it comes to setting limits to their protection. Where necessary, a general limitation provision could be qualified by a specific provision applicable to a particular right. For example, if the right to life were included in the Constitution, the prohibition on capital punishment does not have to be included in the scope of the right as suggested above. Instead a specific limitation provision to the right could make clear that no limit imposed on the scope of the right in accordance with the general limitation provision may amount to capital punishment.¹⁹

14 ECtHR, *Öllinger v. Austria* of 29 June 2006. In par. 40 the Court explained: '[T]hat the present case is one concerned with competing fundamental rights. The applicant's right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the other association's right to protection against disturbance of its assembly and the cemetery-goers' rights to protection of their freedom to manifest their religion.'

15 Act on Equal Treatment of 1994. Cf. M.L.M. Hertogh & P.J.J. Zoontjens (eds.), *Gelijke behandeling: Principes en praktijken*, 2006.

16 For example, in Case 1997-36 the Commission on Equal Treatment, which gives opinions based on the Equal Treatment Act, ruled that a shooting club's constitution had to respect the Act. This was because the club organised competitions, which in the opinion of the Commission meant that it offered a service to the public, thereby engaging the Act.

17 L. du Plessis & H. Corder, *Understanding South Africa's Transitional Bill of Rights*, 1994, p. 126.

18 On the horizontal application of rights in the Dutch Constitution, see L.F.M. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy*, 1992.

19 For example, Art. 15(2) of the South African Constitution (1996) contains a specific limitation provision that qualifies the general limitation provision in Art. 36 regarding the right to freedom of religion. It reads: 'Religious observances may be conducted at state or state-aided institutions, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.'

But what are these common standards that a general limitation provision should guard before a right may be limited? Also, how do the current limitation provisions in the Dutch Constitution measure up to such standards?

3.2. Formal and substantive rechtsstaat

Limitation requirements may usually be divided into those requirements that regulate legality and those that regulate legitimacy.

Limitation requirements grounded in legality concern the non-substantive characteristics that an interference must exhibit in order to pass constitutional muster.²⁰ In other words, legality concerns a formal appraisal as to whether an interference is capable of embodying a limit by asking whether it is properly 'clothed'. In constitutional law this means that interferences with rights must be sanctioned by legal norms or rules in some or other manner.²¹ For example, the Universal Declaration of Human Rights of 1948 provides for legality in Article 29(2) by requiring that limitations are to be 'determined by law'. Legality can be viewed as protecting people's rights from the perspective of the formal *rechtsstaat* (state under the rule of law) of the nineteenth century which emphasised that rights may only be limited by law. Law became a hallowed vehicle for limitation as laws were passed by Parliament and were hence subject to democratic control. As Willem Witteveen explains:

'[T]he core of the classic or liberal *rechtsstaat* is legality. (...) The principle of legality is first and foremost formal in meaning and attempts no material guarantee of civil freedoms. The criminal and administrative law examples of legality, are despite their differences, aimed at legal certainty and the protection of citizens who, for their part, influence their rights, privileges and obligations by electing their representatives. The classic *rechtsstaat* is, in broad terms, a tale of democracy.'²²

The faith placed in the wisdom of Parliament was such in the nineteenth century that most commentators found it unnecessary to control Parliament apart from regular elections.²³ A.V. Dicey, for example, explained that all that had to happen to redress legislative abuse was for voters to make themselves heard through the ballot box.²⁴

However, the dawn of the twentieth century brought with it the horrors of two world wars coupled with an increasing distrust of the soundness of the democratic process to champion people's rights unaided by the judicial review of legislation. Constitutional thought also came to embrace the substantive *rechtsstaat*.²⁵ The substantive *rechtsstaat* added a material element to the equation by requiring that interferences with rights must be substantively justifiable and not only formally acceptable as products of the democratic process.

Essentially, legitimacy amounts to an appraisal that rests on asking if a particular interference is in accordance with the substantive values generated or aspired towards by a particular conception of society. The ideal conception is usually indicated by the term 'democratic society', as is found in the limitation provisions applicable to Articles 8 to 11 of the European Convention on Human Rights, including variants such as 'open and democratic society' in Article 36(1) of the South African Constitution and 'free and

20 Cf. Alexy, supra note 7, p. 189; P. Popelier, *Democratisch regelgeven*, 2001, p. 105.

21 Cf. O.M. Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', 1976 *Harvard International Law Journal* 17, p. 503.

22 W. Witteveen, *De denkbeeldige staat: Voorstellingen van democratische vernieuwing*, 2000, p. 197. Author's translation of: 'Het legaliteitsbeginsel is dan vooral van formele betekenis, geen materiële waarborg van burgerlijke vrijheden. De strafrechtelijke en bestuursrechtelijke uitwerking van het legaliteitsbeginsel zijn bij al hun verschillen toch beide georiënteerd op de normen van rechtszekerheid en rechtsbescherming voor de burgers die door middel van hun gekozen vertegenwoordigers ook invloed hebben op de wetten die hen rechten, bevoegdheden en verplichtingen bezorgen. De klassieke rechtsstaat is een verhaal over democratie.' The avoidance of arbitrary limits is also stipulated under Principle 49 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986.

23 In Belgium, for example, the Constitution contained no explicit bar on judicial review, as is the case in the Dutch Constitution. The reason being that in the nineteenth century it was held to be unthinkable that a court would even attempt to question the democratic will. Cf. R. Leysen & J. Smets, *Toetsing van de wet aan de Grondwet in België*, 1991, p. 6.

24 E.g. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1959, p. 73, arguing that: 'The electors can in the long run always enforce their will.'

25 Van der Schyff, supra note 10, pp. 141-145.

democratic society’ in Article 1 of the Canadian Charter of Rights and Freedoms. The conception is put to use by first judging whether an interference pursues a legitimate aim after which it is determined whether the interference is ‘reasonable’, ‘necessary’ or ‘demonstrably justifiable’. Limitation provisions might not always expressly state the aims for which rights may be limited, but this does not deny the fact that a legitimate aim, and hence an aim acceptable to a democratic society, ought to be identified in pursuit of which a right may be interfered with.²⁶

A review of the Dutch Constitution evidences a focus on legality requirements when it comes to controlling interferences with rights above legitimacy requirements. In particular, the focus falls on Parliament and its authority to limit rights. A good example is Article 6(1), which reads that:

‘Everyone shall have the right to manifest freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law.’

The only textual requirement that needs to be met in limiting this right is that a limit must be clothed in a ‘law’. ‘Law’ in the context of the Dutch Constitution always means that a limit must be in the form of an Act of Parliament, unless a provision expressly allows for delegation to take place.²⁷ The fact that the right to freedom of religion may only be limited by an Act of Parliament excludes the possibility of delegation. By forcing the people’s representatives to decide any limits and not to delegate their authority to another, possibly unelected, body, is intended to shore up the right’s protection and highlights the emphasis on the democratic process.²⁸ The requirement of strict legality is diluted under some rights, though, such as the right to personal integrity in Article 11 which allows for delegation by stating that a limit must be ‘laid down by or pursuant to Act of Parliament’. Limiting a right is very much a question of deciding the extent to which the principle of legality is diluted through delegation or not.

The need to control the legitimacy of interferences is not entirely absent from the Constitution, though. A number of rights state the purpose for which that specific right may be limited, thereby restricting Parliament’s discretion in choosing a purpose at random. The right to the freedom of association in Article 8 is a case in point by stipulating that the freedom may only be limited in the interest of public order. However, references to a ‘democratic society’, or similar formulations, which would warrant a proportionality exercise to determine if a particular aim is pursued in an acceptable manner are, apart from a few provisions, absent from the Constitution. One of the exceptions is Article 15(3), which provides that a person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights ‘in so far as’ the exercise of such rights is not compatible with the deprivation of liberty. ‘In so far as’ is usually taken to warrant a proportionality exercise and hence a substantive brake on the extent to which a detained person may be deprived of his or her rights.

In sum, the crux of the Dutch Constitution’s limitation regime rests on deciding who may limit a right and not so much on how that right is to be limited. This might be acceptable as long as judicial review is absent, but as soon such review is accepted the question will have to turn to how judges are to decide the justifiability of interferences with rights. Apart from the democratic state, in the form of its democratically legitimated Parliament that shoulders the responsibility for deciding how rights are to be limited, the focus will equally have to include the democratic society as well, in the form of substantive requirements applied by the courts on how rights are to be limited.²⁹

This can best be achieved through the adoption of a general limitation provision. The case for a general limitation provision to be included in the Dutch Constitution is strengthened by the fact that not only will it encourage a uniform approach to the two-stage application of rights, but it will also allow for a uniform approach to justifying interferences with rights. As to its form, it should obviously address questions regulating an interference’s legality as well as its legitimacy.

²⁶ Ibid., p. 146.

²⁷ D.J. Elzinga et al., *Handboek van het Nederlandse staatsrecht*, 2006, pp. 251-252. This is not surprising, given the fact that judicial review is not allowed; Parliament is chosen as the primary guardian of rights.

²⁸ L. Dragstra et al., *Beginselen van het Nederlandse staatsrecht*, 2012, p. 260. On the emergence of proportionality in Dutch public law, see M. Barendrecht, ‘Het constitutionele toetsingsrecht van de rechter’, in L. Prakke et al., *Toetsing*, 1992, p. 89, pp. 164-165.

²⁹ On the analytical use of the distinction ‘democratic state’ and ‘democratic society’, see G. van der Schyff, ‘The Concept of Democracy as an Element of the European Convention’, 2005 *Comparative and International Law Journal of Southern Africa* 38, p. 355.

3.3. Giving flesh to legality

Regarding legality, it would be sufficient for a general limitation provision to require of an interference that it be 'in accordance with the law'. While creating such a common point of departure, it would still leave enough room for the current array of delegation provisions to be applied to particular rights. Current delegation provisions would function as specific limitation provisions that qualify the general requirement where necessary. The word 'law' in the general provision could then be interpreted as meaning law in its material meaning as understood by the European Court of Human Rights, in other words all applicable laws irrespective of their source, while law in the specific provisions can still be taken to mean a formal law in the sense of an Act of Parliament.³⁰

A common legality provision encouraging a material definition of the law is of particular significance in making the enforcement of people's rights real and effective by remedying the negative effect of classifying limits as being either 'general' or 'specific'.³¹ Dutch constitutional law is quite unique, and awkward, in the way it construes limitation provisions. 'Specific' limits are taken to mean limits that have a direct link to a specific limitation provision. In other words, a specific limitation is the conscious application of a limitation provision. A good example would be Article 125a of the Civil Servants Act (*Ambtenarenwet*) of 1929. This article states in so many words that it regulates the limitation of a civil servant's rights to freedom of expression, freedom of association and freedom of assembly. The stated purpose is thus to limit the rights identified and to do so in accordance with each right's applicable limitation provision. However, not all limits are conceived of in this manner. For example, fire safety rules in buildings are not intended to limit the right to education in schools, but a side-effect could be that a school might have to be evacuated in the case of a fire. An unintended consequence of these rules is to factually limit pupils' right to education. These indirect interferences with rights are termed 'general' limits.

Because general limits were never intended to limit a right as such, they are not dealt with in accordance with limitation provisions.³² As far as reviewing Acts of Parliament are concerned this does not lead to any problems simply because the courts are not competent to review such acts; were this to change real problems are likely to present themselves. General limits namely give rise to the strange situation that direct limits are to be justified in accordance with limitation provisions, while indirect limitations are not. Although the grand revision of the Constitution in 1983 intended for all interferences with rights to be relayed to a limitation provision, this has not been the case.³³ The reason for this not happening is twofold.

Acts of Parliament in the Netherlands are often viewed as interpreting the Constitution, whereas many other systems emphasise quite strongly that Acts of Parliament should be interpreted in conformity with the Constitution.³⁴ This upside-down logic can be explained by the absence of judicial constitutional review of Acts of Parliament in the Netherlands. Parliament is the primary interpreter of rights in the Constitution and not the courts. This leads to a focus on those instances in which Parliament intended to limit rights and thus make use of any limitation provision. Put differently, the extent to which a limitation provision is engaged is a question to be settled expressly by Parliament. Secondly, Dutch constitutional law would also have a very difficult time in relaying many general limits to a limitation provision, as is the case with specific limits. As explained above, the Constitution prescribes a complicated system of delegation in deciding who may limit a right, usually indicating Parliament, and if that authority may be delegated.

The effect is that many general limits would fall outside the scope of these narrowly defined legality requirements and would thereby be unconstitutional. For example, the right to freedom of religion in Article 6(1) of the Constitution may only be limited through an Act of Parliament, without any delegation

30 ECtHR, *Silver v. the United Kingdom* of 25 March 1983, *Publ. Eur. Court H.R.*, Series A, no. 61, par. 86. The Court was satisfied with an interference having 'some basis in domestic law'.

31 Cf. M.C. Burkens, *Algemene leerstukken van grondrechten naar Nederlands constitutioneel recht*, 1989, pp. 113-138; C.A.J.M. Kortmann, 'Algemene en bijzondere beperkingen van grondrechten', 1978 *Nederlands Juristenblad*, p. 921-924.

32 See also the discussion by B.P. Vermeulen, 'Beperking van grondrechten', in J.B.J.M. ten Berge et al. (eds.), *De Grondwet als voorwerp van aanhoudende zorg*, 1995, pp. 1-34.

33 Elzinga et al., *supra* note 27, p. 252.

34 *Ibid.*, p. 172.

of this authority being allowed. A situation could easily arise that a building may not be used as a place of worship due to zoning regulations set by a local authority stipulating that the structure may only be put to use for industrial purposes, thereby indirectly restricting the right to freedom of religion. On a strict application of the Constitution this interference violates the right to freedom of religion, because its author, the local authority, had no right to limit the right to freedom of religion as Article 6(1) awards this authority to Parliament without the option of delegation. An absurd situation would arise that would see countless useful rules nullified in this way, thereby causing general disruption to the smooth functioning of society. In circumventing such absurdities the requirements of limitation provisions are considered applicable only when it is clear that a right as such was intended to be limited. The effect is that, in our example, the interference will be treated as a general limit and hence outside the scope of the limitation provision in Article 6(1). The situation would have been different had the zoning regulation expressly excluded the possibility of using a building for religious purposes, as this would be a specific interference that would activate the legality requirements set by Article 6(1).

The inclusion of a general requirement that a right may only be limited ‘in accordance with the law’ would solve the problem of some interferences with rights falling outside the scope of constitutional justification. All interferences with rights would have to be traced to the requirement that an interference must have a legal basis at least amounting to a material law. The zoning regulation would thus have to be checked to see if it enjoyed a legal basis that was accessible and foreseeable, similar to the practice of the European Court of Human Rights. At the same time, the current delegation provisions would still apply as well, which would mean that in addition to the general requirement an interference would also have to satisfy these stricter requirements where an interference was intended to limit a right where it is not simply an unintended by-product of a rule. ‘Specific’ limits would therefore have to answer to both the general and specific legality requirement, and ‘general’ limits only to the general requirement. The effect would be to subject all interferences with rights to a basic legality scrutiny, while allowing for additional scrutiny depending on the circumstances.

3.4. *Giving flesh to legitimacy*

The question whether a preamble should be drafted for the Dutch Constitution has been the stuff of debate for years.³⁵ At present the Constitution has no preamble and simply starts listing the rights it guarantees in Chapter 1. Supporters of a sober approach argue that a preamble would add nothing real to the Constitution and that the articulation of values should be left to the political process and not codified.³⁶ On the other hand, calls can be heard for a preamble to be adopted to state the core values on which the Netherlands’ constitutional order rests. Preambles, though, often amount to a ritual of rhetoric that adds little substance to constitutional enforcement, unless such an instrument is used to deduce fundamental rights therefrom, as in the case of the preamble to the French Constitution of 1958.³⁷ A similar need is not apparent in the Dutch context, though, given the rights already guaranteed by the Constitution.

However, this does not mean that in gauging the justification of interferences with people’s rights a distinct declaration of the Constitution’s core values will be altogether redundant as a benchmark. As explained above, the requirement of legitimacy entails judging the quality of interferences against a particular conception of society, usually termed as a ‘democratic society’. The purpose of such a statement in the constitutional text would be to not only encourage the courts to test the substance of interferences, but also to guide them along this process instead of leaving the courts without any textual anchors regarding the crucial tenets of democracy. Such a substantive statement could easily be included in a general limitation provision and together with the discussed requirement of legality might read as follows:

35 For a recent discussion, see P.B. Cliteur & W.J.M. Voermans, *Preambles*, 2009, which is a report drafted for the State Commission on Constitutional Reform.

36 C.A.J.M. Kortmann, ‘Uit of in de Grondwet?’, 2002 *Regelmaat*, p. 75.

37 T. Koopmans, *Courts and Political Institutions: A Comparative View*, 2003, p. 73.

Any interference with a right contained in this chapter is justified only if it is (a) in accordance with law, and (b) pursues an aim which is legitimate and proportional in a democratic society based on the values of freedom, equality and tolerance.³⁸

A general limitation provision along these lines would serve to regulate the legality as well as the legitimacy of interferences, while also formulating the core values underpinning the justificatory process. Whichever values are highlighted in such a statement, the main purpose should be to reflect the ideals of a democratic society in general, and for current purposes its Dutch context in particular. Deciding on these values is of course a matter of debate, which is all the more reason for constitutional drafters to rise to the occasion, given their important responsibility, and not to seem to delegate this duty to the courts entirely.

As to the legitimacy element, it is not necessary to state the aims for which a right may be limited. This is because many rights already state the aim for which they may be limited, in all other cases a court can judge whether a particular aim advanced by the party wanting to limit a right is indeed legitimate in a democratic society. The effect would be that particular provisions function as specific limitation provisions that qualify the general limitation provision in this regard. It might seem that explicitly stating the aim for which a right may be limited might restrict and therefore control the limitation of that right. However, in practice it makes little difference whether a right has a stated aim for which it may be limited or not. This is because the interpretation of such stated aims is often so wide that no real additional control is exercised over and above what was achievable by simply asking whether a freely chosen aim can be judged to be legitimate.³⁹

It is nonetheless necessary for a court to determine if a right is interfered with in pursuit of a legitimate aim, as a court has to decide if the aim was pursued in a manner acceptable to a democratic society. This purpose of this exercise is not simply to ascertain the will of a political majority, but also to scrutinise it before allowing a right to be limited. As the European Court of Human Rights explained in *Chassagnou v. France*:

‘Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’⁴⁰

This is the crux in testing the legitimacy of an interference.⁴¹ In the proposal above, the reference to proportionality was chosen instead of more common references such as reviewing the reasonableness or necessity of an interference. This is because it does not matter so much if one chooses to speak of reason or necessity, the fact is that an interference may not be disproportional in a democratic society. From this it might very well be deduced that an interference may only be accepted once it proves to be reasonable or necessary, but in and of themselves these terms set no benchmark. The real benchmark is set by one’s conception of what a democratic society should amount to and whether the will of a majority respected these values. To this end references to core values such as freedom, equality and tolerance present the major parameters within which the justificatory exercise is to be conducted. No claim can be seriously judged without bringing such values to bear in deciding what a democratic society ought to find of an interference with a right. An enumeration of values should however not be seen as a closed circuit, as the concept of a democratic society knows no fixed definition. Instead it represents a constant search for what is acceptable in the realm of rights.⁴² In this search a value statement could serve as an impulse for

38 Other provisions that guarantee rights, but are not in Chapter 1, could also be obviously included.

39 Consider, for instance, that interferences with rights in the European Convention on Human Rights hardly ever falter for not pursuing a legitimate aim.

40 ECtHR, *Chassagnou v. France* of 25 April 1999, *Reports*, 1999-III, par. 112.

41 T. Maunz & R. Zippelius, *Deutsches Staatsrecht*, 1991, explain similarly that otherwise fundamental rights bring no protection as everything hinges on the legislature.

42 Cf. Van der Schyff, *supra* note 10, pp. 154-167; S. Marks, ‘The European Convention on Human Rights and its “Democratic Society”’, 1995 *British Yearbook of International Law* 66, p. 209.

comparison, for example the jurisprudence of the European Court of Human Rights in which democratic values such as broadmindedness have been emphasised.⁴³

Including an explicit legitimacy requirement would also solve the problem of what to do with general limits. While an expanded legality requirement would bring such limits within the scope of the Constitution, a legitimacy requirement will allow for such limits to be reviewed for their compatibility with the aspirations of a democratic society. In the example sketched above of a school having to be evacuated in case of a fire, it would be patently clear that one deals with an interference with the right to education that is proportional to the aim pursued in a democratic society and hence justified. Otherwise, general limits would have to be interpreted as not interfering with a right's scope in order to escape limitation analysis.⁴⁴ In other words, such limits would have to be interpreted as not being limits at all by restricting the reach of a right. Alternatively, one could argue that the very reach of a right only becomes clear after subtracting general limits from it, but this would be a very strange way of interpreting what is supposed to be a *fundamental* right. This is because the scope of a fundamental right is so justified from the perspective of limits, and not limits from the perspective of the right. As Aharon Barak has argued so clearly:

‘I believe that the scope of the right does not change when it is in conflict with other constitutional values – such as society’s interests (national security, public order) or other conflicting rights. The clash between conflicting interests or values should not be expressed in the scope of the right, but rather in the manner the right is exercised and realized, and it is in this domain that proportionality plays a central role.’⁴⁵

Opponents of an explicit legitimacy requirement might argue that the need for proportionality and the concept of a democratic society might simply be deduced from the constitutional framework. The Government adopted this position in the past when the bar on judicial review was considered.⁴⁶ While it might be true that appropriate legitimacy requirements could be implied by the courts, it would be better still to place such an important issue on a firm footing by guaranteeing it explicitly.⁴⁷ This is especially true in a system where some still insist on a strict separation between law and politics. C.A.J.M. Kortmann, for example, denies that the courts have the power or role to shape the law in any meaningful way.⁴⁸ However, such approaches simply negate the fact that the very act of interpretation calls on the courts to help form the law, albeit within the strictures of the constitutional dispensation.⁴⁹

4. Enter the State Commission

Discussing the ideal limitation regime is only one aspect of the debate, as the attention can also be turned to the possibility of actual reform being brought about. This is where the State Commission on Constitutional Reform enters the scene and especially its findings on the need for a number of constitutional reforms, as presented in its report to the end of 2010.⁵⁰ The Commission, composed for the most part of academics and judges, was appointed in 2009 by the Government and was entrusted with a number of constitutional questions. Although the Commission’s remit did not include the question whether constitutional review by the judiciary should be introduced, which would mean deleting

43 ECtHR, *Handyside v. the United Kingdom* of 7 December 1976, *Publ. Eur. Court H.R.*, Series A, no. 24, par. 114.

44 Discussing various approaches, see L.F.M. Verhey, ‘Het grondwettelijk beperkingsstelsel: Handhaving of herbezinging?’, 2003 *NJCM-Bulletin* 28, p. 216, pp. 223-225; Burkens et al., *supra* note 9, pp. 135-136.

45 A. Barak, ‘Proportionality and Principled Balancing’, 2010 *Law and Ethics of Human Rights* 4, no. 1, p. 5.

46 *Kamerstukken II*, 2000/01, 27 460, no. 1, p. 6.

47 See Verhey *supra* note 44, pp. 228-230; H.R.B.M. Kummeling, ‘Proliferatie van proportionaliteit. Over een beginsel dat ook in de Nederlandse grondwet niet zou misstaan’, in P.P.T. Bovend’Eert et al. (eds.), *Grensverleggend staatsrecht*, 2001, p. 233, p. 248.

48 C.A.J.M. Kortmann, *Staatsrecht en raison d’État*, 2009, pp. 11-12.

49 Cf. G. van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa*, 2010, pp. 247-251.

50 *Rapport Staatscommissie Grondwet*, 2010.

Article 120 or amending it as for example the Halsema bill foresees, the Commission's work on the future of rights in the Constitution warrants closer study.⁵¹

In this regard it is particularly encouraging that in its findings the Commission supported the idea of a general limitation provision, something which is also argued for in this contribution.⁵² Interestingly though, the proposed limitation provision only pays attention to regulating the legitimacy of interference with rights while remaining silent on questions of legality. The proposed provision reads:

1. Limits to fundamental rights do not exceed the purpose pursued by the limitation.
2. The core of fundamental rights shall not be violated.⁵³

If adopted the provision would still leave the problem of general and specific limits unresolved, while this question could easily be addressed by requiring that all interferences with rights must at least have a material basis in law, as explained above.

As to the legitimacy of interferences, Subsection 1 of the proposed provision would introduce the requirement of proportionality to limitation analysis, which can only be welcomed; while Subsection 2 attempts to impose a limit on the extent to which a right may be limited by placing its core outside the reach of limitation analysis. However, while the principle of proportionality is introduced, a measure by which to measure proportionality is absent. In other words, what should an interference with a right be proportional to? Requiring that an interference must be proportional in a 'democratic society' would have answered this question quite clearly. However, a closer look at the Commission's report allows this gap to be filled by the general value provision; this provision would serve to articulate foundational values that need to be followed in interpreting the Constitution as a whole.⁵⁴ The proposed provision reads:

1. The Netherlands is a democratic *rechtsstaat*.
2. The authorities shall respect and guarantee human dignity, constitutional rights and fundamental principles of law.
3. Public authority shall only be exercised based on the Constitution or an Act of Parliament.⁵⁵

The effect of this provision would be to turn what is essentially a rule-based document into a principle-based instrument, thereby allowing the courts to use the value-laden context it presents as a canvas against which to conduct a proportionality analysis. The fact that the Government, in its response to the Commission's report, criticised the proposed general limitation provision for not providing a measure of proportionality seems too harsh, as the Government does not fully appreciate the potential which a general value provision might hold in providing a substantive reservoir of values with which to guide any proportionality exercise.⁵⁶

Where the Government's response is to be welcomed though, is regards its criticism of the idea that the core of rights is to be protected against violation.⁵⁷ While the aim of placing a right's core outside the reach of limitation, thereby rendering it inviolable, is undoubtedly laudable, this ideal shatters as soon as the core is to be identified. A core is not something that simply presents itself, as legal theory and judicial practice also show.⁵⁸ While the Commission seems to approach cores as something that stands separate from proportionality analysis, the reality is quite different, as the core of a right is essentially the

51 Ibid., p. 43. Although the Commission did observe that constitutional review by the judiciary would in principle be advisable in order to increase the normative value of the Constitution, pp. 46-47.

52 Ibid., pp. 55-56.

53 Ibid., p. 55. Author's translation of: '(1) *Beperkingen van grondrechten gaan niet verder dan het doel van de beperking vereist. (2) De kern van grondrechten wordt niet aangetast.*'

54 Ibid. pp. 36-42.

55 Ibid. p. 40. Author's translation of: '1. *Nederland is een democratische rechtsstaat. 2. De overheid eerbiedigt en waarborgt de menselijke waardigheid, de grondrechten en de fundamentele rechtsbeginselen. 3. Openbaar gezag wordt alleen uitgeoefend krachtens de Grondwet en de wet.*'

56 *Kamerstukken II*, 2011/12, 31 570, no. 20, p. 8.

57 Ibid.

58 Cf. R. Nehmelman, 'Een algemene periodieke keuring van de nationale grondrechten. Korte analyse van de grondrechtenparagraaf van de Staatscommissie Grondwet', 2011 *Regelmaat* 26, p. 84, pp. 90-91; G. van der Schyff, 'Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective', in E. Brems (ed.), *Conflicts Between Fundamental Rights*, 2008, p. 131.

product of a considered limitation analysis.⁵⁹ Explained differently, what a core is, or should be, is the product of contextual interpretation which requires a careful balancing of relevant competing interests to determine when an interference intrudes unacceptably upon a right's protection. Take the example of one-stage rights, the prohibition on torture in Article 3 of the European Convention on Human Rights is inviolable, which centres the attention on when an act qualifies as being torture.⁶⁰ The European Court of Human Rights has made it clear on numerous occasions that what amounts to torture is a question of context and that perceptions may very well change over time, thereby changing the scope of protection under the right.⁶¹ While this is logical in applying a one-stage right, the presence of a limitation provision obviates the need to speak of cores where two-stage rights are concerned. The crux should simply, but importantly, rest on courts having to conduct responsible and considered proportionality exercises in determining the justifiability of interferences with protection. To speak of cores adds nothing useful to limitation analysis under two-stage rights but simply clouds the issue.

In sum, when the Commission's proposals are evaluated in the light of the standards developed in this contribution, the introduction of a general limitation clause can certainly be supported. However, the absence of legality requirements in the proposed general limitation provision is to be questioned while the idea of inviolable cores is to be rejected.

5. On limitation provisions

Rights have become indispensable features of modern constitutions. Without rights constitutions would revert to being instruments of government that reveal more about the institutional and formal side of governance than its material properties and obligations. Rights enliven a constitution and have risen to such prominence that many, like the Dutch Constitution, state them first before delving into the state and its composition. Limitation provisions have an important function in bringing rights to life. This might seem like something of a contradiction, namely that positive guarantees are to be animated by provisions that prescribe the circumstances under which such guarantees may be cut short. Karl Marx, for instance, lamented that rights are hollowed out by limitation provisions, as such provisions amount to a:

[T]rick of granting full liberty, of laying down the finest principles, and leaving their application, *les détails*, to be decided by subsequent laws.⁶²

Marx's cynicism might have been justified in the nineteenth century, when limitation provisions were intended to secure a mechanical adherence to legislative legality, but is out of place in a modern context that emphasises not only the need for legality but also that of legitimacy. The purpose of limitation provisions is to scrutinise interference with people's rights in order to decide if such interferences are justified or simply violations. Limits issuing from limitation provisions should be viewed as exceptions to the rule that have been justified against stringent requirements and not as a general excuse to limit a right's protection. Limitation provisions, one could say, ought to allow for a structured and principled dialogue between those wanting to limit a right and those opposing a particular limit. Far from devaluing rights, limitation provisions, properly understood, are the gatekeepers of people's rights. This is because higher

59 Alexy, *supra* note 7, pp. 195-196.

60 E.g. ECtHR, *Gäfgen v. Germany* of 1 June 2010, par. 88: 'In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (...). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (...), as well as its context, such as an atmosphere of heightened tension and emotions (...).'

61 E.g. ECtHR, *Selmouni v. France* of 28 July 1999, par. 101: 'However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (...), the Court considers that certain acts which were classified as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.' Cf. M. Bossuyt, 'Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU asylum law', 2011 *European Human Rights Law Review*, p. 582, who argues for a more restrictive interpretation of what amounts to inhuman treatment in some instances.

62 K. Marx, 'The Constitution of the French Republic Adopted on 4 November 1848', in K. Marx & F. Engels, *Collected Works*, vol. X, 1978, p. 567.

law is applied through such provisions by identifying those instances in which other laws or actions violate such higher laws. Further qualifying Marx's cynicism is the fact that the courts have emerged as one of the primary arbiters of limitation provisions today through the device of judicial review, thereby restricting arbitrary legislatures. However, as mentioned in the introduction, the Netherlands is something of an exception in this regard as Article 120 of the Dutch Constitution still forbids the courts from reviewing the constitutionality of Acts of Parliament. Were the Netherlands to take the plunge, though, and allow the courts to rule on the constitutionality of Acts of Parliament, the current limitation regime would have to rise to the occasion to better reflect the requirements of legality and legitimacy and so secure a sounder limitation analysis. This is not to say that constitutional review by the judiciary will be impossible under the current limitation regime, but certainly that the current situation is not optimal from the point of view of such review. It seems unclear, though, whether judicial review will be introduced in the very near future, as the success of the Halsema bill is still far from guaranteed at the moment. Also, the fact that the Government's response to the State Commission's proposals on constitutional reform, which admittedly did not include the topic of constitutional review as such, actually amounted to dismissing any notion of reform out of hand does not foster a political climate which is conducive to reform anytime soon.