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The Role of Dutch Courts in the Protection of Fundamental Rights

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1. Introduction

As regards the role of the courts in the protection of fundamental rights, Dutch constitutional law is characterized by two contradictory elements. On the one hand, Article 120 of the Dutch Constitution (*Grondwet*) states that the constitutionality of Acts of Parliament shall not be reviewed by the courts. Thus Acts of Parliament cannot be reviewed in the light of the fundamental rights found in the Dutch Constitution. On the other hand, Article 94 of the Dutch Constitution states that statutory regulations – including Acts of Parliament – in force within the Kingdom shall not be applicable if such application is in conflict with the provisions of treaties that are binding on all persons. Acts of Parliament can therefore be reviewed in the light of fundamental rights found in certain treaties. Article 94 had made the Dutch legal order a relatively open one, i.e. open to the influence of treaties protecting fundamental rights and open to the influence of the case law of international courts called into being by such treaties.

In this contribution, we shall first describe the genesis and general character of the system for the protection of fundamental rights by the Dutch courts, as far as this system has been developed on the basis of Article 120 of the Constitution, Article 94 of the Constitution and case law. After a brief consideration of the text and the history of the formation of both articles the main issue, on the basis of rulings and judgements, will be to see how Dutch courts have dealt with the power that is codified in Article 94 of the Constitution. In discussing how Dutch courts have dealt with this power, we shall discuss the case law of the Dutch Supreme Court (*Hoge Raad, HR*), and – albeit to a much lesser extent – the case law of two separate Dutch administrative courts, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State, ABRS*) and the Central Appeals Tribunal (*Centrale Raad van Beroep, CRvB*). This case law will concern one treaty in particular: the European Convention on Human Rights (ECHR). After having shown how Dutch courts have dealt with the power that is codified in Article 94 of the Constitution, we shall pay attention to the way in which the European Court of Human Rights (ECtHR) has influenced the Dutch legal order, and more specifically the Dutch system of the protection of fundamental rights. This influence will be dealt with by a discussion of some key rulings of the ECtHR.

After the aforementioned description we shall discuss some recent developments which might challenge the open character of the Dutch system of the protection of fundamental rights. Proposals have been made to amend Article 94 of the Constitution, and recently there have been discussions on the

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curtailment of the competence of the ECtHR. We shall consider two of those proposals: the proposal by the State Commission on Constitutional Reform (*Staatscommissie Grondwet*) and the proposal by three Members of Parliament of a Dutch political party, viz. the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie, VVD*). We shall also consider the recent discussions on the curtailment of the competence of the ECtHR, paying special attention to a proposal by J.H. Gerards, Professor of Fundamental Rights at Radboud University Nijmegen.

Our contribution will conclude with an analysis of some of the recent developments. The analysis will focus on the consequences that these developments might have for the open character of the Dutch constitutional system and for the system of the protection of fundamental rights by the Dutch courts.

2. The system of the protection of fundamental rights by the Dutch courts and the influence of the ECtHR

2.1. Article 120 of the Constitution

In 1848, a provision was included in the Constitution of the Kingdom of the Netherlands which indicates that the legislature, instead of the courts, is designated as the highest interpreter of the Constitution. From 1848 to 1983, the text of this provision read as follows: 'The laws are inviolable.' Since 1983, the text of the provision prohibiting constitutional testing reads:

'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'¹

Both the old and the new text of the provision establish that the legislature has the final and authoritative say as to the constitutionality of Acts of Parliament and treaties. For the Dutch courts, the constitutionality of an Act of Parliament and a treaty is a legal given. The provision therefore imposes a prohibition on the courts to test whether a statutory provision or a treaty is compatible with the Constitution.² A factual consequence of this is that the courts are obliged to still apply an Act that, in their opinion, contradicts the Constitution,³ even if this Act contradicts fundamental rights which are safeguarded in the Constitution.⁴

In 1848, the inclusion of the prohibition of constitutional review in the Constitution was not undisputed. A Government committee, led by Thorbecke,⁵ which prepared the constitutional revision of 1848, opposed the inclusion of such an article in the Constitution. The proposal to still include the prohibition of a constitutional review in the Constitution came from the Government itself. Thorbecke severely criticized this Government proposal. He thought that the prohibition of constitutional review would break up the unity of legislation.⁶

Apart from this argument by Thorbecke, opponents of the prohibition of constitutional review also argue that because of the prohibition of constitutional review, the Netherlands is an imperfect constitutional state because the courts are not allowed to determine the constitutionality of primary legislation. As the legislature has the final say, in the Dutch model of government, the constitutional aspect is subordinate to the democratic aspect. Another argument by the opponents of the prohibition of constitutional review is that the judiciary is unable to provide a sufficient counter-voice to the ever increasing influence of the legislative and administrative authorities. Besides, the argument is put forward that the prohibition of constitutional review negatively affects the protection of constitutional fundamental rights and the value of the Constitution, because the courts are not allowed to test statutory provisions against the fundamental rights in the Constitution, but they are allowed to do so against the fundamental rights in

1 Art. 120 of the Constitution.

2 The courts are, however, allowed to test secondary legislation against the Constitution.

3 A.D. Belinfante & J.L. de Reede (updated by L. Dragstra, N.S. Efthymiou, A.W. Hins & R. de Lange), *Beginselen van het Nederlandse staatsrecht*, 2012, p. 210.

4 On 8 March 2010 Ms. Halsema, a Member of the Lower House (Tweede Kamer), submitted a legislative proposal to change the Constitution, with the effect of giving the courts the power to test laws against a number of provisions of the Constitution; *Kamerstukken II 2009/10*, 32 334, no. 1. At this moment in time it is not clear who will further defend this proposal.

5 D.J. Elzinga & R. de Lange (in collaboration with H.G. Hoogers), *Van der Pot's Handboek van het Nederlandse Staatsrecht*, 2006, pp. 144-145.

6 J.R. Thorbecke, *Bijdrage tot de herziening der Grondwet*, 1848, pp. 60-63.

treaties.⁷ The above-mentioned arguments show that the criticism of the prohibition of constitutional review is still of current interest. In fact, several proposals have been made to lift the prohibition from the Constitution.⁸ However, up to now, this criticism and those proposals have not led to the prohibition of constitutional review being removed from the Constitution.

The inclusion of the prohibition of constitutional review in the Constitution did not result from judgements by the courts, in which a law was tested against the Constitution, but was a mere confirmation of the existing practice.⁹ Before 1848, the courts seemed never to have judged on the question whether they were allowed to test statutory provisions against the Constitution.

The case law of the Dutch Supreme Court since 1848 shows that the courts respect the prohibition on both substantively¹⁰ and formally¹¹ testing statutory provisions against the Constitution. Furthermore, the case law also shows that our highest court of justice broadly interprets Article 120 of the Constitution, in which the prohibition is currently laid down. Not only is the testing of primary legislation against the Constitution prohibited, the testing of statutory provisions against the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*) and against fundamental legal principles is, in the opinion of the Supreme Court, not allowed either.¹²

Before dealing with Article 94 of the Dutch Constitution, some short remarks on this Charter for the Kingdom of the Netherlands, and on the Kingdom of the Netherlands itself, are called for. The Kingdom of the Netherlands consists of four countries: the Netherlands, Aruba, Curaçao and Sint Maarten. Within this Kingdom, the Charter for the Kingdom of the Netherlands is the highest regulation. Article 14 of the Charter states that rules on the affairs of the Kingdom can be laid down in Kingdom Acts of Parliament (*rijkswetten*) or in Orders in Council of the Kingdom (*algemene maatregelen van rijksbestuur*). Article 42 of the Charter states that the Dutch Constitution regulates the model of government of the Netherlands. Regulations regarding only the Netherlands are to be found in Acts of Parliament. In principle, therefore, the Dutch Constitution concerns only the Netherlands. It must be added, however, that on the ground of Article 5 of the Charter, articles of the Dutch Constitution can deal with affairs of the Kingdom. Article 94 of the Constitution is one of those articles.

2.2. Article 94 of the Constitution

Another argument adduced by the opponents of the prohibition of constitutional review results from Article 94 of the Constitution. The argument is that this provision, which has had a place in the Constitution since 1953, leads to the deprivation of the Constitution in relation to treaties, because the courts are allowed to test statutory provisions against the constitutional provisions of treaties, if these provisions are binding on all persons according to their contents.

During the preparation of the 1953 constitutional revision, a provision which gave the courts the power to test national law against international law was not included in the legislative proposals of the Government to revise the Constitution.¹³ Nevertheless, in 1953 a provision which granted the courts this power acquired a place in the Constitution, because of an amendment approved by Parliament against the express wish of the Government.

In 1956, during the next constitutional revision, this provision was slightly amended. Since then, the provision has only undergone a slight editorial alteration. Today it reads:

7 H. Franken et al., *Encyclopedie van de rechtswetenschap*, 2001, pp. 374-375; see also *Rapport Staatscommissie Grondwet*, 2010, pp. 46-47.

8 E.g. *Proeve van een nieuwe Grondwet*, 1966, p. 55 and *Tweede rapport van de staatscommissie van advies inzake de Grondwet en de Kieswet*, 1969, p. 34; *Jaarverslag Raad van State*, 2009, pp. 73-75; Proposal Halsema supra note 4, nos. 2 and 3.

9 A.A.H. Struycken, *Het staatsrecht van het Koninkrijk der Nederlanden*, pp. 104-105.

10 HR 28 February 1868, *W* 2995.

11 HR 27 January 1961, *NJ* 1963, 248, annotated by D.J. Veegens.

12 HR 16 May 1986, *AB* 1986, 574, annotated by P.J.J. van Buuren, legal ground 6.1; HR 14 April 1989, *NJ* 1989, 469, annotated by M. Scheltema, legal ground 3.1.

13 *Kamerstukken II* 1951/52, 2374, no. 10, p. 28.

‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.’¹⁴

Contrary to the prohibition of constitutional review in Article 120 of the Constitution, this provision does codify an order of judicial review for the courts. The courts have to test against international law ‘regulations in force within the Kingdom’, which is all national law, from low to high, therefore also the Constitution, and from long-existing to recent. That means the courts also have to test more recent statutory provisions against longer existing international law.

Mention should be made of the fact that there is some discussion about the exact meaning of the words ‘regulations in force within the Kingdom’. Some writers claim that these words only refer to regulations concerning the Netherlands. This would imply that regulations which concern the Kingdom of the Netherlands cannot be tested against international law.¹⁵ Most writers claim, however, that these words refer to all regulations within the Kingdom of the Netherlands, including the Charter of the Kingdom of the Netherlands, Kingdom Acts of Parliament and Orders in Council of the Kingdom.¹⁶ In this article we endorse the point of view of the second group of writers: their point of view in our opinion fits in better with the wording and the intention of Article 94 of the Constitution.

Although all national law may therefore be reviewed, it may not be reviewed for compatibility with all international law. The courts are only allowed to review national law for compatibility with the provisions of treaties that are binding on all persons. A ruling dating from 1959 shows that the Supreme Court respects the restriction of the power of review to provisions of treaties which are binding on all persons. In this ruling, the Supreme Court explicitly considered that constitutional history shows that the constitutional legislature wished to expressly restrict the review of national law for compatibility with international law to the ‘provisions of treaties that are binding on all persons’, as stated in the constitutional provision.¹⁷ As a consequence the courts are not allowed to judge on the question whether national provisions contradict unwritten international law, or the provisions of treaties that are not binding on all persons.

Whether a provision of a treaty, according to its contents, is binding on all persons is determined by the courts themselves at last instance. According to the Supreme Court, it is not the intention of the Contracting Parties, but the content of the provision that is decisive for that judgement, unless the Contracting Parties have explicitly agreed that no direct effect is accorded to a provision of a treaty. If the provision of a treaty does not oblige the legislature to enact national legislation and this provision can therefore be immediately applied in the national legal system, then, according to the Supreme Court, the provision, according to its contents, is binding on all persons.¹⁸

If a national provision is incompatible with a treaty provision and the latter provision is binding on all persons, the national provision is no longer applicable, on account of Article 94 of the Constitution. Instead of the national provision, the treaty provision should be applied.¹⁹ The case law of the Supreme Court shows that the question whether the application of a national provision is compatible with a provision of a treaty must be answered on the basis of international standards and international case law. According to the Supreme Court in its judgement of 10 August 2001, incompatibility may not be assumed exclusively on the ground of an interpretation of the ECHR by the Dutch courts, if this results

14 Art. 94 of the Constitution. In 2010, the State Commission on Constitutional Reform, under the chairmanship of Thomassen, proposed to replace the concept of ‘binding on all persons’ in Arts. 93 and 94 of the Constitution with ‘directly effective’. According to the State Commission, this terminological alteration would not affect the meaning and applicability of Arts. 93 and 94 of the Constitution, *Rapport Staatscommissie Grondwet*, 2010, pp. 130-131.

15 H.G. Hoogers & M. Nap, ‘Het Statuut, de Grondwet en het internationale recht’, in L.J.J. Rogier & H.G. Hoogers (eds.), *50 jaar Statuut voor het Koninkrijk der Nederlanden*, 2004, pp. 75-85, H.G. Hoogers, *De normenhiërarchie van het Koninkrijk der Nederlanden*, 2009, pp. 47-63.

16 See J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (diss. Nijmegen), 2004, pp. 340-342 and the authors mentioned there.

17 HR 6 March 1959, *NJ* 1962, 2, annotated by D.J. Veegens.

18 HR 30 May 1986, *NJ* 1986, 688, annotated by P.A. Stein, legal ground 3.2; see also ABRS 18 August 2004, *AB* 2004, 435, annotated by I. Sewandono, legal ground 2.4.1.

19 *Kamerstukken I* 1952/53, 2700, no. 63, p. 5 and *Kamerstukken I* 1952/53, 2700, no. 63a, p. 3.

in the Dutch courts protecting the ECHR rights more extensively than is necessary on the basis of the ECtHR's jurisdiction.

'However, the Dutch courts are bound by Art. 94 of the Constitution, under which provision legal regulations applicable within the Kingdom are not applicable if this application is not compatible with treaty provisions that are binding on all persons. Such an incompatibility cannot be assumed solely on the basis of an interpretation by the national – Dutch – courts (...) which leads to a more extensive protection than may be assumed on the grounds of the jurisdiction of the ECHR (...).'²⁰

Before 1953 the Constitution had not given Dutch courts the competence to review national law for compatibility with international law. Consequently, before 1953 the Supreme Court had always reacted, with one exception, in the same way to the question whether a more recent national statutory provision was compatible with a treaty.²¹ The Supreme Court had always assumed that in the laying down of legislation, the legislature had meant to comply with any treaties concluded²² and had not wanted to deviate therefrom.²³ For some years after 1953, the Supreme Court continued to exercise restraint when reviewing more recent laws against existing treaty provisions.²⁴ It did so, however, not by adhering to the assumption just mentioned,²⁵ but by interpreting the scope of the treaty provision restrictively²⁶ or by interpreting the allowed restrictions extensively.²⁷

In the course of the 1970s Dutch courts started to interpret their power of review more actively. They did so by specifically testing the application of a national provision against a treaty provision more and more often. Until then, the courts had restricted themselves to an abstract review²⁸ or had not considered a review to be necessary.²⁹ This more active attitude by the national courts seems also to have been prompted by two rulings by the ECtHR. In these rulings, the ECtHR had determined that by the application of national provisions of primary legislation, the Dutch Government had violated the rights that the ECHR aims to protect.³⁰

From 1980 onwards, the specific review of the application of national provisions of primary legislation against treaty provisions that are binding on all persons resulted, with some regularity, in the ruling that the application of the national provision was not compatible with international law. As a consequence, the courts will actually have to interpret orders that 'are not applicable' under Article 94 of

20 HR 10 August 2001, *NJ* 2002, 278, annotated by J. de Boer, legal ground 3.9; see also HR 19 October 1990, *NJ* 1992, 129 annotated by E.A. Alkema and E.A.A. Luijten, legal ground 3.4.

'De Nederlandse rechter is evenwel gebonden aan art. 94 Gr.w, ingevolge welke bepaling binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing vinden, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen. Een zodanige onverenigbaarheid kan niet worden aangenomen uitsluitend op basis van een uitleg door de nationale – Nederlandse – rechter (...) die leidt tot een verdergaande bescherming dan op grond van de rechtspraak van het EHRM (...) mag worden aangenomen.' (translation NE & JdW)

21 HR 12 January 1942, *NJ* 1942, 271. This special judgment, delivered during the Second World War, may be called the proverbial exception that proves the rule; see also D. Venema et al. (eds.), *Onder de huidige omstandigheden. De Hoge Raad en het Toetsingsarrest 1942*, 2008; C.J.H. Jansen (in collaboration with D. Venema), *De Hoge Raad en de Tweede Wereldoorlog. Recht en rechtsbeoefening in de jaren 1930-1950*, 2011, pp. 121-134.

22 HR 3 March 1919, *NJ* 1919, p. 371; HR 17 December 1934, *NJ* 1935, p. 5 and p. 11, annotated by B.M. Taverne; HR 5 January 1951, *NJ* 1951, 69, HR 25 January 1952, *NJ* 1952, 125.

23 J.C. de Wit, *Artikel 94 Grondwet toegepast* (diss. Rotterdam), 2012, p. 55.

24 Generally speaking, lower-court judges also exercise restraint when implementing the constitutional power of review acquired in 1953, with the only exception being the judgment of the District Court of Rotterdam of 24 June 1955, *NJ* 1955, 713. This judgment was reversed on appeal by The Hague Court of Appeal and, in addition, by the Supreme Court. Both the Court of Appeal and the Supreme Court, although they reached different judgments, adopted the presumption that legislation does not contradict a treaty, The Hague Court of Appeal 27 March 1957, *NJ* 1957, 576 and HR 11 April 1958, *NJ* 1958, 454; see also De Wit, *supra* note 23, pp. 71-75.

25 HR 14 April 1972, *NJ* 1972, 269 forms an exception to this. As far as we know, this is the only time after 1960 that the Supreme Court adopted the assumption that in enacting legislation, the legislature had meant to comply with any treaties concluded.

26 HR 13 April 1960, *NJ* 1960, 436, annotated by B.V.A. Röling.

27 HR 18 April 1961, *NJ* 1961, 273, annotated by B.V.A. Röling; HR 18 January 1972, *NJ* 1972, 193, annotated by W.F. Prins. Lower-court judges also omit to test national provisions against treaty provisions that are binding on all persons with the argument that treaty provisions do not offer more protection than the national legislation of the Netherlands, HR 5 May 1959, *NJ* 1959, 361.

28 HR 19 January 1962, *NJ* 1962, 107, annotated by B.V.A. Röling.

29 HR 5 May 1959, *NJ* 1959, 361.

30 ECtHR 8 June 1976, *NJ* 1978, 223 (*Engel v the Netherlands*); ECtHR 24 October 1979, *NJ* 1980, 114 (*Winterwerp v the Netherlands*).

the Constitution. In making this interpretation, the courts seem to strive for a treaty-driven result.³¹ This means that the courts – where possible – determine that the national provision should be applied in such a way that this application is compatible with the provision of the treaty. The way in which a treaty-driven result is achieved depends on the formulation of the national provision in relation to the rights that the provision of the treaty aims to protect, as well as the restrictive possibilities offered by the latter provision. If achieving a treaty-driven result does not necessitate a nullification of the national provision, then the courts will not opt for such a nullification.³²

The reason for this is that the courts, generally speaking, try to preserve the implementation of the national provision as far as possible. They do so by interpreting or applying the national provision restrictively or extensively. A provision is applied restrictively if restrictive conditions are added to this provision,³³ as a result of which the provision will only still apply to a smaller group of people or in a more limited number of cases. An extensive application of a provision is achieved when the requirements formulated in the provision need not be met,³⁴ because of which a larger group of people³⁵ or more cases are brought under the scope of the provision. Restrictive and extensive interpretations or application are the most frequently occurring ways in which the courts bring about the compatibility of the application of the national provision with the international provision in question.

Apart from these restrictive and extensive applications of national provisions, the courts very rarely design an additional rule to fill a gap in the national law that leads to incompatibility with a treaty provision. In the 60 years in which Article 94 has had a place in the Constitution, the Supreme Court has only once designed a more extensive regulation.³⁶ This regulation, laid down in the so-called ‘*Spring Rulings*’ (*Lentebesikkingen*), can still be called unique in that respect.³⁷

In the aforementioned examples, the Dutch courts can be seen to find ways to put an end to the incompatibility of national law with international law. There have also been disputes in which Dutch courts have concluded that the application of the national provision is not compatible with a treaty provision, but find themselves unable to put an end to the incompatibility with international law. In these disputes, the courts determine that the termination of the incompatibility would overstretch their law-developing possibilities. This happens when the termination of the incompatibility requires legal-political choices or general considerations of Government policy. In light of constitutional relations, the courts feel that they should leave such choices to the legislature. In these cases the courts will abstain and the incompatibility of the national law with international law will continue.³⁸ A famous example of such a case is the *Employed Persons’ Allowance* ruling (*arrest Arbeidskostenforfait*), in which the Tax Division of the Supreme Court gave extensive consideration to the assessment that the courts should make:

‘Speaking in favour of rectifying the legal deficiency is the fact that it enables the courts to directly offer effective legal protection to the interested party, but speaking against it is that, in the given constitutional relations, a reticent attitude befits the court with such intervention in a statutory provision.

In general, this weighing will lead to the courts themselves rectifying the legal deficiency if this can be done in such a way that it can be derived, sufficiently clearly, from the system of the law, the cases regulated therein and the underlying principles or the legislative history. In cases, however, in which various solutions can be conceivable and choosing from these also depends

31 De Wit, *supra* note 23, p. 300.

32 HR 16 June 2009, *NJ* 2009, 379 annotated by E.J. Dommering and HR 10 July 2009, *LJN* BG 4156 are two recent examples in which the Supreme Court has nullified the applicable national provision because of incompatibility with treaty provisions that are binding on all persons.

33 HR 4 June 1982, *NJ* 1983, 32, annotated by E.A. Alkema; HR 2 December 1983, *NJ* 1984, 164; HR 8 April 1988, *NJ* 1989, 170, annotated by E.A.A. Luijten; HR 10 November 1989, *NJ* 1990, 450 annotated by E.A.A. Luijten.

34 HR 18 January 1980, *NJ* 1980, 463 annotated by W.H. Heemskerk; CRvB 7 December 1988, *AB* 1989, 10, annotated by J.H. Smits; HR 8 October 1992, *NJ* 1993, 730 annotated by W.C.E. Hammerstein-Schoonderwoerd; HR 17 August 1998, *NJ* 2000, 169, annotated by A.R. Bloembergen under *NJ* 2000, 170; HR 15 February 2008, *NJ* 2008, 107; Court of Appeal of Amsterdam 14 July 2009, *RFR* 2009, 110.

35 This is also mentioned as an analogous application, HR 21 November 1996, *NJ* 1997, 422, annotated by J. de Boer.

36 This regulation consisted of four conditions, all of which have been formulated by the Supreme Court.

37 HR 21 March 1986, *NJ* 1986, 585-588 annotated by E.A. Alkema and E.A.A. Luijten.

38 HR 12 October 1984, *NJ* 1985, 230, annotated by W.C.L. van der Grinten; HR 27 September 1989, *NJ* 1990, 449, annotated by E.A. Alkema; HR 12 May 1999, *NJ* 2000, 170 annotated by A.R. Bloembergen.

on general considerations of Government policy, or major choices of a legal-political nature have to be made, the best thing the courts can do is to leave that choice to the legislature, both in relation to the constitutionally desirable reticent attitude of the courts as intended in 3.14 and because of their limited possibilities in this field.³⁹

An implicit assignment to the legislature to terminate the incompatibility of the national law with international law by means of amending the law is inherent in these abstaining rulings of the courts. In general, the legislature complies with this ‘call’ from the courts and brings about new legislation. Still, it should be noted that the legislative process will quite often proceed rather slowly, because of which the legislation that is compatible with international law will take longer in coming than is desirable. For that matter, it should be mentioned that the legislature will change the relevant law or legal provision also after rulings in which the courts have terminated any incompatibility with international law through a treaty-driven result. This justifies the conclusion that the case law in which the national courts safeguard the implementation of international law and in particular the protection of fundamental rights in a treaty in the national legal system regularly results in an adjustment of national legislation.

2.3. The influence of the ECtHR on the Dutch legal system

The ECHR was brought about in 1950.⁴⁰ It was approved by law on 28 July 1954 and thus became part of the Dutch legal system.⁴¹ A rather widespread idea was that Dutch polity and legislation complied so well with the requirements laid down by the ECHR that it would be highly unlikely that the ECtHR would find a Dutch violation of one or more of the fundamental rights included in the convention.⁴²

Initially, practice was in line with this idea. From the 1970s onwards, however, the ECtHR has delivered more than 60 rulings in which it has concluded that the Netherlands has been guilty of a violation of the convention. The first ruling in which the ECtHR so concluded was the *Engel* ruling from 1976.⁴³ In this ruling, the ECtHR determined that certain punishments – close arrest and committal to a disciplinary unit – imposed on conscripts in 1971, amounted to a deprivation of liberty in the sense of Article 5 ECHR and in these cases the punishment had been imposed in contradiction with this provision.⁴⁴ Furthermore, the ECtHR determined in this ruling that certain aspects of the way in which the legal action against the conscripts had been executed were in contradiction with the right to a fair hearing, as safeguarded by Article 6 ECHR. The *Engel* ruling led to adjustments being made to military criminal law.

In the 1980s, a ruling was given that has had a very far-reaching influence on the Dutch legal system: the *Bentham* ruling.⁴⁵ The result of this ruling was that an appeal to the Crown, an important form of administrative appeal, became untenable. The ruling concerned a dispute about granting an administrative permit for an LPG installation. The ECtHR was of the opinion that this was a dispute about a civil right in the sense of Article 6 ECHR, and not an administrative dispute, as was assumed by Dutch law. This meant that the dispute had to be decided by an independent and impartial judge, as prescribed in Article 6 ECHR. In this case, the dispute was resolved by the Crown, after advice had

39 HR 12 May 1999, *NJ* 2000, 170, annotated by A.R. Bloembergen; *BNB* 1999, 271, annotated by P.J. Wattel, legal ground 3.15.

‘Voor het zelf in het rechtstekort voorzien pleit dat de rechter daardoor aan de belanghebbende direct een effectieve rechtsbescherming kan bieden, maar ertegen pleit dat in de gegeven staatsrechtelijke verhoudingen de rechter bij zulk ingrijpen in een wettelijke regeling een terughoudende opstelling past.

Deze afweging zal in het algemeen ertoe leiden dat de rechter aanstonds zelf in het rechtstekort voorziet indien zich uit het stelsel van de wet, de daarin geregelde gevallen en de daaraan ten grondslag liggende beginselen, of de wetsgeschiedenis, voldoende duidelijk laat afleiden hoe zulks dient te geschieden. In gevallen echter waarin verschillende oplossingen denkbaar zijn en de keuze daaruit mede afhankelijk is van algemene overwegingen van overheidsbeleid of belangrijke keuzes van rechtspolitieke aard moeten worden gemaakt, is aangewezen dat de rechter die keuze vooralsnog aan de wetgever laat, zulks zowel in verband met de in 3.14 bedoelde staatsrechtelijk gewenste terughoudendheid van de rechter als wegens zijn beperkte mogelijkheden op dit gebied.’ (translation NE & JdW)

40 *Tractatenblad* 1951, 154.

41 *Staatsblad* 1954, 335.

42 See Van der Pot, *supra* note 5, p. 268.

43 ECtHR 8 June 1976, *NJ* 1978, 223, AA 1977, 55, annotated by E.A. Alkema (*Engel v the Netherlands*).

44 At the time of the ruling by the ECtHR, both punishments had already been abolished by the Kingdom Act (*Rijkswet*) of 12 September 1974, *Staatsblad* 1974, 538.

45 ECtHR 23 October 1985, *NJ* 1986, 102, annotated by E.A. Alkema (*Bentham v the Netherlands*).

been obtained from the Administrative Disputes Division of the Council of State (*Afdeling geschillen van bestuur van de Raad van State*).⁴⁶ The Crown was not an independent and impartial authority: the Royal Decree with which the dispute was resolved is an act of management originating from a Minister who is politically accountable to Parliament for this. The consequence was that Article 6 ECHR had been violated in this case.

The *Bentham* ruling led to the 1987 Crown Appeals (Interim Measures) Act (*Tijdelijke Wet Kroongeschillen*),⁴⁷ which replaced the appeal to the Crown with an appeal to the Administrative Disputes Division of the Council of State. This division could indeed be considered to be an independent judicial tribunal. Subsequently, in 1994 the General Administrative Law Act (*Algemene wet bestuursrecht*) became effective. From that moment onwards, the Crown Appeals (Interim Measures) Act became inoperative, the appeal to the Crown totally disappeared and the Administrative Jurisdiction Division of the Council of State was called into being as an independent and impartial administrative judge. However, the last word on this issue had not been uttered. Two rulings have been important in this respect.

The first ruling was not given against the Netherlands, but against Luxembourg: the *Procola* ruling from 1995.⁴⁸ In this ruling, concerning the Luxembourg Council of State, the confusion between advisory and adjudicative tasks assigned to that office proved to be in contradiction with the requirement of judicial impartiality, as laid down in Article 6 ECHR. Since the Dutch Council of State also had such confused tasks, this ruling was also considered to be important for the Netherlands. One of the consequences of this was that the Administrative Jurisdiction Division of the Council of State came to the following line of policy, as is shown from the 2000 Annual Report of the Council of State:

‘If, within the scope of an appeal lodged with the Division, the legitimacy of a legal provision or another regulation applied earlier in the case because of an aspect (...) with regard to which the Council of State at that time has expressed an explicit opinion in its advice about the proposed provision has been disputed – in a timely fashion – and if, in view of that, a party has raised objections with regard to the independence or impartiality of the chamber in charge of dealing with the appeal, then the chamber, for the purpose dealing with the appeal, will still be made up of members who have not participated in that advice.’⁴⁹

The second important ruling was the *Kleyn* ruling from 2003, which was indeed given against the Netherlands.⁵⁰ In this ruling, the Court of Appeal in an obiter dictum had stated that it was not convinced that the line of policy just indicated would lead, in all cases, to the Administrative Jurisdiction Division being able to function as an independent judicial authority.⁵¹ In 2010, this remark by the Court of Appeal resulted in a provision being included in Article 42 subsection 4 Council of State Act (*Wet op de Raad van State*) to the effect that a member of the Administrative Jurisdiction Division who has been involved in providing an advice from the Council will not participate in the hearing of a dispute concerning a question of law to which that advice relates.

The case law of the ECtHR has also had certain consequences for the Dutch legal system in the field of criminal law, for example the subject of anonymous witness testimonies. In this context the *Kostovski* ruling from 1989 can be mentioned.⁵² The central question in this ruling was whether the use of anonymous witness testimonies could contradict Article 6 ECHR. At the time of this ruling it

46 The Council of State advises the Government and Parliament on legislation and is an administrative court in the final instance.

47 *Staatsblad* 1987, 317.

48 ECtHR 28 September 1995, *NJ* 1995, 667, annotated by E.A. Alkema (*Procola v Luxembourg*).

49 *Jaarverslag Raad van State 2000*, p. 106.

‘Is in het kader van een bij de Afdeling ingesteld beroep – tijdig – de rechtmatigheid betwist van een eerder in de zaak toegepaste wettelijke bepaling of andere regeling in verband met een aspect (...) ten aanzien waarvan de Raad van State zich destijds in zijn advies over de voorgestelde bepaling uitdrukkelijk heeft uitgelaten en zijn met het oog daarop door een partij bedenkingen naar voren gebracht met betrekking tot de onafhankelijkheid of onpartijdigheid van de met de behandeling van het beroep belaste kamer, dan wordt voor de behandeling van het beroep de kamer alsnog samengesteld uit leden die aan die advisering niet hebben deelgenomen.’
(translation NE & JdW)

50 ECtHR 6 May 2003, *AB* 2003, 211, annotated by L.F.M. Verhey and B.W.M. de Waard.

51 ECtHR 6 May 2003, *AB* 2003, 211, annotated by L.F.M. Verhey and B.W.M. de Waard, legal ground 198.

52 ECtHR 20 November 1989, *NJ* 1990, 245, annotated by E.A. Alkema (*Kostovski v the Netherlands*).

was possible to examine witnesses who had been threatened, and who wanted to make their statements anonymously, during the preliminary judicial investigation. Then, they no longer needed to be present in open court and therefore the defence could no longer examine them. According to the Court of Appeal, this was not insurmountable as long as the defence could examine the anonymous witnesses at an earlier stage. In this case, however, this had not been possible, and because of this the defence's rights had been violated and so *Kostovski* could not obtain a fair trial, so that Article 6 ECHR had been violated.

In 1990, the *Kostovski* ruling led to an amendment of the Supreme Court's case law.⁵³ The Supreme Court stated that, in the light of the *Kostovski* ruling, 'it should be assumed that the use of anonymous statements for providing evidence must meet more requirements than have been expressed in the jurisdiction of the Supreme Court up to now.'⁵⁴ The *Kostovski* ruling also led to amendments to the Code of Criminal Procedure (*Wetboek van Strafvordering, Sv*). Among other things, provisions on threatened witnesses (Articles 226a and further Sv) have been added to this Code.

In the field of criminal law, another example of a ruling in which the ECtHR concluded that the ECHR had been violated is the *Van der Velden* ruling.⁵⁵ However, this does not involve legislation which is in contradiction with the ECtHR: in this ruling the Court concluded that the Dutch judge had wrongly applied certain national legislation.

To conclude this brief discussion of rulings in which the Court has concluded that the Netherlands has violated the ECHR, the *Voskuil* ruling needs to be mentioned as well as the *Sanoma Uitgevers B.V.* ruling.⁵⁶ Both rulings dealt with journalistic source protection. In both rulings, the Court concluded that the Netherlands had inadequately safeguarded source protection, leading to a violation of Article 10 ECHR. While awaiting legal regulation, the rulings have led to an amendment to the 'Instruction on the application of coercive measures in respect of journalists'. This amendment has given journalists a stronger position with regard to source protection.⁵⁷

From the previous discussion of some rulings by the ECtHR, it can be derived that the influence of the ECtHR on the Dutch legal system may take several forms. Sometimes the ECtHR's interpretation of the terms of the Convention gives rise to the conclusion that the Netherlands has violated the ECHR. This occurred, for example, in the *Engel* ruling: there, the ECtHR determined that the military disciplinary penalties of close arrest and committal to a disciplinary unit involved a deprivation of liberty.⁵⁸ This interpretation and resulting violation were subsequently a reason to amend the pertinent legislation.

Adjusting legislation is a frequently occurring consequence of rulings by the ECtHR. Sometimes that adjustment takes the form of amending a number of provisions or of adding a number of new provisions to an already existing Act (*Engel* and *Kostovski*). At other times, the adjustment takes the form of the implementation of a completely new act, which sees an adjustment being made to the national system of the division of powers and checks and balances (*Bentham*). But rulings by the ECtHR may also lead to an adjustment of the policy of the executive (*Voskuil* and *Sanoma*). And rulings may simply amount to criticism of the way in which national courts apply national legislation (*Van der Velden*).

In brief, none of the state powers will escape from being influenced by the ECHR through the case law of the Court. This may be a direct as well as a rather indirect influence. Apart from the direct influence of the ECtHR's case law, there is also the indirect influencing of the legislature and the administration through the case law of the national court under the scope of Article 94 Constitution.

53 HR 2 July 1990, *NJ* 1990, 692, annotated by Th. W. van Veen.

54 HR 2 July 1990, *NJ* 1990, 692, annotated by Th. W. van Veen, legal ground 5.1.

55 ECtHR 31 July 2012 (*Van der Velden v the Netherlands*), <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112547>> (last visited 1 October 2012).

56 ECtHR 22 November 2007, *NJ* 2008, 216, annotated by E.J. Dommering (*Voskuil v the Netherlands*) and ECtHR 14 September 2010, *NJ* 2011, 230, annotated by E.J. Dommering and T.M. Schalken (*Sanoma Uitgevers B.V. v the Netherlands*).

57 *Staatscourant* 2012, no. 3656 for the amendment in the Instruction.

58 C.A.J.M. Kortmann, *Constitutioneel recht*, 2008, p. 458.

3. Are the open character of the Dutch legal order and of the system of the protection of fundamental rights by Dutch courts under pressure?

The description in the previous section of the genesis and general character of the system of the protection of fundamental rights by Dutch courts has illustrated the open character of the Dutch legal order and more specifically of the system of the protection of fundamental rights. Among other things, the description has shown that, from 1980 onwards, the specific review of the application of national provisions of primary legislation against treaty provisions that are binding on all persons has resulted, with some regularity, in the ruling that the application of the national provision was not compatible with international law. It has also shown that state powers have been influenced by the case law of the ECtHR and have been willing to be so influenced.

As a consequence, the legislature has proven to be willing to amend laws that do not meet international treaty standards in such a way that the fundamental rights in treaties are once again safeguarded. When the national courts determine that a national law is not compatible with the fundamental rights in treaties, the legislature has always reacted to this by adjusting the law so that it again complies with international standards.⁵⁹ The legislature reacts in the same way to the case law of the ECtHR. When the ECtHR finds a violation of a treaty by the Netherlands as a result of the application of national provisions, the legislature has sooner or later, at least up until now, set about to adjust the national law in question.⁶⁰ This is why it is currently not conceivable that in the near future the ECtHR will feel the need to rule against the Netherlands in line with *Greens & M.T. v the United Kingdom*. In this ruling, which is much discussed in the literature, the ECtHR ordered the United Kingdom to enact new legislation⁶¹ because for more than five years the United Kingdom had not adequately reacted to the judgment by the Court that the national legislation of the United Kingdom, which categorically excludes prisoners from the right to vote, resulted in a violation of the ECHR.⁶²

Lately, however, the tendency of the courts and the legislature to follow the jurisdiction of the international court in national jurisdiction and to incorporate it into national legislation has been regularly criticised. More in particular, proposals have been made to amend Article 94 of the Dutch Constitution. Two of these proposals merit further discussion: the proposal by the State Commission on Constitutional Reform and the proposal by three Members of Parliament of the People's Party for Freedom and Democracy.

3.1. Proposals by the State Commission and by three Members of Parliament

In 2010, the State Commission on Constitutional Reform proposed to add a second subsection to Article 94 Constitution. This second subsection would have to determine that the provisions of treaties should not be applicable if these contradict the foundations of the democratic rule of law, human dignity, fundamental rights and the fundamental principles of law. In this way, it can be prevented in future that international law which is not compatible with fundamental constitutional principles on the basis of Article 94 Constitution could directly extend to the national legal order.⁶³

Early in 2012, three Lower House Members of the People's Party for Freedom and Democracy made it known that they wanted to amend Article 94 Constitution. The amendment they favoured would give the legislature the power to make a reservation in statutory provisions concerning the direct effect of fundamental rights in treaties. The effect of Article 94 Constitution and, with that, the direct effect of treaty provisions that are binding on all persons in the national legal order would be greatly restricted

59 De Wit, supra note 23, p. 214 and pp. 291-292.

60 De Wit, supra note 23, pp. 218-219 and 229.

61 ECtHR 23 November 2010, NJ 2012, 285, annotated by E.A. Alkema, ECHR 2011/20, annotated by R. de Lange (*Greens & M.T. v United Kingdom*).

62 ECtHR 6 October 2005, ECHR 2005, 115, annotated by J.L.W. Broeksteeg, NJCM-bulletin 2006, p. 234, annotated by H.J.B. Sackers (*Hirst v United Kingdom*).

63 Rapport Staatscommissie Grondwet, 2010, pp. 127-130.

because of this alteration.⁶⁴ The proposed alteration has been severely criticized, both by academics and by the judiciary.⁶⁵

Both proposals wish to alter Article 94 Constitution and both proposals aim to restrict the scope of this provision and the openness of the Dutch constitutional system. Yet, a clear difference can be seen between both proposals. The proposal by the State Commission on Constitutional Reform accurately describes, through the said fundamental constitutional principles, when treaty provisions should not extend to the national legal order. This adequately safeguards that the Netherlands will continue to meet the obligations that it has internationally entered into. In the second proposal this is not immediately evident, because in this proposal the legislature will have unconditional authority to restrict the direct effect of treaty provisions. The risk of instrumental legislation which may not allow the Netherlands to meet its international obligations lies in wait. Whether instrumental legislation will actually be enacted will obviously strongly depend on the political set-up at that moment in time.

As a consequence of the reinforced alteration procedure of the Dutch Constitution, there would still be a long way to go before the proposed alterations can actually be adopted. Besides, the Government, in its reaction to the report by the State Commission on Constitutional Reform, stated that it does not intend to adopt the aforementioned proposal of the Commission.⁶⁶ The second proposal has been pending since September 2012. The parliamentary discussion on this proposal has not yet started.

However, the period in which openness to the extension of international law to the national legal order as a self-evident aspect of the Dutch constitutional system now seems to belong to the past, as especially the last proposal shows. To illustrate this development, mention could also be made of the coalition agreement of the first Rutte Cabinet (2010-2012), stating that the Cabinet will not by definition adjust its policy if this contradicts international law, but will investigate whether a treaty alteration, not excepting the ECHR, is possible.⁶⁷

3.2. Recent criticism of the ECtHR's performance and the proposal by Gerards

Criticism has in recent years not limited itself to the national courts and legislature, but has also been expressed with regard to the ECtHR's performance. According to Spijkerboer, four issues can be distinguished in the criticism that the British Supreme Court justice Lord Hoffmann was the first to express.⁶⁸ The Court acts too much as a court deciding on questions of fact, as a court of cassation and as a court of preliminary relief proceedings,⁶⁹ whereas the Court should only concern itself with the main issues and leave the rest to the national courts. To that end, it is necessary for the Court to grant a much broader margin of appreciation to the Member States. Besides, the Court interprets its own competences too widely. A striking example of this is the Court's decision to designate its own preliminary provisions as binding. The third point of criticism is that the Court's approach to the ECHR as a 'living instrument' leads to too free and dynamic an interpretation of the Convention and the final remark is that the Court is undemocratic.⁷⁰

This criticism could also lead to a curtailment of the Court's competences. On the basis of the criticism and her own analysis in her inaugural lecture delivered in Nijmegen at the end of 2011, Gerards made a proposal to this end. According to this proposal, the Court should firstly define the ECHR rights more clearly, so that it will only judge those cases in which actually the core of the fundamental right's interest is at stake. Furthermore, the Court should initially restrict itself to a procedural review. Here, it

64 S. Blok et al., 'Verdragen mogen niet langer rechtstreeks werken', *NRC Handelsblad*, 23 februari 2012, p. 17.

65 T. Prakken, 'Mensenrechten zonder rechter zijn gunsten', *NRC Handelsblad*, 25 februari 2012, p. 38 and B. Oomen, 'Kamerleden zijn lui met grondrechten en verdragen', *NRC Handelsblad*, 1 maart 2012, p. 16.

66 *Kamerbrief 24 October 2011*, pp. 12-13, <www.rijksoverheid.nl> (search for kabinetreactie staatscommissie Grondwet) (last visited 1 October 2012).

67 *Regeerakkoord VVD-CDA 'Vrijheid en verantwoordelijkheid'*, 2010, p. 3, p. 21 and p. 26, <www.rijksoverheid.nl> (search for regeerakkoord kabinet Rutte) (last visited 1 October 2012).

68 Lord Hoffmann, 'The Universality of Human Rights. Judicial Studies Board Annual Lecture', 19 March 2009, <<http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009>> (last visited 1 October 2012).

69 T. Zwart, 'Een steviger opstelling tegenover het Europees Hof voor de Rechten van de Mens bevordert de rechtsstaat', 2011 *Nederlands Juristenblad*, pp. 414-416 where he cites the chairman of the Belgian Constitutional Court, Marc Bossuyt.

70 T.P. Spijkerboer, 'Het debat over het Europese Hof voor de Rechten van de Mens', 2012 *Nederlands Juristenblad*, pp. 254-257. T.P. Spijkerboer is Professor of Migration Law at the VU University Amsterdam.

is assessed whether the national procedures of both decision-making and court assessment have been sufficiently careful and just. If the Court determines that this is the case, then in principle it will accept the result of the procedure reviewed. If the Court establishes that there are some shortcomings in the procedure in the decision-making or in the legal protection, then the Court will proceed to a contents-wise assessment of the complaint.⁷¹

At first sight, the curtailment of the ECtHR's competences, as proposed by Gerards, seems to put much greater emphasis on the role of the national courts in protecting the fundamental rights found in the ECHR. In principle, the national courts will become the only courts that will still deal with the dispute substantively. This means that the national courts will probably have to deal more often with the interpretation of ECHR concepts and the consequences of this interpretation for the scope of the fundamental rights and the possibilities of curtailment. This will not be the case immediately after the implementation of the competence curtailment of the Court, as the existing case law will then still offer sufficient guidance, but with the passage of time the courts will probably see themselves presented with this task more regularly, because of social and legal developments. Furthermore, the national courts will give a final ruling on those cases in which the exercise of a fundamental right is at stake, but in which that exercise is not actually considered as the core of the fundamental right in question. That is because the Court will not allow complaints about these cases. Should the Court develop a narrow view of what belongs to the core of a fundamental right, then the national courts will finally settle the dispute in many cases in which a fundamental right is clearly exercised.

4. Analysis of two of the proposals

The question is which consequences the criticism discussed and these proposals may have on the open character of the Dutch constitutional system and on the system of the protection of fundamental rights by the Dutch courts. In particular the proposal by Gerards and that by the three VVD Lower House Members deserve attention. To begin with the Gerards proposal: two issues play a role here. The first issue is the notion of the 'core' of a treaty provision relating to fundamental rights. This notion is a substantive criterion, and the way of interpreting such criteria cannot be established beforehand. Obviously, it is possible that the ECtHR will initially (want to) adopt a reticent attitude, but a gradual stretching of the core after some time cannot be precluded. Up until now, the ECtHR has always emphasized that the ECHR is a 'living instrument' that should be interpreted in accordance with the standards of the time.⁷² In the past, such an interpretation has, by nature, been rather more expanding than curtailing, and it seems to us that there is little reason to assume that this will be different with an explanation of what does and does not belong to the core of a fundamental right. Whether, in the longer term, the ECtHR defining (the core of) ECHR rights more clearly will bring about a less prominent role for the ECtHR is still doubtful.

The second issue which is important in Gerards' proposal is the role of the national courts. Depending on the attitude of the national courts in the cases no longer judged, contents-wise, by the ECtHR, the open character of the Dutch constitutional system will be preserved or not. It is difficult to guess which attitude the Dutch courts and in particular the Supreme Court will adopt when the competences of the Court will be curtailed in the way proposed by Gerards, although in fact it does not seem impossible to say something about this on the basis of current case law. The case law in which a violation of fundamental rights in treaty provisions was contended, shows that, in principle, the Supreme Court adopts a reticent or very reticent attitude. The Supreme Court only rarely determines of its own accord that the national law contradicts international law. Only when the international court has given this ruling will the Supreme Court adopt this stance. There is little reason to assume that the Dutch courts will immediately abandon this reticence. Still, it is conceivable that a less prominent role for the Court during a longer period will lead to a less reticent Dutch court. However, this cannot be more than speculation. Besides, as has just

71 J.H. Gerards, *Het prisma van de grondrechten* (inaugural lecture Nijmegen), 2011, pp. 14-23, see also Spijkerboer, *supra* note 70, p. 258.

72 Compare Spijkerboer, *supra* note 70, p. 256.

been said, it is still the question whether the realization of Gerards' proposal will lead to a less prominent role for the Court.

All in all, it seems that the realization of Gerards' proposal need not have far-reaching consequences for the open character of the Dutch legal system and for the system of the protection of fundamental rights by the Dutch courts. That seems different to us in the case of the proposal by the VVD Lower House Members: here, a curtailment of this open character seems almost unavoidable. Furthermore, it should be mentioned that this proposal seems to be based on a presupposition that reaches further than just this curtailment. The Lower House Members begin their proposal in the following way:

'The specific benefit for artists, the Artists' Work and Income Act (*Wet werk en inkomen kunstenaars*, *WWIK*) was rescinded as per 1 January, without a transitional arrangement. Because of this, artists will be entitled to the same forms of benefit as all other Dutch people. It is a democratic decision, supported by a majority in Parliament, taken after a fierce debate between advocates and opponents. That is exactly like it should be, in our opinion. Still, the Dutch courts call it a violation of fundamental human rights on the basis of the European Convention on Human Rights.⁷³

The text continues by elaborating on inflating the concept of human rights, but the particular element we want to draw attention to is the contradiction which is created between the democratic decision, on the one hand, and the Dutch courts, on the other. The authors not only have issues with the ECHR and the Court, but also with the Dutch courts which, on the basis of the ECHR, call a certain act a violation. With that, the proposal by the VVD Members of the Lower House does not only aim at a less open character for the Dutch legal system and a less far-reaching protection of human rights, but also at a stronger emphasis on the element of 'democracy' in the Dutch constitutional constellation.

The Dutch constitutional constellation – and this comes as no surprise – is that of the democratic '*rechtsstaat*' (the state under the rule of law). Kortmann points out that democracy can be seen as part of the concept of '*rechtsstaat*', but that it is also possible to distinguish between the concept of 'democracy' and the concept of '*rechtsstaat*'. The latter concept implies being bound to a previous rule, which need not necessarily have been brought about democratically, and a moderation/mitigation of the exercise of power. Democracy implies that legislation is (also) brought about by people's representation and, in an extreme form, it can lead to absolutism or the tyranny of the majority.⁷⁴ Because the concepts of democracy and of '*rechtsstaat*' may clash, but are both essential for the Dutch constitutional constellation, they should both be protected through 'checks and balances'.

A strong emphasis on the element of 'democracy', found in the proposal by the VVD Members of the Lower House, endangers the equilibrium between both concepts. This equilibrium requires courts that are able to independently review against a standard that cannot easily be changed by Dutch political institutions and that should therefore be found in treaties – in the current Dutch context the Constitution, because of the prohibition of constitutional review, is less relevant.

It goes without saying that a review by the courts is not a neutral, and certainly not a politically neutral activity. Hamilton's view that the judiciary 'may truly be said to have neither force nor will but merely judgement',⁷⁵ has been superseded a long time ago. For example, in 1972, Prakke, and he was by far not the first to do so, already pointed out that in the activities of the judiciary an element of will is involved and that in the constitutional administration of justice – which in this context includes a review of acts against treaties on the basis of Article 94 of the Constitution – 'much of what is presented as a

73 Blok et al., *supra* note 64.

'De specifieke bijstand voor kunstenaars (*de WWIK*) is per 1 januari afgeschaft, zonder overgangsregeling. Kunstenaars krijgen hierdoor recht op dezelfde uitkeringsvormen als alle andere Nederlanders. Het is een democratisch besluit, gedragen door een meerderheid in het parlement, dat werd genomen na een stevig debat tussen voor- en tegenstanders. Dat is precies zoals het volgens ons behoort te gaan. Toch spreekt de Nederlandse rechter op grond van het Europese mensenrechtenverdrag van een schending van de fundamentele rechten van de mens.' (translation NE & JdW)

74 Kortmann, *supra* note 58, pp. 52-53.

75 J. Madison et al., *The federalist papers*, 1788, LXXVIII.

conformity check is basically rather the formation of standards.⁷⁶ And in 2012, Spijkerboer pointed out that the Court's jurisdiction is political by nature and cannot be anything but political.⁷⁷ However, this does not alter the fact that a review by the courts remains a necessary counterbalance against overassertive political institutions.⁷⁸

All this, by the way, does not necessarily mean that the competence of review of the Dutch courts should be further developed. In 1999, De Lange defended the point of view that a review against international law has become such common property that it has partly rendered the implementation of constitutional review superfluous.⁷⁹ A right of review for the courts that has been pushed too far could bring about a breach in the system of 'checks and balances', in line with the point of view expressed in this text. Should, however, the proposal by the VVD Members of the Lower House lead to an amendment of Article 94 Constitution, then the implementation of constitutional review in line with the Halsema proposal is desirable. Such an implementation cannot rectify the violation of the open character of the Dutch legal system, it is true, but it can ensure that a proper form of 'checks and balances' and of an adequate system for the protection of fundamental rights by the Dutch courts are maintained.

76 L. Prakke, *Toetsing in het publiekrecht*, 1972, p. 164.

77 Spijkerboer, *supra* note 70, p. 262.

78 T. Koopmans, *Courts and political institutions. A comparative view*, 2003, pp. 245-251.

79 R. de Lange, *Concurrerende rechtsvorming* (inaugural lecture Rotterdam), 1999. Nowadays, De Lange may possibly think differently about this. At least, the report by the State Commission on Constitutional Reform leads one to suspect this.