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Constitutional Review in the Netherlands: A Joint Responsibility

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1. Introduction

The Dutch constitutional system gives the legislature the final say regarding the compliance of statutory laws with both written and unwritten constitutional law. Article 120 of the Constitution of the Netherlands (*Grondwet*) prohibits a judicial review of laws and treaties against the Constitution. The judiciary contributes to the interpretation of the Constitution and unwritten law only in cases in which the constitutional compatibility of laws passed by the legislature is not at issue. This strong emphasis which is placed on legislative supremacy is one of the main characteristics of the Dutch constitutional tradition. It is also a point on which the Netherlands significantly differs from other European countries. Over time, some other European countries have experienced a shift toward judicial supremacy.¹

The difference between legislative supremacy and judicial supremacy may offer a useful theoretical grip for comparing the different constitutional systems. However, at the same time, one may wonder whether it is correct to define the relationship between the legislature and the judiciary in terms of the supremacy of one over the other. After all, in order for the democratic rule of law to function properly, balance and dependency are of great importance. This is also the case for the relationship between the legislature and the judiciary. These branches have joint responsibility for the actualisation and protection of constitutional norms and principles. While each has its own role, they depend on each other to ensure the effectiveness of their actions. The legislature and the judiciary are, in this way, partners in the business of law.

Developments in the democratic rule of law make it of increasing importance that this joint responsibility is further investigated and defined. An additional element is of importance as well, one we could call globalisation. The growing interconnectedness between the national legal order, that of the European Union and the international legal order gives reason to see the position of the national legislature and judiciary less in terms of a hierarchy that has one central point of control.²

These developments lead us to view constitutional law making as the joint responsibility of different national and international actors that are situated in a multipolar network of legal developments, in which the relations among the actors are characterised by a certain measure of mutuality. The Council of State (*Raad van State*) of the Netherlands plays, seen from a Dutch point of view, an important role

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1 M.L.H.K. Claes, 'De Raad van State in het proces van constitutionele interpretatie en constitutionele toetsing. Enkele rechtsvergelijkende beschouwingen', in H.D. Tjeenk Willink et al. (eds.), *De Raad van State in perspectief*, 2011, pp. 229-251.

2 See also W. Van Gerven & S. Lierman, *Algemeen deel (veertig jaar later)*, *Beginselen van Belgisch Privaatrecht I*, 2010, p. 231.

this network. What is the exact role of the Dutch Council of State in this network of constitutional review and how and to what extent can the cooperation between the Council of State and the other national and international actors in this network be strengthened? These questions will be addressed in this contribution.

The following sections, Sections 2 and 3, will first focus on the way in which the Dutch legal system shapes constitutional interpretation and review. I will first approach this topic by placing the *exception hollandaise* next to other constitutional systems. I will analyse the differences between these systems by using the classic distinction between constitution models: the distinction between legislative supremacy and judicial supremacy. I will describe the special position of the Netherlands based on its historical context, during which I will pay special attention to the position of the Advisory Division of the Council of State (*Afdeling advisering van de Raad van State*), as the most important advisor to the Government in the law-making process, the Supreme Court of the Netherlands (*Hoge Raad*) and the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) as the highest courts.

Next, Sections 4 and 5 will deal with the relations between the different actors that are involved in the development of the law. This will be done by attending to the multiple layers of the constitutional legal development network. Against this background, the question will be asked how, and to what extent, the cooperation between the actors involved with constitutional interpretation can be further strengthened. Finally, Section 6 will, with the necessary caution, look to the future of the judicial constitutional review of laws passed by Parliament by a specially formed constitutional court.

2. Constitutional interpretation and review: legislative supremacy vs. judicial supremacy

A defining characteristic of a constitutional system is whether there is one specific actor that has the last word in constitutional interpretation and review and if so, which actor. This is, as Kortmann has described, a question as to which actor fulfils the role of an ‘ultimate interpreter’ of the constitution.³ On one side of the spectrum there are constitutional systems that give the last word to the legislature (legislative supremacy). On the other side are the systems in which the courts are the ultimate interpreters of the constitution (judicial supremacy).

The constitutional system of the United States of America is an example of the latter model of constitutional review. Chief Justice Charles Evans Hughes’ legendary words of 1907 were based on this model: ‘We are under a Constitution, but the Constitution is, what the judges say it is (...)’.⁴ There are diverse arguments in favour of a strong position of the judge in the constitutional debate. In the first place, there seems to be a certain need for a constitutional judge in most countries with a federal structure. In these federal states, such as Germany, Belgium and Austria, constitutional courts play a role in guarding the vertical separation of powers between the federal government and the entities that make up the federation. Second, we see constitutional courts, sometimes with far-reaching powers, in young democracies that have recently overcome authoritarian regimes. Claes has pointed out that the judicial review of actions taken by the political branches is then used to supervise the democratisation process because constitutional values – the rule of law, democracy, the protection of minorities and human rights – have not yet been sufficiently internalised by the political branches.⁵ It is for this reason that young democracies in Central and Eastern Europe have chosen strong constitutional courts with the power to check and steer political decision making to a certain extent. Finally, the protection of fundamental rights of the individual and minorities plays an important role in all constitutional systems that allow for judicial constitutional review. We can see this, for example, in France, where that responsibility is given to the *Conseil constitutionnel*, in Germany, where the *Bundesverfassungsgericht* devotes an important part of its activities to the protection of fundamental rights and also in Belgium, where the *Grondwettelijk Hof*

3 C.A.J.M. Kortmann, *Constitutioneel recht*, 2008, p. 376.

4 Charles Evans Hughes, speech before the Chamber of Commerce, Elmira, New York, May 3, 1907. *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908*, p. 139 (1908).

5 M.L.H.K. Claes, ‘De Raad van State in het proces van constitutionele interpretatie en constitutionele toetsing. Enkele rechtsvergelijkende beschouwingen’, in H.D. Tjeenk Willink et al. (eds.), *De Raad van State in perspectief*, 2011, p. 242.

has extended its authority via the principle of equality, after initially having a limited purpose, to a more or less full review of constitutional rights.

The proponents of a model in which the last word is given to the legislature (legislative supremacy) hesitate, for various reasons, to give a substantial role to the courts when it comes to constitutional interpretation and review. The unfolding shift of the law-making task from the legislature to the judge is problematic when seen against the background of the *trias politica*. Two specific problems come to light. The first can be found in the model of checks and balances that provides the foundation for the way in which the different branches of government function among themselves. Does a substantial role for the judge in reviewing parliamentary-made legislation against the constitution, and in doing so thus engaging in the interpretation of the constitution, not affect the delicate balance in the *trias* in an unacceptable way? A second consideration regards the democratic deficit of the judicial branch: to what extent is the democratic foundation of the law lost when a judge engages in independent law making? Or, as Gardbaum has formulated it:

‘In short, the judicial veto of legislation replaces government by the people with the *gouvernement des juges* in regard to many of the most important and controversial issues that are to be resolved in a political community. It gives final decision-making power over fundamental, usually hotly-contested matters of principle and over the issue of what is and is not the law of the land to the branch of government that is least accountable and which, if it is representative at all, represents the sovereignty of the past over the present. In doing so, it disables representative institutions and displaces popular self-government.’⁶

It is clear that this reasoning, based on the lack of democratic legitimacy for judicial decision making, is less important when the (partial) shift of the law-making task of the legislature to the judiciary is a reaction to distrust of the political branches’ majoritarianism, whether this distrust is historical or a reaction to recent developments.

3. Constitutional interpretation and review in the Netherlands

3.1. Constitutional interpretation and review in historical context

The way in which a country’s constitutional interpretation and review is shaped – or more specifically, the weight that is given to the importance of the direct democratic legitimacy of the branch of government that conducts the interpretation and review – is to an important extent historically determined. As Gardbaum wrote:

‘In Europe and elsewhere, legislative supremacy is often understood as the distinctive institutional manifestation of popular sovereignty, the notion that all political power derives from and remains with the people. Moreover, popular sovereignty is not generally perceived as an empty political truism, for it was typically the concrete and hard-fought result of centuries of struggle over where the ultimate power lay, either with the people or the monarch (usually supported by church and aristocracy). During the course of this struggle, popular sovereignty was generally institutionalised in the legislature and monarchical power in the executive and judiciary. Legislative supremacy thus reflected the historical triumph of the people against the rival claims to supremacy of the Crown and a narrow political elite.’⁷

This historical context has determined constitutional thinking in Western European democracies to an important extent. The historical context also helps explain the fact that some Western European constitutional systems give the judiciary an important role in the interpretation and review of the constitution. In some countries there is a limited democratic tradition (for example, in Spain and Portugal)

6 S. Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, 2001 *American Journal of Comparative Law* 49, no. 4, pp. 739-740.

7 *Ibid.*, p. 741.

and a certain distrust of the majoritarian political branches. The constitutional courts are meant to check the constitutionality of the political branches' actions. The strong position of the *Bundesverfassungsgericht* in Germany can, of course, also be explained to an important extent by the specific German historical context. It was against the background of the horrors of the Second World War that the constitutional judge was given an important role in guarding the fundamental principles of the democratic rule of law. The historical background of the United States with its Supreme Court as the ultimate interpreter of the constitution is different, but here too, the historical context provides an explanation. Democracy developed along different lines in the United States than it did in Western Europe.⁸ Democracy in the United States is not so much the result of a revolution of the middle-classes against the king and the aristocracy as the French Revolution of 1789 was, but a result of colonial revolt, whereby the sovereignty of the people was assumed from the beginning. That likely explains why the legislature is not seen as 'the distinctive collective organ of the people'.⁹

The 1848 Constitution of the Netherlands limited the power of the king to a large extent and set out the foundation for a system of parliamentary democracy. However, the 1848 Constitution did not include the possibility to judicially review legal measures taken by the Government and Parliament against the Constitution. This kind of constitutional review met with resistance from the bourgeoisie. They resisted against the fact that the – predominately aristocratic – judicial branch would be given the power to define the limits of the Constitution for the legislature and, thereby, also for the sovereignty of the people. To this day, because of the current Article 120 of the Constitution of the Netherlands, the Netherlands does not have a system of judicial review against the constitution of laws passed by Parliament.

3.2. Constitutional interpretation and review by the Advisory Division of the Council of State

Although there is no possibility for a constitutional review in the Netherlands, there is a system whereby bills are presented to the Advisory Division of the Council of State in order to obtain the Advisory Division's advice on the bill before it is submitted to the Second Chamber (*Tweede Kamer der Staten-Generaal*). The Advisory Division determines the constitutionality of the bill. Yet, the constitutional position of the Council of State as an advisor is an inherently different position from the one that a constitutional court would hold.

The Council of State only gives advice and thus does not issue binding judgments. The Government is not bound to adhere to the advice of the Council of State and has only the obligation to justify any deviations from the advice in a report. This means that the context in which the Council of State conducts its constitutional review is fundamentally different from that in which a constitutional court would operate. The advice from the Council of State plays a role in the political, not legal, domain. As Konijnenbelt has remarked in this regard, it is '(...) a place in which legal arguments compete, rather freely, with political arguments of all natures'.¹⁰ The political context in which the Council of State provides advice is strengthened by the lack of after-the-fact constitutional review of legal measures by a judge. The Council of State lacks, with regard to its constitutional review, a natural ally in the system that could deal with constitutional frictions flagged by the Council of State but passed over by the legislature.¹¹

The advisor does not issue binding decisions; it is ultimately the Government and the legislature that decide. In this position as an advisor, the Council of State sometimes weighs the utility of giving a certain advice against not giving it.¹² As one renowned constitutional expert has pointed out, the role of the Council of State as an advisor of the Government could in this regard be classified as the skill of a tightrope walker: a delicate balance must always be sought between, on the one hand, what a sincere conviction about the meaning of the Constitution demands in a certain case and, on the other, the receptivity of the addressee (the Government and, in the background, possibly the legislature) for an

8 See for example the amazing work of Alexis de Tocqueville, *De la démocratie en Amérique*.

9 See also S. Gardbaum, 'The New Commonwealth Model of Constitutionalism', 2001 *American Journal of Comparative Law* 49, no. 4, p. 741.

10 W. Konijnenbelt, 'Grondwetsinterpretatie door de Raad van State', in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 74.

11 See literally W. Konijnenbelt, 'Grondwetsinterpretatie door de Raad van State', in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 73.

12 See J.C.A. de Poorter & H.J.Th.M van Roosmalen, *Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State*, The Hague: Council of State 2010.

unwelcome message.¹³ To the contrary, a judge cannot refuse to pass judgment on a ground of appeal. Yet, it would be a mistake to see the advisory role of the Council of State as characterised by a large measure of voluntariness. The fact that Article 73(1) of the Constitution of the Netherlands speaks of the ‘hearing’ of (*horen van*) and not of ‘advising’ by (*adviseren door*) the Council of State could indicate that a special meaning must be given to the Council’s advice, in the sense that it cannot be readily deviated from and that at least such a deviation must be supported by sufficient grounds. This argument is strengthened by the fact that in the mentioned provision the ‘hearing’ of the Council of State is a mandatory step in the legislative process. Moreover, the Council of State’s ability to advise is, in a certain way, a broader power than the power a judge would have in reviewing law against the Constitution. The Council is not obliged to limit itself to the question whether the bill *violates* the Constitution. The Council of State’s role within the constitutional system leaves the Council free to speak about the desirability of the bill in the light of certain constitutional, or even broader societal, developments. The Constitution can thus play a role in judging the expediency, the necessity or the appropriateness of a bill.¹⁴

3.3. Constitutional interpretation and review by the judiciary: the court of cassation (Supreme Court) of the Netherlands and the Administrative Jurisdiction Division of the Council of State

Even though the Dutch judiciary is not authorised to review laws against the Constitution, one can speak of a certain type of constitutional review. Article 120 of the Constitution of the Netherlands does not prohibit the Dutch judiciary from reviewing laws against European and international provisions, which include human rights and fundamental freedoms. This provision also does not prohibit the Dutch judiciary from reviewing lower regulations against the Constitution. These types of constitutional review take place in a model of diversified review. The manner in which the Dutch judiciary – I limit myself here to the highest courts: the Supreme Court (*Hoge Raad*) and the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak van de Raad van State*) – contributes to the constitutional legal development seems to depend to an important extent on the judiciary’s constitutional perspective on the relation between the legislature and the judiciary. Where does the judiciary see the limits of the judiciary’s law-making role?

These constitutional perspectives play a role as soon as a judge is faced with a choice without there being legally definable criteria for making the decision given to the judge beforehand. The judge is confronted with this when he finds a national legal measure to be in violation of European or international law and the question is raised whether the judge can deal with the gap in the law himself. A useful example here is a case in which the Administrative Jurisdiction Division had to decide on decisions taken on the basis of the Elections Act (*Kieswet*) regarding the European Parliamentary elections.¹⁵ The European Court of Justice had responded to the Administrative Jurisdiction Division’s preliminary reference by stating that the Dutch Government had not sufficiently shown that the difference in treatment that existed between Dutch citizens who lived in a third country and the Dutch citizens who lived in the Netherlands Antilles or Aruba was objectively justified and thus not a violation of the principle of equal treatment. The Administrative Jurisdiction Division struck down the challenged decision because of its violation of the Union’s equal treatment principle and thus its violation of the law of the European Union. Next, the question arose of how to remove the difference set out in the law so that people in the position of the litigants would not be treated less favourably, without a legally viable reason, than subjects that are in comparable situations. The Administrative Jurisdiction Division decided on this point that ‘at this moment, it falls outside of the law-making role of the judge’ to solve this problem. If a judge finds national law in violation of higher law, the simplest cases are those in which just not applying the provision in violation of the higher law is sufficient. In other cases, like in the case discussed here, it is more difficult.

13 W. Konijnenbelt, ‘Grondwetsinterpretatie door de Raad van State’, in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 75.

14 See H.J.Th.M. van Roosmalen, ‘Constitutionele toetsing aan grondrechten in het wetgevingstraject’, in J.C.A. de Poorter & H.J.Th.M. van Roosmalen, *Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State*, The Hague: Council of State 2010.

15 ABRS 21 November 2006, no. 200404446/1b and 200404450/1b.

The Administrative Jurisdiction Division decided that the way in which the difference laid down in the Elections Act could be removed demanded political choices and that these choices should, in principle, be taken by the legislature. The Administrative Jurisdiction Division here followed the reasoning of the Supreme Court in the *arbeidskostenforfait* case.¹⁶ This reasoning is that it is the legislature that has supremacy but not the monopoly when it comes to law making. The judge should, in principle, rectify gaps in the law by forming new law if it is clear what that new law should be, based on the legal system or by looking to cases that are already regulated by law. However, if it is not clear, if a choice must be made between different solutions and general considerations of government interest or if other important questions of a legal-political nature play a role in making that choice, the judge must, *for the time being*, leave this choice to the legislature.¹⁷ If the legislature fails to take its opportunity to rectify the problem found by the judge, it seems that it becomes the turn of the judge. That is likely what the Administrative Jurisdiction Division meant to say with the judgment that it finds the making of such legal-political choices to fall outside of the law-making role of the judge 'at this moment'. This is made more explicit when the Administrative Jurisdiction Division stated that it assumes that the legislature would take timely action so that the violation of the law is removed in time for the following election of the members of the European Parliament.

This view of the supremacy of the legislature is particularly expressed when it is apparent that the legislature has already started to amend the relevant legal provision.¹⁸ It is especially in such cases that the judge will act with restraint. This is not just the case when the relevant legal measure has been found to be in violation of higher law and the judge finds himself faced with the question of whether he should deal with the gap in the law himself, but also in cases for which there is no legal provision available to answer a legal question presented to the judge but it is clear that the legislature will provide one within the foreseeable future. In the latter case, the Administrative Jurisdiction Division aimed, if possible, to act in a restrained manner in order not to be too ahead of the times. An example here is the case in which an administrative fine was imposed regarding an industrial accident in Haarlem where the façade of a historical church collapsed while a fire was being fought in the building. Three firemen died in this accident.¹⁹ In the case before the Administrative Jurisdiction Division, the dispute turned on the criminal immunity of the public body against whom the fine had been imposed. The Administrative Jurisdiction Division ruled: 'In that case it must be considered that since the judgment of the Supreme Court of 6 January 1998, 1998, 369 (*Pikmeer II*), the issue of the criminal immunity of public bodies has been the subject of public debate, in which varying degrees of distance have been taken from the acceptance of the immunity. Of particular note are the discussions following a memorandum from the Cabinet on the criminal liability of governmental bodies (*Kamerstukken II* 1996/97, 25 294) and an initiative proposal from Chamber member Wolfsen advocating the amendment of the Criminal Code and other laws so as to abolish the criminal immunity of public law legal persons (*Kamerstukken II* 2005/06, 30 528, no. 2)'. In the developments on the level of the legislature and the insecurity that accompanies the future meaning of the criminal immunity of public bodies, the Administrative Jurisdiction Division found reason to leave unaddressed the general question whether that immunity also holds true with regard to administrative fines.

But even when a question is being dealt with by the legislature, the courts will not wait endlessly for an answer. This can be seen, for example, in the case law of the Supreme Court. In the case of 30 June 1998, the Supreme Court gave the legislature a time limit within which action had to be taken.²⁰ The Supreme Court decided: 'It cannot be excluded that the possible failure to make a legal arrangement could lead to a different balance in judging future cases (...)' The judiciary thus gave the legislature a time limit, in the sense that if the legislature did not come with a law within a certain amount of time, the court, would itself start acting in a law-making way.

16 HR 12 May 1999, *BNB* 1999/271, annotated by Wattel.

17 See further S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter', *NJB* 2000, pp. 747-758.

18 See for example *VzABRS* 29 March 2007, no. 200701654/2.

19 See *ABRS* 22 November 2006, *AB* 2007, 5 annotated by A.P.W. Duijkersloot.

20 HR 30 June 1998, *NJ* 1998, 799.

4. Towards a strengthening of the cooperation in the relationship between national, European and international legal orders

The process of constitutional legal development – the development of the fundamental assumptions and principles that are supposed to be at the foundation of our law and that should be guiding for every form of governmental action – cannot be studied only within the framework of the national rule of law. Because of the growing interconnectedness of the national legal order with that of the European Union and with the international legal order, constitutional legal development must increasingly be seen in a multipolar model of law making. On the other hand, the European and international legal order can only be developed and have effect with the cooperation of the Member States' legislatures, executives and judiciaries. The legal development in the area of fundamental human rights and freedoms cannot only take place with a European or international perspective. Against this background, it seems preferable to take an approach that assumes cooperation and interaction instead of one that sees a strict hierarchy between the levels of the nation state on the one hand, and the level of the European and international legal order on the other. Yet, the question is whether there should be more room for this type of cooperation and interaction instead of thinking in the strict terms of a hierarchy.²¹ In other words, is it possible to bring hierarchy and dialogue into harmony with each other? This question is suited to a very wide reflection; yet, in the context of this contribution I will limit myself to the role of the national, European and international judiciary in their relationships with each other. I choose this perspective not in the least because the judiciary is heavily relied upon on the supranational level when it comes to constitutional development.

4.1. *The relationship between supranational judiciaries: the European Court of Human Rights and the Court of Justice of the European Union*

The first element in the relationship between the national, European and international legal order relates to the supranational judiciary. In the case law it is often expressed that there is a certain form of interaction between the national, European and international legal orders. An example is the case law regarding Articles 6 and 13 of the European Convention on Human Rights (ECHR) and the European Court of Justice's effectiveness requirement, first formulated in the cases of *Rewe* and *Comet* and later expanded to a principle of effective remedy.²² These principles of an adequate remedy and fair trial were explicitly developed in a dialogue between the different legal orders. The way in which the Court of Justice expressed this in its case law is very telling. It spoke of a 'general principle of community law which stems from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'.²³ This case law shows that there has already been interaction between the ECtHR and the Court of Justice in the area of fundamental human rights and freedoms. We can assume that the interaction between the European and international courts will only increase as a result of the entry into force of the Charter of the Fundamental Rights of the European Union and the possible accession of the EU to the ECHR.

These latter developments indicate that there is a good reason for the coordination between the CJEU and the ECtHR in the area of constitutional legal development. The coordination of their case law serves legal unity well and thereby also the equality of subjects before the law as well as legal certainty. As Kapteyn justly remarked, the interests that are at stake in regard to legal unity, equality before the law and legal certainty cannot be treated lightly: 'To the contrary, they are heavy, so heavy that it can be expected from a judge that he puts them first in the decision-making process. The judge must let his interpretation of the applicable legal rule be led by the case law of judges who are equal to or above him

21 See also M. Scheltema, 'De toekomst van de bestuursrechtspreek', 2011 *Trema*, no. 9, p. 320.

22 Judgment of the Court of 16 December 1976, Case 33/76, *Rewe*, [1976] ECR 1989 and Judgment of the Court of 16 December 1976, Case 45/76, *Comet*, [1976] ECR 2043.

23 See e.g., Judgment of the Court of 15 May 1986, Case 222/84, *Johnston*, [1986] ECR 1663 and following; Judgment of the Court of 15 October 1987, Case 222/86, *Heylens*, [1987] ECR 1651 and Judgment of the Court of 3 December 1992, Case C-97/91, *Borelli*, [1992] ECR I-6313.

in rank.²⁴ This coordination between both supranational judges can take place in different ways. In many cases this coordination takes place spontaneously or, if you will, silently. One can think here of cases in which a court adopts the direction taken by the case law of another court without having first (in) formally consulted that other court. It is obvious that in cases in which there is settled case law from the highest judge, the other courts adopt this line of case law when the same legal question in comparable circumstances is presented to these courts and that it is obvious that this will also be explicitly mentioned in the judgement. If a court does decide to deviate from the highest court's settled case law, it is clear that this court must clearly provide a reasoned decision as to why it did not follow the case law of the highest court. This serves not only legal unity but also legal development. When adjudicating on cases in which an appeal is made to the EU Charter, the CJEU will be confronted with more or less crystallised case law from the ECtHR often during the first few years since the Charter entered into force. It seems logical that the CJEU will follow the ECtHR explicitly in this case law, or if it (hopefully rarely) does deviate from the case law, that it does so explicitly.

The increasing interconnectedness of the European and international legal orders will also lead to an increase in the need for adjustments to each other in ways other than only a reference to each other's case law in judicial decisions. It is possible, for example, that certain judges from the CJEU will be named as 'replacement' judges at the ECtHR and the other way around, as is now the case with the highest judges in the Netherlands. In this way, the 'mixed' composition of the court in a specific case will express the dynamic and reciprocal relationship between these courts. To an increasing extent, it will be necessary to engage actively in (in)formal discussions in order to sufficiently streamline the case law. These discussions can take place with regard to a specific case or, in other cases, more in the abstract with regard to a certain problem area in the case law or in preparation for cases that will present themselves within the foreseeable future. This is already a well-known phenomenon among the highest judges of the Netherlands. The legal unity between the different highest administrative courts – the Supreme Court, the Central Appeals Court for Public Service and Social Security Matters (*Centrale Raad van Beroep*), the Administrative Court for Trade and Industry (*College van Beroep voor het Bedrijfsleven*) and the Administrative Jurisdiction Division of the Council of State – is insured by way of an inter-collegial Commission for Legal Unity (*Commissie Rechtseenheid*). In this commission, a common judicial policy is formed that is then set out in the judgments of the different courts. I could imagine that the CJEU and the ECtHR also feel the need to structurally approach the constitutional legal development in this dialogical way.

The dialogue becomes even more active and explicit when the CJEU and the ECtHR make agreements on how to divide labour. The consequences of the accession of the European Union to the ECHR has led to such a type of dialogue between the presidents of both of these courts. There is a certain concern on the side of the CJEU that the ECtHR will be called upon to judge the legality of the actions of EU institutions and that it will render judgment without the CJEU being given the opportunity to determine the validity, and in particular the compatibility with the ECHR, of the relevant EU provision.²⁵ The CJEU has therefore proposed that in such an instance, the ECtHR would suspend the case if the CJEU had not yet decided on the EU act's alleged violation of the ECHR so as to give the CJEU a chance to rule on the case. This proposal was received favourably by the ECtHR and was set down in a joint announcement from the presidents of the CJEU and the ECtHR on 17 January 2011. However, the question still remains whether there are not other ways to pursue the interest of the CJEU in retaining the authority to render final judgment on the compatibility of an EU act with the ECHR.²⁶ I will return to this question below.

4.2. *The Relationship between the national and supranational judiciary*

The ECtHR can only give judgment in a case after domestic remedies have been exhausted and the ECtHR must, in that case, check whether the national legislation of a Member State and the procedures

24 P.J.G. Kapteyn, 'Vormen van samenwerking tussen rechters: de Afdeling rechtspraak', 1989 *NJB*, 23/30 December, Special, pp. 1648-1649.

25 See the Discussion Document of the Court of Justice of the European Union on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg, 5 May 2010.

26 See the Discussion Document of the Court of Justice of the European Union on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg, 5 May 2010, p. 4, Section 8.

followed by that Member State are in accordance with the European Convention on Human Rights. As a consequence, the ECtHR does not often rule on the same legal relations as those that the national judge has ruled upon. The decision making by the national judge is only indirectly involved in the procedure at the ECtHR. This quite autonomous style of adjudication, a style that, to a certain extent, makes a decision on a more abstract level than that on which the dispute as it was presented to the national judge took place, is different in an important way from the development of European Union law by the Court of Justice. Because of the possibility to pose a preliminary reference to the Court of Justice, judges at this court have been more able to lead legal developments in the area of Union law in cooperation with national judges. The Court of Justice has developed almost all of its important legal concepts, such as the supremacy and direct effect of EU law and the liability of states for the violation thereof as the result of preliminary references on these issues.

The preliminary reference procedure has as an advantage that the decision from the supranational court is explicitly positioned in the context of the dispute as it was presented by the national judge. Supranational courts, including the ECtHR and the CJEU, often have to deal with a large measure of diversity between the different legal systems. It is often a challenge for the supranational court to fit its judgment into the legal system of the specific country where the dispute originated. It benefits the acceptability of this 'fitting in' of the judgment when this occurs not only from the perspective of the supranational law. There are, after all, strong arguments to be found in both in the relationship between the international and European legal order on the one side and the national legal order on the other side, and also within the national legal order, to assume that a strict top-down system of rules is unproductive. This is also the case, to a certain extent, in the relationship between the ECtHR and the national judiciary. It is against this background that I believe that a preliminary reference procedure for the ECtHR can contribute to the legitimacy of that process of trying to fit the supranational law into the national law. This is mainly because it would offer more room for judicial cooperation in which the national judge and the ECtHR, both according to their own competencies, are called upon to directly and mutually contribute to finding a decision that ensures the uniform application of the ECHR in all its Member States.

Moreover, such a preliminary reference procedure is not only advantageous because of the cooperation it would engender between national judges and the ECtHR, but also because of the effects it would have for the relationship between the ECtHR and the CJEU. As mentioned above, the question of which court has the last word in disputes regarding the legality of acts of EU institutions is an important point of concern accompanying the possible future accession of the EU to the ECHR. The ECtHR, as a protector of human rights, is the logical institution to judge on the compatibility of such acts with human rights and fundamental freedoms. However, it is the prerogative of the CJEU to pass final judgment on the legality of the way in which the EU institutions exercise their authority in general. A preliminary reference procedure at the ECtHR would speak to this joint responsibility by letting the ECtHR, with its special expertise in the area of human rights and fundamental freedoms, play a preliminary role in procedures before the CJEU, the court that should have the final word in these sort of internal EU issues. The introduction of a preliminary reference procedure at the ECtHR should be accompanied by a reflection on the current procedure of the exhaustion of local remedies. In the light of the preliminary reference, but also considering the large backlog of cases the ECtHR currently has, I am in favour of introducing an *a certiorari* system to decide which cases should be accepted, after the requirement of the exhaustion of local remedies has been met.

When I characterise the relationship between the ECtHR and the CJEU, on the one hand, and the national judiciary, on the other, as one of mutuality this raises not only the questions regarding the position of the ECtHR in relation to the national judiciary but also the opposite question of what this interaction means from the perspective of the national judiciary. In the first place, this interaction means that the national judiciary must be aware that it is exercising its authority in a complex pattern of making and applying the law. This means that it must realise that it not only has a duty to care for the implementation of European and international law in the national legal order but also that its judgments contribute to the further development of the European and international legal order. This type of law making by national judiciaries often has a transnational character. The transnational character of a judicial decision can ideally be found in the type of argumentation the national judge uses. When the highest national court

must deal with a legal issue that has also been dealt with elsewhere, its judgment will be more persuasive when it takes this into account and acts in conformity with how the issue was dealt with by that other court. This is the case for legal issues that are largely the same in different countries and in particular when the legal issue is one that deals with principles of the rule of law.²⁷ This means that the importance of external comparative law will increase. At the same time, it can be said that the highest courts in the Netherlands rarely use external comparative law, possibly because they do not have enough familiarity with it or because they do not yet deem it to be sufficiently important. Yet external comparative law can provide added value.²⁸ In this way, the opinion of an advocate general can be useful. The Supreme Court of the Netherlands, the highest court in the Netherlands in the area of civil, criminal and tax law, is already familiar with this instrument. The administrative courts will soon also have the possibility to ask for an opinion from an advocate general, as a result of the Law Amendment Administrative Procedural Law (*Wet aanpassing bestuursprocesrecht*) that will soon enter into force. An advocate general's opinion is an excellent instrument to inform judges about case law from colleague judges in other countries who have been confronted with similar legal issues. In this way, the judgments of these colleague judges will get their own place in the legal procedure. It is important to note that this will not take place in a way that will bind a judge to his colleague's judgment. It will only allow the Dutch judge to account for his colleague's judgment and, if he decides to deviate from it, that he explains why in his judgment. Such a dialogue benefits the judicial decision's persuasiveness.

An advocate general's opinion is not the only source of information about case law from other countries. Cooperation in the context of groups such as the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union also offer possibilities for the provision of such information. This possibility could be given a more structural nature in regard to the external legal comparison of the ECHR and the EU Charter and it could promote dialogue with the supranational judiciary. The formation of a permanent working group within this Association that is tasked with following the developments in Strasbourg and Luxembourg and that initiates appropriate action based on those developments is an attractive option. This is of great importance for a number of reasons.²⁹ First, because a larger involvement and leadership from the Member States would strengthen the legitimacy of the judgments given by the ECtHR and the CJEU. Second, it would give the Member States, and in particular the highest national judiciaries, a certain measure of (co)responsibility for the legal developments on the supranational level. The increasing Europeanisation and internationalisation is shifting the legal development to a large extent to the supranational level and that demands that the national judiciary actively engages with this process. This means that the ECtHR and CJEU case law must be followed structurally and that, based on that and with regard to the ECHR, the state should be encouraged to intervene as a third party in Strasbourg procedures against another country. This is the case, for example, when there is not yet any case law from the ECtHR on a certain matter or when there is uncertainty about the general meaning of a decision from the ECtHR. It is also conceivable that in these cases a national court will attempt to request a judgment from the ECtHR in a certain case and that the national court will justify its decision based on the ECtHR's answer.

Closer contact in general between the (representatives of) national judiciaries and supranational courts will become increasingly important. This contact might take place during periodical meetings in which ambiguities in the case law of the supranational courts are discussed or aspects on which people would like to see a leading judgment from the ECtHR or CJEU as soon as possible are brought up. It is also possible that meetings between national judges from different Member States will show that a certain legal issue is present, giving rise to a request for the ECtHR or the CJEU to deal with this case jointly. It might also be possible to have certain judges with specific expertise in an area of the law assist the work of the ECtHR or CJEU. This could take place, for example, by having judges from the highest national constitutional courts appointed as replacement judges at the ECtHR or the CJEU. Vranken has

27 M. Scheltema, 'Is de rechter niet democratische dan wij denken?', in J.W. Duyvendak et al. (eds.), *Macht en verantwoordelijkheid, Essays voor Kees Schuyt*, 2007, p. 332.

28 See also E. Mak, 'Globalisation of the National Judiciary and the Dutch Constitution', 2013 *Utrecht Law Review* 9, no. 2, pp. 36-51.

29 See in this regard also T. Barkhuysen, 'Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht', in T. Barkhuysen et al., *De betekenis van het EVRM voor het materiële bestuursrecht (preadvies VAR)*, 2004.

suggested ancillary chambers at the ECtHR that are staffed by three judges from the highest national (constitutional) courts that would, in varied composition, deal with the simpler cases. This type of contact would be very beneficial for increasing a mutual understanding of each other's problems.

5. Strengthening cooperation on the national state level

As mentioned above, the legislature, executive and judiciary have a joint responsibility to realise the values that lie at the core of our legal system. Each branch of the government has its own role to play and its own responsibilities but their functioning compliments each other. The legislature and executive are responsible for making laws, and making policy and executing policy, respectively. In the coming years, much emphasis will be placed on the execution of fundamental reforms in social and economic policy. The current economic problems will amplify the already visible developments of speed, efficiency and financial-economic impact as leading parameters in legislation and government. Constitutional principles and general legal principles seem to be viewed more as obstacles than as leading values. This, together with the related linkage between the legislature and the executive, will increase the pressure on the judiciary to act as a counterforce and to protect the fundamental values that lie at the core of our law.

This fact brings us to the question of the legitimacy of judicial decisions, and more generally the legitimacy of government action. Although political decision making takes place primarily through formal procedures, the legal character of political decisions is an insufficient basis for their legitimacy. Legitimacy does not immediately flow from legality. In his famous work *Faktizität und Geltung*, Habermas defended the proposition that a proper definition of the force of the legitimacy of democratic procedures must see these procedures as giving institutional form to the argumentative political formation of opinions and will.³⁰ This argumentative description of the democratic process means, more concretely, that while actual political decision making is the prerogative of the Government and Parliament, the legitimacy of political decisions depends on the measure to which the decision-making process took account of all arguments and counter-arguments that were brought forth in public debate. If the legitimacy of political decision making, in terms of making decisions based on a vision of the general interest, is sought more in the deliberative character of the procedure that is at the foundation of the decision, it becomes less obvious that democratic legitimacy can only be found in a system of representative democracy. This means that law making by the judge, a case in which the judicial activity cannot support itself solely on the democratic foundation of the law that it is applying, is not necessarily lacking all legitimacy. Against this background, one can no longer simply say that the legislative supremacy the Netherlands knows with regard to the interpretation and application of the Constitution is a logical consequence of the fact that legislative decision making is supported by a stronger democratic legitimacy than judicial decision making. The argument for the judiciary's lack of democratic legitimacy can be significantly weakened if the judiciary searches for a certain measure of social consensus when it engages in law making.³¹ And there is an additional element of importance as well. One of the reasons why the judiciary's lack of democratic legitimacy should not be too heavily emphasised in comparison to that of the legislature can be found in the increasingly visible step back the legislature is taking in favour of the executive. Parliamentary-made law has less and less normative meaning, partially because of (sub)delegation to ministers or other governmental institutions and also to formally depolarised quasi-governmental institutions. In relation to this, Van Gerven has noted 'it is, I believe, a fiction to state that because of the ministerial responsibility to Parliament the values that lie at the foundation of these laws have more chance of reflecting a majority consensus than those set out by a judge, who because of his profession and function is more well trained than the civil servant to weigh and reconcile contradictory positions.'³²

This brings us to a valuable conclusion. If it is the case that the legitimacy of governmental action depends on the measure to which the decision-making process took account of all arguments and counter-arguments brought forth in public, representative democracy no longer provides a justification

30 J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992.

31 W. Van Gerven, *Het beleid van de rechter*, 1973, pp. 148-149.

32 W. Van Gerven, *Het beleid van de rechter*, 1973, p. 149.

for giving the legislature supremacy over the judiciary in the area of constitutional interpretation and review. This fact leads more logically to the position that the legislature and judiciary are partners in law making and that this partnership, in its most far-reaching form, will lead to the question of who can do what best, based in part on the unique nature of the process of law making by the legislature or the judiciary. In this way, the argumentative definition of the democratic process leads us not only to a deliberative model in the material sense – in the sense that it is important how much political decision making is open to the desires and needs expressed in the public debate – but also in a more institutional sense. It demands more dialogue between the legislature and judiciary on the question of who can best take the lead in individual areas. Such a dialogue can contribute to strengthening the legitimacy and the quality of the constitutional law making. I will deal with this further in the sections below.

5.1. Constitutional review ex ante: the relationship between the legislature and the Advisory Division of the Council of State

The Netherlands does not have a constitutional court like France, Germany or Belgium have. These courts have the possibility to review the conformity of enacted legislation with written and unwritten constitutional law. Such a power is denied to the Dutch judiciary in Article 120 of the Constitution of the Netherlands. However, the Government does present bills to the Council of State for the Council's advice before the bills are introduced to Parliament. The Council of State considers it part of its role to protect the core values of the democratic rule of law and the constitutional review of these bills holds an important place in the work of the Council of State. As mentioned above in Section 3.2, the constitutional position of the Advisory Division of the Council of State means that its review differs significantly from that of judicial review.

It was concluded above that different developments have shifted the balance within the *trias politica* and that recovering this balance can be attained by, for example, strengthening the quality of legislation. The question is how the Advisory Division of the Council of State can contribute to that, in cooperation with the other actors that are involved with the interpretation of the Constitution. I believe here as well that interaction between the involved partners in the legislative process is of great importance. A dialogue strengthens the meaning that is given to constitutional principles and to the provisions of the Constitution in the legislative process.³³ First, one could strengthen the dialogue between the Council of State and the Government by introducing a weightier governmental duty to give reasons. If the Government decides not to follow the advice of the Council of State this decision should be based on well-founded arguments. These arguments need to be of a higher quality than they now sometimes are. In that case, it can be expected that the Government's report on the issue goes beyond merely giving (a repetition) of the arguments that support the view of the Government; the reasoning must clearly show that the Government has considered the arguments of the Council of State and must, when possible, engage in a debate with these arguments. Such a weighty duty to give reasons should apply in cases in which the Council has concluded with clear reasons that a bill violates, or at least is not fully in line with, the Constitution or other constitutional principles. These comments also hold true in the cases in which bills are proposed by Parliament.

The remarks made above about a weightier duty to give reasons give rise to the question whether there is not also a need for a further-reaching dialogue between the Government and the Council of State. In certain cases, the Council of State does not go much further than commenting that the explanation of a bill is insufficiently clear or that a certain element is missing in the argumentation. In these cases it would be useful to re-hear the Council after the Government takes a position on the part of the bill the Council found lacking. This is also the case in the instances in which the Council of State has provided a negative advice on a bill. In that case it would also be useful to hear the Council's views on a bill amended after such a negative advice. There are two ways in which this could be done. First, it is possible that working agreements between the Government and the Council of State could initiate a practice of the Council postponing its advice if it notes a lack of clarity or completeness in the explanation of the bill.

³³ J.C.A. de Poorter & H.J.Th.M van Roosmalen, *Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State*, The Hague: Council of State 2010, especially pp. 142-151.

In this case, the Council of State could first give the Government the opportunity to react to this initial finding, thus giving the Government an opportunity to rectify the problem. After this, the Council would give its advice on the amended bill. This could be achieved by making a minor adjustment in the Rules of Order for the Council of Ministers (*Reglement van orde voor de ministerraad*). In cases in which the Council of State finds that a bill violates the Constitution or is, in any case, not fully compliant with the provisions therein, I can imagine that the Council would not postpone giving its advice. In that case, it would become the Government's turn and it is to be recommended that the Government present its amended bill to the Council of State a second time. In this case as well, all that is needed to achieve this is a minor adjustment to the Rules of Order for the Council of Ministers. The Council of Ministers would have to agree to ask the advice of the Council of State again in such a case.

Finally, the dialogue between the Government and the Advisory Division of the Council of State can be strengthened by letting the Council of State make comments regarding the constitutionality of a bill at the beginning of the legislative process. At that moment, a moment that takes place *before* the Council of Ministers' discussion of the bill, the Council of State would have more room to manoeuvre and the constitutionality of the bill would be able to play a full role in the legislative process. This has happened a few times in the past, for example with regard to the memorandum on the placement of cruise missiles and the memorandum on the creation of a Council for the Judiciary (*Raad voor de rechtspraak*). The Law on the Council of State (*Wet op de Raad van State*) allows for this. The Council of State is able to inform ministers or to give advice even when it was not asked to do so. Here too, working agreements with the actors involved might be able to achieve such a practice. It is particularly important to explore the possibilities for this further in dialogue between the Government and the Council of State considering the social economic reforms that we will be dealing with in the coming years and the pressure this will put on constitutional relationships.

5.2. *Constitutional review ex post: the relationship between the legislature and the judiciary*

The Netherlands lacks a direct dialogue between the judiciary and the legislature. Such a dialogue is present in countries such as Germany, France and Belgium, where legislation is reviewed in the abstract by a constitutional court. The Dutch judiciary is not authorised to review legislation passed by Parliament against the Constitution or against unwritten principles of constitutional law. However, the judiciary can review legislation in concrete cases against European and international law. Additionally, the Dutch judiciary is authorised to review lower-level legislation against the Constitution and unwritten principles of constitutional law. The Dutch system of diversified review has as a consequence that a judgment only has meaning in the specific dispute between the parties. If a law is in violation of a higher law, the judge may only rule that the lower law should not be applied in the case at hand. This is an important difference as compared to systems with a concentrated judicial constitutional review. Gerards noted that this lack of *erga omnes* effect has consequences for the interaction between the judiciary and the legislature: 'Because ruling a law may not be applied only has consequences in the specific dispute between the parties, the question that arises is how the legislature will become aware of the judicial decision and which reaction the legislature should have. However, if a constitutional court can strike down a law or declare it void, it is immediately clear that the legislature has work to do.'³⁴ Additionally, it may be assumed in a system of diversified constitutional review that the judge will act in a more restrained manner with regard to the legislature than constitutional courts do. That might have partially to do with the difference in the position in the constitutional system that a constitutional court holds as compared to the position of a 'normal' judicial body. Also, the nature of the review partially explains this difference. When a constitutional court comes to the conclusion that a legal provision is in violation of the Constitution, that leads to the law being completely denied its legal effect. Thus, the judge is presented with the question in which manner cases that deal with this annulled law must be dealt with. At the very least this should be dealt with by way of a transitional arrangement.

34 See also J. Gerards, 'Wisselwerking tussen wetgever en rechter – naar een betere dialoog?', in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 188.

It is possible, and even necessary, to have a certain amount of interaction between the judiciary and the legislature in a diversified system of review. Properly speaking, this interaction begins in the legislative process. It is very important that the legislature realises that it is functioning as an ‘indicator’ for the judge.³⁵ If a litigant claims that a certain legal provision is in violation of, for example, an internationally protected human right, it is then of importance to the judicial review that the provision and the explanation for this provide sufficient insight into the reasons for the limitation of that human right, the measure in which attention was paid to the proportionality of the chosen instrument in relation to the human right limitation, and the way in which a balance was struck between the interests that are affected. This information is of great importance to the judge’s ability to review the law. However, the literature concludes that the information provided in the memorandum of explanation to the law is often superficial and unclear.³⁶ That is possibly the effect of a lack of centralized constitutional review. A concentrated constitutional review can be expected to affect the entire legislative process by alerting the legislature to the necessity to provide appropriate reasons for and an explanation of the bill.

It is also important that the judiciary sends a signal back to the legislature by way of the judicial decision. This is particularly the case when a judge comes to the conclusion that the law is in violation of a constitutional right. The legislature must be able, based on the judicial decision, to decide whether it should take further action and if so, in which way this action should be undertaken. This demands an argumentation that attempts to show, as sharply as possible, what exactly the problems are. This is an area in which improvement is called for as well. In this way, one can see that the legislature and the judiciary need each other. It is against this background that one should think about how these branches can best facilitate each other.

In relation to this, it is relevant that because of the less salient character of the constitutional review in a diversified model like that of the Netherlands, the legislature is less easily informed of judicial decisions on the legality of law. As mentioned above, the power that judges in other systems have to strike down legislation completely on grounds of unconstitutionality has as a consequence that a law, or a part thereof, is denied legal effect. In this way, a direct dialogue is called into existence between the judiciary and the legislature. A Dutch judge is faced with a different scenario. When a Dutch judge comes to the decision in a concrete case that a law violates a certain human right as set out in an international treaty, for example, he only has the ability not to apply the law in that specific case or to solve the incompatibility by applying the law in conformity with the treaty. In the Dutch judge’s scenario, the judicial decision has no effect on the legal effect of the law as regards other cases. The question is thus whether the legislature is, or more specifically, the relevant departments are, always sufficiently aware of such judicial decisions. An active feedback loop from the judge can be useful in this regard. The Council of State developed such a system – outside of the area of constitutional review as well – by having its Advisory Division give feedback to the Government about problems found in the law by its judicial division. This system could possibly be used more systematically, and possibly even with the involvement of other judicial institutions.

The forms of dialogue between the legislature and the judiciary that have been described thus far are, apart from being very valuable, also mainly conceptualised from each actor’s own position. Much more active and explicit is the constitutional dialogue that occurs when there has been interaction between the legislature and the judiciary that leads to agreements over which actor can best deal with certain tasks. Vranken pointed to ‘creeping legislation’, or the open method of coordination, as a far-going example of such a constitutional dialogue.³⁷ The legislature sometimes finds it impossible to deal with certain subjects in a legislative manner. This is particularly the case with regard to ethical issues. Even aside from the heavily politically loaded quality of these issues, the increasing fragmentation of the political landscape in the Netherlands, a country that is historically one of minorities, makes it difficult to form coalitions that are sufficiently broad for decision making on such issues. One could think here of issues

35 See J. Gerards, ‘Wisselwerking tussen wetgever en rechter – naar een betere dialoog?’, in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 161.

36 See among others C. Waaldijk, *Motiveringsplichten van de wetgever* (dissertation Maastricht University), 1994 and J.L.W. Broeksteeg et al., *Zicht op wetgevingskwaliteit. Een onderzoek naar de wetgevingsadvisering van de Raad van State*, WODC series Onderzoek en beleid 233, 2005.

37 J.B.M. Vranken, ‘Taken van de Hoge Raad en zijn Parket in 2025’, in A.M. Hol et al. (eds.), *De Hoge Raad in 2025: Contouren van de toekomst van de cassatierechtspraak*, 2010, pp. 29-46.

surrounding progressing scientific developments and the questions that accompany them regarding, for example, genetic modification and assisted suicide. With regard to this latter issue, societal pressure recently forced a parliamentary debate about the socially expressed desire that elderly people who consider their lives to have been ‘completed’ are given the right to assisted suicide, even if there is not an urgent medical reason for this. Yet, no political decision was made on the issue and, because of divisions in Parliament and the relations among the different parties, a decision is not expected in the immediate future. Yet, this does not mean the problem has gone away. One can very well imagine that this problem will confront the judiciary in the coming years. Based on what was discussed before in Section 5, I concluded that one cannot persuasively say that the judiciary lacks the legitimacy to make such ‘political’ decisions. Actually, in this case, the special nature of the process of judicial decision making might make the judiciary more suited than the legislature to develop the law further in a way that strongly reflects the societal consensus.

This brings me to an important aspect: the position of society in the law-making role of the judge in these types of cases. By concluding that the judiciary engages in law making, we acknowledge that the judicial decision is not purely of consequence as between the parties. If we assume that the legitimacy of the judicial decision depends to a large extent on how much the decision reflects a societal consensus that has become apparent in public debate, this raises the question of how this should play a role in the judicial procedure. Scheltema has pointed to the American experience regarding the instrument of the *amicus curiae*.³⁸ In 2004 the US Supreme Court took account of the views of the European business world in a competition law case. These views were introduced to the case by way of an *amicus curiae* brief.³⁹ When searching for an answer to the question of how societal input can be given a place in the judicial procedure, one should begin by acknowledging that law making increasingly takes place in networks of legal developments that are not necessarily institutionally anchored. For example, regarding euthanasia, a judge will have to decide whether, and to what extent, the right to life also has an active meaning, thus giving an individual the right to self determination. The open method of coordination entails that the problem is regulated in case law, step by step, and with a conscious coordination with ‘the field’ (doctors and patient organisations), with knowledge from other disciplines (ethics, for example) and with a legislature that starts by positing one or more main points and that then slowly elaborates on or adjusts these points, partially based on insights from case law, practice and new developments. These are only preliminary views but, nevertheless, they call for further attention. One of the most important questions to be dealt with in the future is how cooperation between the legislature, judiciary and society can be given form without damaging constitutional requirements and protections.⁴⁰

6. An eye towards the future: towards a constitutional court in the Netherlands?

The prohibition of judicial constitutional review set out in Article 120 of the Constitution of the Netherlands has proven not to be wholly accepted. It was these discussions that have led former Second Chamber member Halsema to introduce a bill that would make judicial constitutional review possible with regard to certain named constitutional provisions detailing constitutional rights. At the same time, this bill may well turn out to be nothing more than a step towards a more far-reaching form of judicial constitutional review (assuming that it can count on the necessary two-thirds majority which is necessary for a constitutional amendment in the second round of voting in Parliament). Although many say that such an expansion is not necessary considering the ability of the judiciary to review laws against the equivalents of these constitutional rights that are contained in European and international law, I am less convinced. As Witteveen pointed out, such an expansion would be a desirable contribution to the emancipation of the Constitution.⁴¹ Moreover, the introduction in the Netherlands of some sort of constitutional review against the Constitution provides an opportunity to strengthen the cooperation

38 M. Scheltema, ‘De toekomst van de bestuursrechtspraak’, 2011 *Trema*, no. 9.

39 See the case *F. Hoffman-Laroche, Ltd. vs. Empagran S.A.* of 14 June 2004, 542 US 155.

40 See also J.B.M. Vranken, ‘Taken van de Hoge Raad en zijn Parket in 2025’, in A.M. Hol et al. (eds.), *De Hoge Raad in 2025: Contouren van de toekomst van de cassatierechtspraak*, pp. 29-46.

41 See W.J. Witteveen, *Evenwicht der machten*, 1991, pp. 85-86.

in the field of the constitutional law making between the legislator and judiciary, on the one hand, and between the actors on the national state level and those acting on the supranational level on the other.

As the review of laws against the Constitution is extended further than a review against constitutional rights, it becomes less fitting to have a decentralized review in concrete cases. If a review against the institutional and procedural provisions and against unwritten constitutional law is made possible, it would be fitting to give one single institution the power to render binding decisions regarding the conformity of laws with the Constitution, after such a court is approved by both Chambers of Parliament. Such a constitutional review in the abstract can take place before (*ex ante*) or after (*ex post*) the public announcement of the law. This form of constitutional review unmistakably has a number of advantages. It serves the ideal of the unity of interpretation and promotes the dynamic nature of governmental organs' interpretation of the law. This holds both for review *ex ante* as well as review *ex post*.

The existence of constitutional review in the abstract would not necessarily exclude the existence of constitutional review in concrete cases. One can imagine that an appeal to annul a legal provision could be submitted to the constitutional court within six months after the public announcement of the law. After those six months, a legal provision could no longer be struck down via a direct appeal to the constitutional court but, instead, this could be affected in a procedure requesting a pronouncement on the conformity of the law with the constitution in a specific case and before the 'normal' courts. I would propose that legal unity is best served if in such procedures the judge, or at least the highest judge, would have an obligation not to rule in such a case until he has submitted a preliminary reference to the constitutional court.

I spoke before about a 'constitutional court'. I would argue in favour of setting up a separate constitutional court for the concentrated type of constitutional review I mentioned above. I believe that the special nature of a judicial review of legislation against the Constitution means that the court that conducts this review must have a special composition. As Van Dijk has noted, 'that judicial institution will receive, after all, a special position in the constitutional system or, if you will, cooperation, between legislature and judiciary. The decisions of that judicial institution can have very intrusive political and societal consequences, which makes it obvious – and I would even say necessary – that this judicial institution continues to take these consequences into account when engaging in this review and in the putting into words of the results of the review.'⁴² I, together with Van Roosmalen, have asked for attention for the special character of the judicial constitutional review of law: 'The nature of constitutional review is not only determined by the uniqueness of the document against which the law is reviewed but also by the object of the review. The review of a bill or law passed by the legislature against the Constitution strengthens the conclusion that review against the Constitution is often a process that demands a balancing of interests, in which factors play a role that do not solely lie in the legal domain. This is particularly the case because, as Konijnenbelt wrote, in passing a law by the legislature, law and politics meet each other in an inextricable way.'⁴³ It is because of this that other countries have different procedures for appointing judges to constitutional courts than they use for 'normal' courts.

Concentrated review by a constitutional court is an attractive idea. It would strengthen the position of Dutch constitutional law with regard to supranational law but, at the same time, it would also raise questions about the relations between the two types of law. This will necessarily increase the cooperation between the different legal systems. A concentrated form of constitutional review in the abstract can, moreover, contribute to strengthening the cooperation between the legislature and the judiciary. The constitutional quality of legislation would thereby be improved.

Although a constitutional court in the Netherlands is attractive for many reasons, caution is necessary. An important condition for fruitful dialogue is that there is a certain equality in the relations between those actors who are engaged in the 'dialogue', in this case the legislature and the constitutional

42 P. van Dijk, 'Constitutionele toetsing in toekomstig perspectief', in *Verslag van het symposium van de Raad van State op 25 mei 2010. Rol en betekenis van de Grondwet*, The Hague: Council of State 2010, p. 51.

43 J.C.A. de Poorter & H.J.Th.M van Roosmalen, *Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State*, The Hague: Council of State 2010, p. 140. See W. Konijnenbelt, 'Grondwetsinterpretatie door de Raad van State: wetgevingsadvisering en grondwetsbepalingen in de Grondwet', in R. de Lange (ed.), *Wetgever en grondrechten (Staatsrechtconferentie 2007)*, 2008, p. 65.

court.⁴⁴ If the legitimacy of the legislature and the executive is reduced because of varying circumstances, the pressure on the judiciary to offer a counterweight to this will increase. This is an understandable reaction but it must not distract us from the real problem. Moreover, one can easily imagine that at that moment the pressure on the judiciary will increase and the (legitimacy of) judicial action will also be put under pressure. This will be the case even if simply because the judiciary will be approached to review the actions of the legislature against the constitutional values that are to be embodied in the law. The role of the judiciary is made more difficult if the law-making role of the judiciary and the executive become weaker, even if just because this carries with it the danger that people will harbour too high expectations about what one can expect from the judiciary.

It is based on this that I see the judicial constitutional review of legislation by a specially designed constitutional court as an attractive long-term development. However, at the same time, care must be taken that the legislature sufficiently invests in the constitutional quality of the law. Some countries have established a special parliamentary committee to rule on the constitutionality or conformity of proposed legislation with international treaties. An example of such a committee is the British Joint Committee on Human Rights. Although no such committee exists in the Netherlands, the Council of State does act as a protector of the democratic rule of law in its role as an advisor and it aims to contribute to the quality of constitutional review in this way. It might well be conceivable to strengthen this role of the Council of State, with an eye to a possible future introduction of a constitutional court.

44 See also T.S.R. Allan, 'Constitutional dialogue and the Justification of Judicial Review', 2003 *Oxford Journal of Legal Studies* 23, pp. 563-584.