Structuring the Judiciary to Conduct Constitutional Review in the Netherlands

A Comparative and European Perspective

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Abstract

Whether a legal system decides to centralize or decentralize constitutional review by the judiciary is dependent on various factors. This article critically considers a host of these factors, ranging from the separation of powers to the desire to bring about far-reaching constitutional change and the possible impact of membership of the European Union, in studying whether in the Netherlands constitutional review should be centralized or decentralized upon its possible introduction. The conclusion is reached that although decentralization can be opted for under the current circumstances, a persuasive case for centralization can also be made and might even become stronger and inevitable depending on the course of future constitutional reform.

Keywords: centralized/decentralized constitutional review, Netherlands constitutional law, comparative law.

A. Setting the Scene

What influences whether constitutional review by the judiciary is centralized or decentralized? This question is inescapable whenever the merits of constitutional review are discussed, as review pre-supposes institutions capable of conducting such review. Just as the merits of constitutional review deserve continued attention, so too does the nature of its institutional shape warrant study due to changing circumstances and insights. At first glance, researching this question with respect to the Netherlands seems misplaced. This is because the country is one of the last liberal democracies to bar the courts from reviewing the constitutionality of acts of parliament. However, the bar on constitutional review is not uncontroversial. Not only is the topic lively debated in academic circles, but a private member's bill has passed also a number of legislative hurdles and will exempt certain constitutional provisions from the bar were it to be successful.[1] As to the form of

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1 *Parliamentary Proceedings II*, 2001–2002, 28, 331, No. 2; 2002-2003, 28, 331, No. 9. On the debate, *see* P.B. Cliteur, *Constitutionele toetsing*, Teldersstichting's-Gravenhage, 1991; L.F.M. Besselink, *Constitutional Law of the Netherlands*, Ars Aequi Libri, Nijmegen, 2004, pp. 91-108.

review, the bill foresees the decentralized review of the selected provisions in that all courts will be empowered to apply those provisions of the Constitution to acts of parliament.[2]

The purpose of this contribution is to critically consider the bill's choice from a comparative and European perspective. This is done not only to highlight and discuss the situation in the Netherlands, but also to consider the larger debate surrounding the centralizing and decentralizing of constitutional review today.

B. Developing the Context

While the constitutional review of acts of parliament is barred by Article 120 of the Netherlands Constitution, Article 94 of the Constitution allows the conduct of binding treaty review.[3] This has led to the anomalous situation that courts must refuse to apply an act of parliament where it contradicts international law but not where the same act violates the country's Constitution.

The bar first made its way into the Constitution in 1848 when a provision was inserted holding that acts of parliament were inviolable, thereby giving full expression to a strict separation of powers and reaffirming the trust which legislatures typically enjoyed in the nineteenth century. The courts on the other hand started to develop over time the idea that treaties enjoyed a monist application in the country's legal order as a matter of unwritten constitutional law.[4] After World War II, the constitutional legislature, in a spirit of openness to international law, decided to formalize in the Constitution the direct applicability of international law, which after subsequent revision is now provided for in Article 94. Initially, the political conviction was expressed that national legislation was in line with international law, which meant that findings of violation would be a rare occasion.[5]

This confidence in the compatibility of national law with international law seemed to underline the acceptance of treaty review, as opposed to constitutional review that was deemed to implicate matters more concrete and closer to home and that still warranted legislative primacy over judicial review in interpreting the Constitution. However, over time, international law came to focus more on individual rights than simply reciprocal agreements between states. This in combination with a number of Strasbourg judgments starting in 1976 with *Engel*,

2 *Parliamentary Proceedings II*, 2002–2003, 28, 331, No. 9, pp. 16-18.

3 Art. 120 reads: "The constitutionality of acts of parliament and treaties shall not be reviewed by the courts." Art. 94 reads: "Legislative regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or in conflict with resolutions adopted by international institutions."

4 HR 3 March 1919, *NJ* 1919, 371 (*Grenstractaat Aken*); HR 6 March 1959, *NJ* 1962, 2 (*Nyugat*).

5 E. Alkema, 'The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order', *in* R. Lawson & M. de Blois (Eds.), *The Dynamics of the Protection of Human Rights: Essays in Honour of Henry G. Schermers*, Marthinus Nijhoff Publishers, Dordrecht, 1994, p. 1, at p. 3.

increased the importance and frequency of treaty review in the Netherlands and served to highlight the gap with constitutional review.[6]

The current proposal, usually referred to as the Halsema bill after the then opposition member of parliament who tabled the proposal in 2002, aims to remedy this difference in applying both constitutional law and international law to acts of parliament. The bill has passed its first reading, which required a simple majority in both houses of parliament, and can now be read for the second time.[7] Should it pass its second reading with a two-thirds majority in both houses, the bill will succeed in amending the Constitution. Its slow progress, given that the bill has been in the pipeline now for ten years, can probably be ascribed to the political fluctuation in the Netherlands over this period of time. The country has had a relatively quick succession of elections and cabinets with varying legislative priorities, which has meant that the bill is constantly overshadowed by new initiatives while its supporters wait for the right moment to initiate its second reading.

Although introducing constitutional review by the judiciary will in itself be momentous, the shape that such review will take is decidedly less ambitious. The Halsema bill will leave the bar in Article 120 intact, save for the addition of a subprovision which will allow the judicial review of what the proposal terms 'enforceable' provisions.[8] For the most part, these provisions amount to classical rights, which means that socio-economic rights and operative provisions, such as the legislative procedure, will continue to be excluded from judicial scrutiny. This resembles treaty review, in that courts are reluctant to apply socio-economic provisions while readily applying classical rights.[9] As mentioned above, the bill settles for decentralized review. This choice is defended with reference to treaty review which is also carried out on a decentralized basis. The bill explains that in exercising treaty review, the courts have not encountered significant problems and that it should therefore be emulated by constitutional review.[10] On its part, the decentralized review of treaties is usually defended as an optimal way in giving effect to monism and protecting the unity of international law.[11] These arguments resemble those advanced for the decentralized and monist application of EU law, which it must be noted, does not resort under Article 94. EU law is considered to function on its own accord independent of the Constitution.[12] In what follows the choice for decentralized constitutional review will be considered more closely.

6 *Engel v. The Netherlands*, ECHR [1976] Series A, No. 22. *See also Winterwerp v. The Netherlands*, ECHR [1979] Series A, No. 33.

7 *See* Art. 137 of the Netherlands Constitution for the amendment procedure.

8 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, pp. 18-19.

9 M.C. Burkens, *et al.*, *Beginselen van de democratische rechtsstaat: Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht* (7th edn), Kluwer, Alphen aan den Rijn, 2012, p. 364.

10 *Parliamentary Proceedings II*, 2002-2003, 28 331, No. 9, p. 16.

11 E.C.M. Jurgens, 'Wetgever heeft laatste woord over uitleg van Grondwet', *Regelmaat*, Vol. 12, 1995, p. 68.

12 HR 2 November 2004, *NJ* 2005, 80. *See* Burkens, *et al.*, 2012, pp. 368-369.

C. Evaluating the Separation of Powers

I. Between Europe and America

In settling the question whether a system should opt for centralized or decentralized review, traditional theory holds that civil law systems are natural candidates for centralized review.[13] Much is then made of the fact that such systems usually insist on a strict separation of powers, which is translated into the centralization of judicial review as a way of maintaining such a strict separation between the legislature and courts. In this regard, Hans Kelsen argued that constitutional review had to be exercised by a constitutional tribunal especially designed for the purpose and which was to be detached from the ordinary judiciary and only competent in constitutional matters.[14] This body then had to function as a 'negative legislature' in that it had to declare void acts passed by parliament, which was the 'positive legislature', upon such acts having been found unconstitutional. Constitutional review would be centralized completely as ordinary courts would have to refer preliminary questions on the constitutionality of acts of parliament to the constitutional tribunal for decision. This would mean suspending proceedings while awaiting the tribunal's answer. The idea behind this model is to divide the legislative function between parliament and the constitutional tribunal, while keeping it separate from the judicial function as embodied by the ordinary courts. As many civil law systems in Europe started to adopt this model after World War I, and especially World War II, it is sometimes referred to as the European model.[15]

The European model is generally contrasted with decentralized review as the idea that a special tribunal need not be created for the exclusive review of the constitution as all ordinary courts are competent to apply the constitution. This model is usually referred to as the American model, as it was practised first in the United States after the 1804 decision of *Marbury v. Madison* opened the door to constitutional review.[16] The root for decentralization in the United States has been traced to the nature of its common law system, which places a lower premium on the neat separation of the legislative and judicial branches than would do a typical civil law system. Common law systems generally place less emphasis on the separation of powers as they were little influenced by the mistrust which the protagonists of the French Revolution had in the courts. While the courts or *parlements* of the *ancien régime* served as buttresses of reactionary feudal forces,

13 M. Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford, 1989, pp. 136-146.

14 H. Kelsen, 'La garantie juridictionnelle de la Constitution', *Revue de droit public*, Vol. 44, 1928, p. 197;C. Bezemek, 'A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court', *Zeitschrift für öffentliches Recht*, Vol. 67, 2012, p. 115, at pp. 116-117.

15 *See* V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective*, Yale University Press, New Haven & London, 2009, pp. 11-12. Also referred to as the 'Austrian model', in reference to the first country to adopt centralized constitutional review, *see* Bezemek, 2012, p. 115, at pp. 116-117.

16 *Marbury v. Madison*, 1 Cranch 137 (1803). *See also* M.J. Shapiro & A. Stone, 'The New Constitutional Politics of Europe', 26 *Comparative Political Studies*, Vol. 26, 1994, p. 397, at p. 400.

which tainted their reputation, the common law courts in the United Kingdom cultivated public trust over the centuries by limiting the executive power of the king and stressing their judicial independence from other government branches.[17] Systems taking their cue from common law thought, such as the United States and many Commonwealth countries, therefore lack a similar zeal than their civil law counterparts in separating the legislative and judicial functions.[18]

This lack of separationist zeal is further evidenced by the fact that judges in common law systems have long been entrusted with developing the law to the extent that it was not regulated by an act of parliament, thereby giving judges a distinct taste and experience of law-making.[19] Civil law systems, in contrast, championed the codification of law, which in theory meant that parliament made all law, leaving the judges simply to apply as a syllogical exercise that which had been posited as law.[20] Introducing constitutional review, and the political overtures this inevitably entails, would understandably leave common law systems with less unease than their civil law counterparts when it comes to deciding who should conduct such review.

II. Rethinking Conventional Theory

However, the guiding force of these conventional understandings of the separation of powers, as interpreted through either a civil or common law lens, is not as compelling as it might once have been in predicting whether a particular system will centralize or decentralize its constitutional review. The simple fact is that not all civil law systems opt for centralization, exceptions to received orthodoxy include Sweden and Finland, while not all common law systems opt for decentralization, an exception which is discussed further below is South Africa.[21] Furthermore, centralization and decentralization should not be conceived as unconnected poles, but rather as opposite ends of the same spectrum. This is because not all

17 *See* J.H. Baker, *An Introduction to English Legal History* (3rd edn), Butterworths, London, 1990, p. 193; Ferreres Comella, 2009, pp. 11-12.

18 *E.g.* F. Venter, 'The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State', *in* G. van der Schyff (Ed.), *Constitutionalism in the Netherlands and South Africa: A Comparative Study*, Wolf Legal Publishers, Nijmegen, 2008, p. 25, at pp. 28-31 shows that before the advent of South Africa's new constitutional dispensation in the 1990s, constitutional study centred on the interpretation of the country's inherited English public law constructs such as the 'rule of law' and 'parliamentary sovereignty' and by implication not so much on the separation of powers.

19 G. van der Schyff, *Judicial Review of Legislation: A Comparison of the United Kingdom, The Netherlands and South Africa*, Springer, Dordrecht, 2010, pp. 85-86; H.R. Hahlo & E. Kahn, *The South African Legal System and Its Background*, Juta, Cape Town, 1968, p. 305. *Compare also* the *dictum per* Lord Reid in *Indyka v. Indyka* [1976] 2 All E.R. 689 (HL) at p. 701: "Parliament has rarely intervened in the matter of recognition of foreign matrimonial decrees. The existing law is judge-made and I see no reason why that process should stop."

20 Ferreres Comella, 2009, pp. 14, 22.

21 *See* the summaries by Ferreres Comella, 2009, pp. 3-5. The South African legal system is officially described as a hybrid or mixed system, however the court system and law of civil procedure are traditionally decidedly English products, hence its treatment as a common law system for current purposes.

systems adopt pure Kelsenian centralization or pure American decentralization, but sometimes systems opt for semi-centralization. Portugal is a case in point of a civil law jurisdiction with a specialized constitutional tribunal, but where ordinary courts may disregard legislation for unconstitutionality subject to appeal before the tribunal.[22] The term 'diffuse review' for decentralized review is then also to be discouraged, as it implies a category of review, instead of typifying the organization of review as a sliding scale between the extremes of total centralization and decentralization.[23]

One of the main reasons for this blurring of the lines is that the goal of maintaining a strict separation of powers has proved unattainable to the extent once desired, which has also qualified the urgency placed on such a strict separation in many civil law systems. This realization is particularly evident in systems that have been modelled closely along the lines of Hans Kelsen's thought. Research has shown that although styled as constitutional tribunals in centralized systems, to avoid confusion with the court system, such tribunals quickly become judicialized in their operation and conceive of themselves as part of the judiciary in a broad sense.[24] Little is then left of the idea that such 'constitutional tribunals' are rather 'negative legislatures' than actually 'constitutional courts', which discharge a decidedly judicial function. Importantly, it is also increasingly accepted in civil law jurisdictions, such as the growing academic consensus in the Netherlands, that the adjudicative function as exercised by ordinary courts is more sophisticated than simply expecting of judges to approach the law as a codified jigsaw puzzle devoid of any value-laden balancing exercises.[25] The mere fact that a law is applied implies a measure of law-making on the part of the judiciary and hence entails an unavoidable cross-over between government functions. This is all the more the case where applying the law by the judiciary entails interpreting vague terms, which is something that the Halsema bill also points to in portraying the modern-day separation of the legislative and judicial powers.[26]

To this, it might be replied that adjudicating higher law, such as a country's constitution, is altogether a different exercise than ordinary law and warrants

22 Arts. 207, 225 and 277 of the Constitution of Portugal.

23 For continued use of the term 'diffuse review', *see* A.-R. Brewer-Carías (Ed.), *Constitutional Courts as Positive Legislators*, Cambridge University Press, Cambridge, 2011, p. 6. Instead of centralized and decentralized review, reference can also be made to concentrated and deconcentrated review.

24 Ferreres Comella, 2009, p. 14, pp. 15-16. Belgium is a case in point as the 'Court of Arbitration' was transformed into a fully-fledged 'Constitutional Court', *see generally* J. Velaers, *Van Arbitragehof tot Grondwettelijk hof*, Maklu, Antwerpen, 1990.

25 *See* J.B.M. Vranken, 'Dient de nieuwe Grondwet een bepaling te bevatten over de taak van de Nederlandse rechtspraak bij de bevordering van de Nederlandse, Europese en internationale rechtsorde', *in* A. Kristic, A. Meuwese & G. van der Schyff (Eds.), *Functie en betekenis van de Grondwet: een dialogisch perspectief*, Wolf Legal Publishers, Nijmegen, 2010, p. 159, at p. 168; J. Uzman, T. Barkhuysen & M.L. van Emmerik, 'Netherlands', *in* A.-R. Brewer-Carías (Ed.), *Constitutional Courts as Positive Legislators*, Cambridge University Press, Cambridge, 2011, p. 645, at pp. 661-677. Still defending the position that judges do not enjoy the power of 'law-making', *see* C.A.J.M. Kortmann, *Staatsrecht en raison d'Etat*, Kluwer, Deventer, 2009, pp. 11-12.

26 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 15.

traditional scepticism of the judiciary's capabilities.[27] Although this argument can certainly be made, its worth is nonetheless diluted by the fact that quite a few civil law judiciaries, including France and Belgium, have gained day-to-day experience in the decentralized application of higher law in the form of binding treaties. This is also the case in the Netherlands, where decentralized treaty review has been conducted for decennia and has become a firm feature of the judicial function.[28] Although Belgium still only foresees the centralized application of the Constitution, France since 2008 now also allows ordinary courts to conduct constitutional review instead of centralizing such review exclusively in the hands of the Constitutional Council.[29] In doing so, France puts the old strict separation of powers in perspective for the purpose of structuring review. Moreover, this re-evaluation of the separation doctrine is reinforced by the fact that the Halsema bill emphasizes the smooth exercise of decentralized review of treaties in the Netherlands as a reason to review the Constitution in a similar fashion.[30]

The intrinsic law-making aspects of adjudication and the growing experience of ordinary judges in some jurisdictions in applying higher law means that it does not follow that the civilian doctrine of separation requires centralized constitutional review as a matter of course. However, care should be taken not to rush to the conclusion that the relative force of arguments based on the separation of powers means that decentralized review is now automatically justified in civil law jurisdictions. As mentioned above, not all common law jurisdictions choose decentralized review either. Where does this then leave the separation of powers?

From the criticism of the separation of powers, some authors, such as Victor Ferreres Comella, deduce that the doctrine no longer has a meaningful role to play in structuring the courts when it comes to constitutional review.[31] This is to be disagreed with. What does follow is that the distinction between civil and common law jurisdictions is no longer a sure guide in thinking about the effect of the separation of powers on the structuring of review, which is not the same as saying the doctrine has lost its value. Instead, an inquiry should focus on the reality and needs of a particular system when it comes to factoring in the separation of powers in shaping the courts to conduct constitutional review and not depart blindly from a system's pedigree as either common or civil law. In the case of the Netherlands, it means that the civilian doctrine of separation no longer stands in the way of decentralized constitutional review given its theoretical re-evaluation over decennia and the reality of decentralized treaty review, which is something that the Halsema bill employs in wanting to emulate the decentralized modality of treaty review.

27 *See* R. Leysen & J. Smets, *Toetsing van de wet aan de Grondwet in België*, W.E.J. Tjeenk Willink, Zwolle, 1991, pp. 10-11; P.W. Hogg, *Constitutional Law of Canada*, Thomson Carswell, Ontario, 2007, pp. 727-729.

28 *See generally*, Van der Schyff, 2010, pp. 154-157.

29 Art. 61-1 of the Constitution of France. *See also* J.H. Reestman, 'De Franse grondwetswijziging van 23 juli 2008: Op zoek naar een nieuw evenwicht', *Tijdschrift voor Constitutioneel Recht*, Vol. 1, 2010, p. 73 at p.77.

30 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 16.

31 Ferreres Comella, 2009, pp. 14, 19.

D. Two Angles on Legal Certainty

I. Absence of Binding Precedent

The typical absence of the doctrine of binding precedent or *stare decisis* in civil law systems has been advanced as another reason to champion the centralization of constitutional review, while the existence of this doctrine in common law systems would make the centralization of review theoretically unnecessary.[32] According to the argument, the possibility in civil law systems that different courts may contradict each other when it comes to constitutional issues is a significant threat to legal certainty that justifies only one court having the power to conduct such review. Otherwise, parliament might be left exposed to the will of a particular court acting of its own accord which could lead to differing judgments on similar constitutional topics and confusion as the result. Viewed against the general hesitance to cross the divide between the legislature and the courts in civil law systems such a spectre fuelled the normative appeal of centralization for many.[33]

While they may be rational, traditional arguments for the centralization of review are not as convincing as they might seem at first glance. For example, basing centralization on the absence of binding precedent is not very persuasive given the fact that history has shown courts in civil law jurisdictions very loath to contradict other courts, especially higher courts.[34] In the Netherlands, for example, binding precedent is the *de facto* if not the *de iure* norm.[35] The case of Belgium illustrates the point also quite well. Unlike the Netherlands, the Belgian Constitution has since its adoption in the nineteenth century never contained a bar on constitutional review, lower courts were nonetheless extremely careful to follow the Court of Cassation which refrained from constitutional review until the matter was settled in the 1980s by the introduction of a constitutional court with centralized powers of review.[36] As to treaty review in Belgium, this only became an acceptable practice in the country's courts once the Court of Cassation set the trend in a groundbreaking judgment in 1971.[37]

These examples confirm, as Victor Ferreres Comella has argued, that the need for judicial convergence is felt in both common law and civil law systems, even though the latter do not formally work along the lines of binding precedent.[38] This is because civil law systems achieve judicial convergence by other means. While many judges in common law systems are often seasoned practitioners who make a career change to become judges, judges in civil law systems are career

32 Ferreres Comella, 2009, pp. 14, 21; Van der Schyff, 2010, p. 85.

33 *See* H. Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution', *Journal of Politics*, Vol. 4, 1942, p. 183, at p. 186.

34 *Compare* D.N. MacCormick & R.S. Summers, 'Further General Reflections and Conclusions', *in* D.N. MacCormick & R.S. Summers (Eds.), *Interpreting Precedents: A Comparative Study*, Ashgate, Aldershot, 1997, p. 531, at pp. 531-532.

35 *See* Uzman *et al.* 2011, pp. 661-662; R.J.B. Schutgens, 'Het rechtsgevolg van onverbindendverklaring: Naar een stelsel van materiële vernietiging', 2006 *Themis*, p. 96.

36 Cassation 23 July 1849, *Pas.*, I, 443; Leysen & Smets, 1991, pp. 14-15.

37 Cassation 27 May 1971, *Pas.*, I, 886; A. Alen & K. Muylle, *Handboek van het Belgisch staatsrecht*, Kluwer, Mechelen, 2011, pp. 43-60.

38 Ferreres Comella, 2009, p. 22.

judges who enter the judiciary while relatively young and inexperienced.[39] An important way for such novice entrants to gain promotion and climb the judicial ladder is to follow the precedent set by higher judges even if they are not formally required to do so. Even if lower judges in civil law systems decline to follow precedents in matters before them, the chance is real that a higher court will quash any divergence from the norm thereby ensuring congruence. This is because many more matters in civil law jurisdictions are reconsidered by higher courts than is the case in common law jurisdictions.[40] While a bench such as the Supreme Court of the United States can select the cases that it decides to hear on appeal, highest courts in civil law systems such as the Administrative Law Division of the Council of State in the Netherlands often cannot control their docket in a similar fashion. The judicial structure in civil law systems is therefore more hierarchical in that cases make their way up the system, whereas common law systems are more dependent on the doctrine of binding precedent to coordinate a common approach between various courts. The effect is therefore one of following precedent in both common and civil law systems.

With regard further to the Netherlands, the Hammerstein commission that was instituted to evaluate the working of the Supreme Court, advised in 2010 that the Court be allowed to select the cases it hears, instead of hearing all the cases lodged before the Court.[41] At first glance, one might be tempted to think that such reform would free lower courts by removing the spectre of having their judgments quashed by the Supreme Court, thereby encouraging them to follow their own minds. The reality of the situation proves to be very different though. The Commission's idea was acted upon and since 2012, the Supreme Court can strike cases from the roll which are deemed to have very little merit or where a party has no real interest.[42] Far from compromising the convention of precedent, the reform is intended to strengthen the Court's grip by weeding out undeserving cases thereby allowing it to handle its case load more effectively. If anything, the trend to follow precedent is becoming even more fixed in the country's judicial landscape with the Supreme Court even formalizing the practice in some instances by requiring of civil courts to follow the line taken by the Administrative Law Division of the Council of State – the highest court in many matters of administrative law.[43] Applied to the question of organizing constitutional review, there seems to be no necessary requirement to centralize such review in the Netherlands for fear of divergent constitutional judgments among lower courts, as bind-

39 Mirjan Damaška, *The Faces of Justice and State Authority*, Yale University Press, New Haven, 1986, pp. 36-37.

40 *See* Ferreres Comella, 2009, p. 22. The example was set by France, which in 1804 abolished the *référé legislatif* that meant that judges could no longer put questions of legal interpretation to parliament. Instead, the Court of Cassation was created to answer questions on the interpretation of the law and in the process quash divergent interpretations, thereby securing legal certainty in a system that formally disregards precedent as a source of law.

41 Rapport van de commissie normstellende rol Hoge Raad, *Versterking van de Cassatierechtspraak*, The Hague, 2008, pp. 41-42 (hereafter Hammerstein Commission).

42 *Parliamentary Proceedings II*, 2002-2003, 32, 576, A.

43 *E.g.* HR 18 February 2005, *NJ* 2005, 283 (*Aujeszky*); HR 17 December 2004, *NJ* 2005, 152 (*OZB/Staat*). *See also* Schutgens, 2006, pp. 99-101.

ing precedent is a fact even though the doctrine is not immediately as prominent in the country's civil law system as it is in many common law systems.

II. Horizontal Centralization

The second aspect of the legal certainty argument relates to the fact that civil law judiciaries often know different highest courts, whereas common law judiciaries typically have an apex court. For example, the Canadian Supreme Court is the highest court and final court of appeal in the country's legal system, while the Netherlands knows at least four highest courts depending on the nature of the dispute being heard. These benches are the Supreme Court (*Hoge Raad*) in matters of civil, criminal and tax law, the Administrative Law Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) in administrative law matters not covered by the jurisdiction of the other highest courts, the Central Appellate Council (*Centrale Raad voor Beroep*) in matters related to social security and the civil service, and finally the Appellate Chamber for Economic Affairs (*College van Beroep voor het Bedrijfsleven*) in many commercial matters.

The general idea is that each body of law knows its own highest court, and in some civil law systems, even its own system of lower courts, such as administrative law courts in France or labour law courts in Germany. This means that each highest court becomes the ultimate constitutional authority in its particular hierarchy when constitutional review is introduced, thereby creating as many highest constitutional jurisdictions as there are highest courts.[44] Ensuring legal certainty is then not put as the question whether there should be 'vertical' decentralization by allowing all courts in a particular hierarchy to conduct constitutional review, but one of 'horizontal' decentralization in considering whether there should be more than one highest court in constitutional matters across the various hierarchies in a given legal system.

At first glance, the Halsema bill's argument that the absence of some sort of centralized treaty review has not led to significant legal uncertainty and should therefore be copied under constitutional review seems appealing.[45] Where there have been differences between highest courts in the Netherlands, such as on the question whether a treaty provision was directly applicable or not, these have been corrected over time through informal coordination thereby explaining the bill's preference for horizontal decentralization.[46]

44 Van der Schyff, 2010, p. 87.

45 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 15.

46 This practice of informal coordination is most apparent in the field of administrative law, where a commission composed of the presiding judges of the various highest courts meet to discuss and agree general policy, *see* M. de Visser, 'Veranderingen in de dialoog tussen Nederlandse rechters en het Hof van Justitie?', *Tijdschrift voor Constitutioneel Recht*, Vol. 3, 2012, p. 249 at pp. 270. *See also* G.K. Schoepen & K. Teuben, 'Rechterlijke samenwerking', *in* E.R. Muller & C.P.M. Cleiren (Eds.), *Rechterlijke macht*, Kluwer, Deventer, 2006, p. 403. *Compare* HR 16 May 1986, *AB*, 573 (*Heesch/Van den Akker*); ARRvS 2 February 1989, AB 1989, 154; J.C.A. de Poorter, 'Rechtsvorming door de bestuursrechter', *in* A. Kristic, A. Meuwese & G. van der Schyff (Eds.), *Functie en betekenis van de Grondwet: een dialogisch perspectief*, Wolf Legal Publishers, Nijmegen, 2010, p. 121, at pp. 150-152; G. Boogaard, 'Een carrousel van conformeren: Over de toerismebepaling uit de Winkeltijdenwet', *Ars Aequi*, Vol. 61, 2012, p. 573.

However, choosing horizontal decentralization for constitutional review disregards the fact that some of the most important sources of international law do in fact have 'guiding lights'.[47] Examples include the European Convention on Human Rights whose ultimate interpreter is the European Court of Human Rights in Strasbourg and the European Union Treaties whose ultimate interpreter is the Court of Justice of the European Union in Luxembourg.[48] This means that while the Netherlands system of treaty review might be decentralized, some important sources of law which judges are called to apply are indeed subject to one supreme judicial interpreter ensuring legal certainty as to their application. Moreover, one of the reasons in the past for keeping intact the bar on review in Article 120 of the Constitution was precisely the concern that constitutional uncertainty would ensue without central coordination.[49] This is also the reason why in Greece the Special Supreme Tribunal was created to resolve constitutional conflicts between the highest courts in that jurisdiction and thus ensure legal certainty.[50] The Tribunal, which is composed among others of the presiding judges from the various highest courts, is not so much intended as an autonomous constitutional court that presides hierarchically over the highest courts, but more as a forum for mediation when incongruent constitutional interpretations arise. The Tribunal is nonetheless a court of law and not simply an exercise in informal coordination as its judgments are published and binding on all other courts including the various highest courts.

There is much to be said for the argument of horizontal centralization in the Netherlands, because if legal certainty in criminal law or tax law is considered important enough to justify a single highest court instead of relying on chance or informal coordination between different highest courts, why not too the Constitution as the law of laws? However, a close reading of the Halsema bill seems to suggest that achieving legal certainty in constitutional law is not as important as the proposal might at first suggest. Paradoxically, while the bill avers that horizontal decentralization would not jeopardize legal certainty, it continues that spread constitutional jurisdiction would counter a *gouvernement des juges* because parliament would not be confronted by a unified judicial force.[51] In other words, preventing real legal certainty might even be considered a good thing, as the courts are divided for the benefit of parliament. Not only does this argument intentionally contradict the idea of legal certainty, it also debases the very idea of effective judicial review and is therefore no sound justification for horizontal decentralization.

47 *See* E.M.H. Hirsch Ballin, 'Een levende Grondwet', *Regelmaat*, Vol. 12, 2005, p. 161, at pp. 164.

48 Art. 32 ECHR; Art. 19 TEU.

49 M.L.P. van Houten, *Meer zicht op wetgeving*, Tjeenk Willink, Zwolle, 1997, p. 155.

50 Art. 100 of the Constitution of Greece. *See further* A.-R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge, 1989, pp. 170-172; J. Iliopoulos-Strangas & S.-I.G. Koutnatzis, 'Greece', *in* A.-R. Brewer-Carías (Ed.), *Constitutional Courts as Positive Legislators*, Cambridge University Press, Cambridge, 2011, p. 539, at pp. 540-541.

51 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 17.

E. Exploring Process-Based Centralization

In *Democracy and Distrust*, John Ely distinguished the judicial review of processes from the judicial review of outcomes and defended the theory that the proper function of review was to review processes and not outcomes.[52] This meant that fundamental rights were process rights and not so much substantive rights, which entailed that judicial review had to protect the right of their bearers to participate in the democratic process, while leaving the outcome of that process to the wisdom of its free participants.

Although Ely intended his theory as a justification for judicial review, the distinction he makes between different forms of review might also be useful in studying the organization of courts that conduct review. For instance, when the distinction between process and outcome is applied to the organization of constitutional review, there exists enough evidence that the closer such review focuses on how the process of democratic decision-making functions and not only on what it produces, the stronger the need is felt to centralize review in adjudicating such politically sensitive issues. A distinction can therefore be made between outcome-based and procedure-based review, with the latter often being centralized and the former not. In France for example, while the constitutional review of legislation as the product of parliamentary decision-making was decentralized in 2008, still only the Constitutional Council is empowered to determine the constitutionality of bills during their legislative treatment.[53] This is similar to the situation in South Africa where although most courts may conduct constitutional review, only the Constitutional Court may decide the constitutionality of bills and whether the president or parliament failed to fulfil their respective constitutional duties.[54] Compare also Sint Maarten, which is an autonomous country within the Kingdom of the Netherlands with its own constitutional system, where constitutional review by the judiciary was adopted in 2010. In that country, the constitutionality of acts of parliament may be reviewed by all courts, but only the Constitutional Court may review the constitutionality of laws that have yet to come into force.[55]

Centralizing review in these systems can be understood as an attempt to protect the democratic initiative of executive and legislative organs in regulating their primary processes, which logically becomes a less pressing need to the extent that a decision-making process has run its course and the public is directly

52 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge (Mass.), 1980.

53 Arts. 61, 61-1 of the Constitution of France.

54 S. 167(1)(b), (e) of the Constitution of South Africa.

55 Arts. 119, 127 of the Constitution of Sint Maarten.

affected such as in the case of legislative enactments capable of application.[56] The inspiration for the centralization of process-based review is therefore essentially democratic in nature, more precisely the recognition of the pride of place enjoyed by elected institutions in constitutional systems and the need to protect the integrity of their individual processes while still conducting mandated review. *A contrario* by preferring decentralized review, the Halsema bill provides evidence for the supposition that centralization is the solution in not wanting to unduly pre-empt the functioning of elected institutions. The bill is essentially outcome-based, as it only foresees the review of legislation and not also of bills, while stressing too the act of review as something concrete and designed to solve a particular dispute.[57] In addition, the bill leaves the bar on constitutional review intact as it regards all operative provisions on the functioning of state organs, which means that the 1960 *Van den Bergh* Supreme Court decision that the bar extends to the democratic process remains unchallenged.[58] On a process-based reading of the organization of review, the choice for decentralized review under the Halsema bill cannot therefore be criticized.

F. Driving Constitutional Change

The purpose with introducing constitutional review is also a factor that can shape the organization of constitutional review. Where review is intended as a motor or vector of constitutional change, the greater the probability becomes that review will be centralized.[59] This often falls together with the creation of a special constitutional court, as there is usually little faith in existing courts that might be perceived as part of an old or discredited political dispensation which is to be superseded by a new constitutional dawn. One of the best examples to date of this happening was the creation of the German Constitutional Court which had to chart a future radically different from that experienced by Germany after the rise of National Socialism. As Alfred Rinken explains, the German Court's powers and central role exceeded that given to other constitutional courts in comparable Western democracies as a way to protect the country's nascent constitutional

56 *See* the shades of this argument as discussed in the various judgments of the South African Constitutional Court in *Doctors for Life International v. Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC), paras. 53-54, 68-69 (Ngcobo J. on behalf of the majority stressing the importance of the democratic process), paras. 128, 145 (Ngcobo J. on behalf of the majority stressing the wide discretion enjoyed by the legislature in deciding how it regulates its process in fulfilling its constitutional obligations), para. 239 (Sachs J. calling for a "measured and appropriate judicial response" in dealing with judicial intervention in the legislative process), para. 288 (Van der Westhuizen J. delineating the wide discretion enjoyed by the upper chamber in regulating its process), paras. 253-267 (Yacoob J. stressing that only the Constitutional Court may adjudicate certain constitutional issues because of their political sensitivity).

57 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, pp. 14-15.

58 HR, 27 January 1961, *NJ* 1963, 248 (*Van den Bergh*). On this case, *see* Besselink, 2004, pp. 91-94.

59 Ferreres Comella, 2004, pp. 79-85.

order from being usurped.[60] Germany experienced what he typifies as a 'fear of democracy', meaning that popular democracy had to be constrained in order not to repeat the excesses of the past which meant the creation of a powerful constitutional court with centralized powers to protect the Constitution and impress legal discourse and concerns on the political process.[61]

Similar examples of this happening were the creation of constitutional courts in many Eastern European countries after the fall of the Berlin Wall in 1989, as well as the creation of the South African Constitutional Court after the end of apartheid in the 1990s.[62] In the case of South Africa, the Constitution can clearly be described as a programme-constitution or constitution with a clear mission. As Mahomed J. explained in *S. v. Makwanyane*:

> In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that past (...). The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. [63]

In particular, the Constitution was envisaged as a bridge between the old order based on parliamentary sovereignty and the new order based on constitutional supremacy.[64] Apart from this paradigm shift, the Court also had to drive the creation of a human rights culture in the country.[65] This obviously entailed a concerted effort, which is why the decision was made to create a special constitutional court, initially with entirely centralized and later semi-centralized powers, to steer the country's constitutionalization. On this basis, it can be argued that far-reaching constitutional change can warrant the centralization of review and the creation of a constitutional court to implement an ambitious constitutional agenda.

This raises the problem though at what frequency of constitutional change the centralization of review becomes a real possibility. Although the frequency of the envisaged constitutional change in the Netherlands might not be as high as

60 A. Rinken, 'The Federal Constitutional Court and the German Political System', *in* R. Rogowski & T. Gawron (Eds.), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, Berghahn Books, New York, 2002, p. 55, at p. 61.

61 *Ibid.*

62 W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer, Dordrecht, 2005; J. van der Westhuizen, 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German Experience', *De Jure*, Vol. 24, 1991, p. 1, at p. 3; Van der Schyff, 2010, pp. 94-100.

63 *S. v. Makwanyane*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), para. 262.

64 E. Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights', *South African Journal of Human Rights*, Vol. 10, 1994, p. 31 interpreted this as a shift from a 'culture of authority' to a 'culture of justification'.

65 Van der Schyff, 2010, p. 96.

that experienced in Germany or South Africa, it would be wrong to assume that only change of a magnitude comparable to these situations can ever justify the centralization of review. Always requiring what Bruce Ackerman would call a 'constitutional moment' for introducing centralized review would set the bar too high.[66] This is because, as explained above, organizing review should be understood as a spectrum ranging from exclusive decentralization to exclusive centralization. Whether review is then to be decentralized or not should be approached as a question of degree and not one of category. Even with this qualification though, the Halsema bill's desire to exert the Constitution's normative force by introducing a measure of judicial review is probably not pressing enough to enjoin centralization.[67]

Since the groundwork for the current constitutional dispensation was laid in the nineteenth century, the Netherlands has known very little domestic political upheaval. Threats to societal stability have generally been addressed and solved within the confines of the system without the need to replace the system as a whole. A good example of where a threat to systemic continuity was averted is the Pacification in 1917 when proportional representation was introduced at the behest of the liberals and socialists, while conservatives secured state-funding for confessional schools in return.[68] The value of continuity is seemingly what the Halsema bill means when it stresses that introducing constitutional review in the Netherlands is not to be understood as a rebalancing of the constitutional relationship between the legislature and the courts, but is intended as an additional and natural check on the exercise of power.[69] The bill is quite clear that the primary duty to exercise constitutional review rests with the legislature, which is clearly different from the German desire to exercise decisive judicial control to ensure compliance with the Constitution. This helps to explain why the Halsema bill chose to copy the system of decentralized treaty review in also reviewing the Constitution, while countries that have experienced more radical constitutional change chose to drive and consolidate their ambitious agendas through centralized constitutional review under the auspices of a special bench.

While the Halsema bill's rather limited ambition with the introduction of constitutional review can be advanced to justify decentralized review, some commentators have criticized the proposal as such for its lack of ambition in not evidencing a greater desire to increase the normative effect of the Constitution.[70] Jan-Willem Sap, for example, places such a high premium on enhancing the nor-

66 *See generally* B. Ackerman, *We the People: Foundations*, Belknap Press, Cambridge (Mass.), 1991; B. Ackerman, 'Revolution on a Human Scale', *Yale Law Journal*, Vol. 108, 1999, p. 2279; N. Walker, 'The Legacy of Europe's Constitutional Moment', *Constellations*, Vol. 11, 2004, p. 368.

67 W.J. Witteveen, 'Hamilton, Koopmans en Ackerman over constitutionele toetsing', 2006 *Regelmaat* p. 177 at p. 182 even speaks of a general reluctance of 'normal politics' in the Netherlands to get involved with questions of a constitutional nature.

68 On the Pacification, *see* P.J. Oud & J. Bosmans, *Staatkundige vormgeving in Nederland 1840-1940*, Vol. 1 (10th edn), Van Gorcum, Assen, 1990, pp. 208-224.

69 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 14.

70 P.A.M. Mevis, 'Constitutioneel toetsingsrecht: Zuinigheid in plaats van revolutie', *Delinkt en Delinkwent*, Vol. 32, 2002, p. 933, at pp. 934-935.

mativity of the Constitution that he advocates the creation of a semi-centralized constitutional court to conduct such review as the only way to give proper effect to the Constitution.[71] Sap clearly wants to propel the Constitution more to the fore than the Halsema bill would be comfortable in doing. While genuine constitutional need might not be sufficiently present to justify such a move, the political argument can certainly be made that the Constitution should as a matter of principle play a greater and more focussed role in the Netherlands. An impetus in this direction might be if the advice of the 2010 State Commission is followed to include a general value clause in the Constitution to bolster its normative character. The Commission proposed the following formulation:

1 The Netherlands is a democratic rechtsstaat.
2 Government authorities respect and guarantee human dignity, fundamental rights and fundamental principles of law.
3 Public authority may only be exercised in accordance with the Constitution or the law.[72]

The clause would be binding on the legislature, executive and judiciary and herald a new approach to the Constitution. While the Constitution is conventionally understood as a collection of rules derived from political practice, the clause would stress the document's nature as a principled-based instrument and stress the balancing of competing interests over the all-or-nothing application of rules.[73] This has the potential to strengthen the prospective ability of the Constitution as a source of authoritative principles capable to constrain and control political actors, instead of its traditional function as a manual of established practice. Were the clause to be inserted and become reviewable by the courts, the case for centralized review, maybe even in the form of a special bench, becomes more plausible to steer and consolidate this new approach to constitutional interpretation in the Netherlands.

71 Jan Willem Sap, 'De aanbeveling van de Nationale Conventie om een constitutionele hof in te stellen', *NJCM-Bulletin*, Vol. 32, 2007, p. 590. Sap was a member of the National Convention, which in 2006 advised the Government on constitutional reform and recommended the institution of a constitutional court. However, the Commission did not elaborate on its view that such a court had to be introduced. *See* R.J. Hoekstra, *Hart voor de publieke zaak: Aanbevelingen van de Nationale Conventie voor de 21e eeuw*, The Hague, 2006, National Convention, 2006, pp. 9, 47.

72 W. Thomassen, *Rapport van de Staatscommissie Grondwet*, The Hague, 2010, p. 40. Author's translation of: '1. Nederland is een democratische rechtsstaat. 2. De overheid eerbiedigt en waarborgt de menselijke waardigheid, de grondrechten en de fundamentele rechtsbeginselen. 3. Openbaar gezag wordt alleen uitgeoefend krachtens de Grondwet of de wet.' However, the Government did not warm to the idea, *see Parliamentary Papers II*, 2011-2012, 31, 570, No. 20, p. 8.

73 Fundamental rights are particularly cast in the form of rules by identifying the organ capable of limiting a right, instead of shielding the principle guaranteed by a right from excessive limitation. *E.g.* Art. 6 on the right to freedom of religion.

G. Considering the European Dimension

The emergence of legal pluralism to describe the relations between various legal systems that have traditionally been thought of as exclusive or subject to single a sovereign authority might be an additional reason to prefer some sort of centralization to pure decentralization, as the case of the European Union illustrates.

Since its inception, the European Union was essentially about creating a common market, in addition the Union is today increasingly being characterized by a process of constitutionalization.[74] Not only did the Treaty on European Union create a European citizenship in 1992, but Article 2 TEU can be described as a veritable constitutional mission statement in that it founds the Union on democracy and the respect for fundamental rights. The reality of neofunctionalist spillover is that economic integration inevitably means that political and constitutional cooperation must follow if economic integration is to be successful in the long run.[75] The depth and reach of EU law means that very few issues can still be classified as purely internal and therefore entirely national matters. A case such as *Rottmann* proves the point.[76] In this matter, the ECJ ruled that where a Member State deprives someone of that state's nationality, this must be done in accordance with EU law as a loss of national citizenship would mean that EU citizenship is also lost. Even a core topic such as deciding who belongs to a state's political population is now no longer entirely outside the reach of EU law. A consequence of this is that national sovereignty, understood as ultimate authority, has itself become weak and contested with one of the last vestiges of classic sovereignty being a state's power to withdraw from the European Union.

The flipside of the coin is that while national sovereignty is severely limited through EU membership, supranationalism is also qualified.[77] Not only does an expansion of EU competence mean that more national (constitutional) domains become subject to EU regulation, but it also means that the European Union is to be more sensitive to national circumstances in exercising its competences. This is because European integration does not mean that Member States' constitutional orders are dissolved, instead they become a part of Europe's developing composite constitution.[78] This is confirmed by Article 4(2) TEU which mandates the European Union to factor in Member States' essential constitutional characteristics in its decision-making:

74 *See generally* A. Rosas & L. Armati, *EU Constitutional Law* (2nd edn), Hart Publishing, Oxford, 2012; R. Schütze, *European Constitutional Law*, Cambridge University Press, Cambridge, 2012.

75 *See* P. Craig, 'Integration, Democracy and Legitimacy', *in* P. Craig & G. de Búrca (Eds.), *The Evolution of EU Law*, (2nd edn), Oxford University Press, Oxford, 2011, p. 13, at pp. 14-17.

76 Judgment of 2 March 2010 in *Case 138/08, Janko Rottmann v. Freistaat Bayern*, [2010] ECR I-1449.

77 L.F.M. Besselink, 'National and Constitutional Identity Before and After Lisbon', *Utrecht Law Review*, Vol. 6, 2010, p. 36, at pp. 38-42.

78 On the term, *see* L.F.M. Besselink. *A Composite European Constitution. Een Samengestelde Europese Constitutie*, Europa Law Publishing, Groningen, 2007, p. 6.

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[79]

Before the European Union can respect a state's national identity, it obviously needs to be expressed first. It would be quite presumptuous for the European Union to determine a Member State's national identity, thereby defeating the purpose of identity as self-conception. In this regard, Advocate General Maduro in his Opinion in *Marruso and Sardino* stressed the role of state institutions and in particular constitutional courts in expressing national identity.[80]

This preference for constitutional courts in formulating and communicating a state's national identity is understandable. Although national identity can be expressed by various national institutions, it would make sense to centralize thought about the core of a constitutional order in the hands of a particular court as far as the judicial expression of identity is concerned. This does not have to mean that all Member States must adopt centralized constitutional review, or create a constitutional court, as not all Member States emphasize the importance of the judicial expression of their respective identities to the same degree. Instead, the stronger the emphasis is on the judicial expression of national identity, the stronger the case for centralizing its expression becomes. In this way clarity as to the components and reach of each Member State's national identity can be achieved, which is necessary for fruitful constitutional interaction between the European Union and its Members in the context of Article 4(2) TEU.

As to the Halsema bill, its modest reach does not suggest that it intends for the courts to be conferred with the power to determine the Netherlands' national identity in a significant way and certainly not in the country's relations with the European Union. Such a move would amount to rebalancing the traditional relationship between the legislature and the courts and that the bill does not set out to do.[81] However, were the advice of the State Commission to be followed and a general value clause adopted and made justiciable, such a clause could become the spawning ground for jurisprudence on the national identity of the Netherlands and its relationship with the European Union.[82] The case for centralizing such

79 On this provision, *see* A. von Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, Vol. 48, 2011, p. 1417.

80 *Marrosu and Sardino* (C-53/04) [2006] ECR 2006 I-7213 at [40] of the Opinion.

81 *Compare Parliamentary Proceedings II*, 2002-2003, 28 331, No. 9, pp. 14-15.

82 *Compare* G. van der Schyff, 'Adjudicating the Constitutional Game in the Netherlands: What Shape the Courts?', *in* J.H. Reestman, *et al.* (Eds.), *De regels en het spel: opstellen over recht, filosofie, literatuur en geschiedenis aangeboden aan Tom Eijsbouts*, T.M.C Asser Press, The Hague, 2011, p. 387, at pp. 394-395; E. Mak, 'De Grondwet en de globaliserig van de rechtspraak', *in* A. Kristic, A. Meuwese & G. van der Schyff (Eds.), *Functie en betekenis van de Grondwet: een dialogisch perspectief*, Wolf Legal Publishers, Nijmegen, 2010, p. 73, at pp. 84-85.

review then becomes all the more convincing for the reasons just sketched, as adjudicating such a clause would mean that the courts are now the guardians and authors of the identity of the Netherlands as a democratic *rechtsstaat* and not merely the occasional correctors of legislative mistakes in the field of selected rights, as Halsema envisages. Determining the very identity of the constitutional order in this way is then best entrusted to a single court, especially where such an identity reverberates onto the European plane.

The case for centralizing the adjudication of national identity would become unavoidable even were the judiciary also to enjoy the power to set aside European executive and legislative acts that are found to infringe the constitutional order's identity. This highly sensitive power, which controversially contradicts the primacy of EU law and has the ability to unsettle the European project, is understandably centralized in those jurisdictions that recognize it in order to keep its exercise under close check, such as in Germany and Italy. However, before the judiciary in the Netherlands can exercise similar powers it must first be accepted that EU law operates subject to the Constitution, whereas at present the doctrine is followed that EU law operates on its own account and independent of and superior to the Constitution, as noted above.

What seems at first as a decidedly national question, namely whether to decentralize or centralize constitutional review, can obviously not be settled in Member States of the European Union without thinking about how the national and supranational dimensions interact and what role the courts are to play in this exchange.

H. Gathering the Strands Together

Reviewing the arguments thus far, it becomes clear that many arguments favour the decentralization of constitutional review in the Netherlands, or at least would not prevent it from being put into place. To recapitulate, the separation of powers does not necessitate the centralization of review in the Netherlands as it might once have done, the doctrine of binding precedent also does not immediately require centralization. In addition, the Halsema bill does not want to introduce process-based review and does not foresee a European dimension to review, both of which could have bolstered the odds for centralization. The bill's appetite for constitutional change is also rather modest and the general climate not one of radical reform at the moment, which pleads for copying the tradition of decentralized review of the Constitution, as it has come to be developed under treaty review.

Although the case for decentralized review can evidently be made under the Halsema bill, the case for such review might not be entirely as strong as the bill advances. This is because the need for horizontal centralization does not point to, or fit comfortably with decentralized constitutional review as advocated by the bill. Leaving the various highest courts to conduct constitutional review without such review being centralized in one bench risks undermining legal certainty on an important topic such as the constitutionality of acts of parliament and negates

the importance of the Constitution. While the Halsema bill might not emphasize its wish to enhance the normativity of the Constitution to such a degree as to warrant centralized review for the sake of normativity alone, as Sap would urge, the need for centralization cannot be done away with altogether easily given the various highest courts. It is therefore certainly plausible that given the current state of play as far as the would-be reforms of the Halsema bill are concerned, a credible case for centralized constitutional review in the Netherlands can be made drawing on the argument for horizontal centralization.

The next question relates to how constitutional review should be centralized. For example, must a classic constitutional court be created from scratch, as was the case in Austria or Germany, or can an existing court be assigned to conduct constitutional review and pass judgments binding on all other courts? Given that the Halsema bill wants to upset the current constitutional arrangements as little as possible it would make more sense to centralize review in an existing court instead of creating a special bench for the purpose. Should constitutional developments in the Netherlands ever result in a justiciable value provision in the Constitution or should the courts formulate and protect the country's national identity in the European Union such as in Germany, the centralization of review in a special court becomes a greater possibility to reflect the gravity of the changes. However, creating a dedicated constitutional court to implement the limited changes envisaged by the Halsema bill might overshoot the mark. As observed above, special constitutional courts are often courts with a clear-cut mission and vectors for far-reaching constitutional change, which does not fit the situation in the Netherlands at present.[83]

As to which existing body should conduct constitutional review, were the Halsema bill to succeed in its aim to amend the Constitution, the two most likely candidates are the Supreme Court and the Council of State. The Supreme Court has the benefit of a wide jurisdiction which strengthens the case to add also constitutional matters to its balance sheet. Alternatively, commentators such as Ernst Hirsch Ballin have argued for a constitutional chamber to be added to the Council of State to exercise constitutional review.[84] The benefit of selecting the Council of State to act as ultimate constitutional bench is that that body already acts through its Legislative Division to advise the government, albeit non-judicially, on the quality and sometimes constitutionality of bills before parliament gets to vote on a bill.[85] Adding constitutional review to the Council's powers would draw on its existing capabilities and serve to unify constitutional control in one body, whether in the form of the nonbinding advice on bills or the judicial review of acts of parliament and their implementation.

Another option would be to create an *ad hoc* court composed of judges delegated by each of the highest courts to agree on a common and binding interpreta-

83 *See also* Ferreres Comella, 2009, pp. 79-85.

84 E.M.H. Hirsch Ballin, 'Constitutionele toetsing van wetten als bijdrage aan de rechtsontwikkeling', *in* W. Konijnenbelt (Ed.), *Rechter en wetgever*, Council of State, The Hague, 2001, p. 47, at pp. 58-61.

85 On the Council's constitutional review functions, *see* B.P. Vermeulen & H.J.T.M. van Roosmalen, 'De constitutionele toetsing door de Raad van State', *Regelmaat*, Vol. 27, 2012, p. 212.

tion of the Constitution and so guard legal certainty where divergent interpretations threaten the uniform application of the Constitution.[86] This is then not so much the creation of a distinct constitutional bench with its own identity and composition, but rather the various highest courts acting in unison on the Constitution through their representatives, somewhat similar to the Special Supreme Tribunal in Greece which was referred to when the horizontal centralization of review was discussed.[87] However, for this option to be viable in meeting the demands of legal certainty the body created should have a clear legal basis and be a real court of law that operates according to a clear procedure and which pronounces and publishes judgments that are binding on all other courts. Otherwise, constitutional review would be centralized in name only, leaving definite constitutional review in the domain of informal and nonbinding coordination between the various highest courts.

Whether the Supreme Court or the Council of State is chosen as constitutional bench or whether the highest courts act jointly through a new court, it is probably unnecessary to centralize constitutional review completely by restricting it to these highest courts. There exists no need in the Netherlands to detach constitutional review from the lower or ordinary courts to achieve a higher degree of separation between the legislature and judiciary given the judiciary's experience at conducting treaty review, nor are the lower courts to be distrusted for political reasons either. Instead, the centralization of review should rather be understood as the need for coordination and not as a particular substantive or ideological point that has to be made in breaking with an unhappy institutional reality or constitutional legacy. A form of semi-centralization, such as that in Portugal whereby all courts can rule on the constitutionality of acts of parliament which can then be appealed to the Constitutional Court for a definite ruling can be considered, or perhaps the South African approach can serve as an inspiration whereby rulings of unconstitutionality by lower courts must be certified by the Constitutional Court before they can stand.[88]

Centralizing constitutional review in the Netherlands along the lines of the Portuguese or South African example would mean that ordinary court proceedings will not be disrupted or delayed in waiting for the constitutional bench to rule on a preliminary constitutional question before a matter can proceed. Instead a court hears and decides a constitutional matter as it would any other, after which the matter may or must make its way to a central constitutional bench depending on the circumstances. Opting for a comparable form of semi-centralization can also help to address the real concern expressed in the Halsema bill that centralizing constitutional review along the lines of a preliminary question procedure will cause an unacceptable procedural disjuncture with treaty review which is conducted decentralized in accordance with Article 94 of the Con-

86 *See also* De Visser, 2012, pp. 269-271.

87 The Greek Tribunal though is not exclusively composed of sitting judges, as it is also composed of the president of the Court of Audit and two professors of constitutional law.

88 *See* Arts. 207, 225 and 277 of the Constitution of Portugal and S. 167(5) of the Constitution of South Africa.

stitution.[89] Avoiding a preliminary question procedure for constitutional review will then have the effect of streamlining the application of higher law, obviously bar the preliminary question procedure as it applies to EU law which functions independently of the Constitution. The new preliminary question procedure, which was introduced in the Netherlands in 2012, whereby lower courts are able in some cases to put civil law questions to the Supreme Court before proceeding with a matter, is by comparison therefore not desirable in applying the Constitution as it might exactly lead to such a disjuncture between constitutional and treaty review.[90] The same goes for earlier ideas and proposals that constitutional review needs to be conducted by means of preliminary questions.[91]

Not only would semi-centralization allow the court system to function smoothly, but it would also mean that the Constitution becomes the property of all courts which allows constitutionalism to permeate the system thereby increasing the normative effect of the Constitution instead of reserving such review for but one court. This substantive benefit of semi-centralization is also one of the reasons why the South African Constitutional Court went from exercising complete centralized review to semi-centralized review and could prove interesting for the Netherlands, too.[92]

I. On a General Note

As the experience in the Netherlands shows, the question of whether constitutional review should be centralized or decentralized in a particular system is a complicated one. The traditional dichotomy of civil law and common law jurisdictions is no longer as sure as it might once have been in providing an answer to the question. Of increased importance is determining the frequency of change that constitutional review is intended to bring to a society or system and how best such change can be achieved. Also, where centralization is chosen, the eminent desire is no longer that of strict Kelsenian thought to create a hermeneutically sealed constitutional body that has to shield the courts from every legislative influence and reassure the legislature that the courts do not meddle in any political issues. Instead the debate has become more sophisticated to the extent that sure categories have been abandoned for a spectrum in classifying the degree to

89 *Parliamentary Proceedings II*, 2002-2003, 28, 331, No. 9, p. 16.

90 Brought about by the Act on Preliminary Questions (2012); *Parliamentary Proceedings II*, 2010-2011, 32, 612, C. This procedure is based on the recommendations of the Hammerstein Commission 2008, pp. 50-53. *See also* De Visser, 2012, p. 270.

91 On constitutional review and preliminary questions, *see* Sap 2007, p. 599 arguing that preliminary questions be put to a special constitutional court where a decision is not open to appeal; *see* Hirsch Ballin, 2001, pp. 58-61 arguing for preliminary questions to be put to the Council of State; C.A.J.M. Kortmann, 'Advies van prof.mr. C.A.J.M. Kortmann', *NJCM-Bulletin*, Vol. 17, 1992, p. 305 and A.W. Heringa, 'Rechterlijke toetsing in Nederland', *NJCM-Bulletin*, Vol. 17, 1992, p. 235 discussing a previous cabinet viewpoint that preliminary questions should be put to the Supreme Court.

92 Van der Schyff, 2010, p. 100.

which systems of judicial review are, or can be centralized or decentralized in meeting their respective needs.