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# Is the Dutch Constitution Unique? From Its "Petrifaction" to its transformation

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# Abstract

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The object of the research is the Dutch constitution and questions its uniqueness. The peculiarity of the constitutional text is due to its rigidity, foreseen by Article 137,138 and 139; and to the ban on constitutional adjudication, foreseen by Article 120 of the constitution. The first part of the thesis, after having defined the origins of the practice of judicial review and of constitutional adjudication, will analyze the institutions and the legal system in force in the Netherlands. Then, once the characteristics of the Dutch system have been analyzed, the thesis will analyze it in comparison with other countries that adopt a different stance toward judicial review. The analysis of Estonia, Finland and Italy will help to contextualize where the Netherlands can be placed in the framework of European continental constitutionalism. Despite the longevity of the Dutch constitution, the legal tradition of the country is changing due to the influences brought by international and EU law. To conclude, it is unsure whether the process of change will endure or be temporary, but according to ongoing developments, such as the Halsema's proposal, it can be said that the Netherlands might change its approach towards judicial review, and adopt the centralized model of judicial review, with the establishment of a constitutional court.

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# 1.INTRODUCTION

## 1.1 RESEARCH QUESTION

The relevance of the topic today concerns the European legal landscape, more specifically whether it is still possible to affirm that Netherlands lacks of a mechanism of control of constitutionality on legislations or the accession to the EU and ECHR, with their subsequent evolutions, has changed the Dutch legal tradition on constitutional adjudication.

The object of my research entails the Dutch Constitution[1], a peculiar constitutional text that is defined petrified. This definition derives from Foster and Ryan, defining that, in order to alter the Constitution in presence of rigidity:

« a procedure is stipulated which requires specific legal/constitutional obstacles to be overcome[2] ».

The Dutch constitution is in line with this description, as proven by the mechanism for constitutional amendment contained in Article 137, 138 and 139 of the Grondwet[3].

In my research it will be discussed the nature of the Dutch constitutional text, in order to understand whether it is unique, a model of its own, or it can be regrouped in a shared constitutional model. Determining the uniqueness of the Grondwet will represent the last step of the research question, that will be anticipated by other sub questions that are necessary for our research. These early queries concern respectively: the origin of judicial review, the Dutch constitution and constitutional adjudication, the position that Netherlands has with respect to other countries with regard to judicial review and finally the relationship between the Dutch constitutional text and the ECHR. Having defined these characteristics, in my opinion, it will be easier to cast an opinion on the nature of the *Grondwet.* With the acknowledgement of the nature of the Dutch Constitution, it is of our interest to understand whether this peculiarity is set to last in the future or is likely to change.

[1] Grondwet voor het Koninkrijk der Nederlanden
[2] Ryan, M, & Foster, S, Unlocking Constitutional and Administrative Law, 3d ed.: Routledge, 2014,16.
[3] See Chapter 3, Section 5.1

### 1.1.2 METHOD OF ANALISYS

In order to answer to the research question and its sub question, the thesis is divided in different steps that determine the method of analysis. In order, the first analysis will be conducted on judicial review. Starting from the notion of precautionary constitutionalism and the origins of the judicial practice in Ancient Greece, it will be of our interest to understand the development of the culture on judicial review through the works of Sieyès in France and by analyzing the Madison vs. Marbury case, an American milestone in constitutional justice. After having determined these notions, we will shift back to Europe, in order to understand the more recent factors that prompted the European shift towards constitutional justice. New doctrines have been enshrined in the EU framework, determining the constitutional to be taken by the member states of EU. Above all, the primacy of EU law[4] and the direct effect principle[5]. Given these precepts, it will be of our interest to see different patterns of integration of domestic constitutional adjudications with the European doctrines. To determine that, it will be presented as a dichotomy formed by the French and Belgian case on one hand, and the German and Polish on the other.

The background discussed in Chapter 2 will permit us to focus on Netherlands in Chapter 3. In this section, attention is completely given to the constitutional nature and mechanisms of Netherlands, while also considering the governmental institutions of Netherlands. Starting from the constitutional text, to be analyzed step by step in its different versions, it will be clear that peculiarity is given not only by Article 137,138 and 139, but also by Article 120 that establishes the prohibition on judicial review[6] and Article 90 that determines the Dutch engagement in the development and promotion of international law[7]. The rigidity of the Dutch constitution has been threatened multiple times, with proposals that aims to change the nature of the Grondwet. Among these proposals, the most important are "Halsema" one and the one issued by Gerards[8]. Threats to the essence of the Grondwet are also brought by the European influence regarding the

[4] CJEU, Case 6/64, Flaminio Costa v ENEL, 1964
[5] CJEU, case 26/62, Van Gend en Loos v Netherlands, judgment of 5 February 1963
[6] Article 120, Grondwet: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts"
[7] Article 90, Grondwet: "The Government shall promote the development of the international legal order"
[8] These two not only will be analyzed in Chapter 3 but are essential in understanding the future of the Dutch Constitution, Chapter 7.

entrenchment of fundamentals and human rights, but it is not the only country to be affected from that. For this reason, we take into account the British case with the issuing of the Human Rights Act of 1998, in order to determine whether there is a parallelism between the two nations or not.

Having framed the characteristics of Dutch constitutionalism, we move to a comparative framework on different approaches to constitutional review. In this framework, we take into consideration the three models of judicial review. Two traditionally recognized: the centralized, Kelsenian, model and the decentralized one, of American inspiration. The third one is a hybrid model: its existence, in the Finnish model, debunks the polarized view on judicial review admitting the possibility of pluralism. The Finnish model exercise a compromise between the abstract ex ante review and the concrete ex poste one. The proper formulation, and its late acceptation, of the hybrid model will be analyzed in Chapter 6, based on Gardbaum's «The New Commonwealth Model of Constitutionalism.». The framework analyzes Italy, Estonia and Finland by taking into account the different constitutional approach by each country, that is analyzed by taking into account the institutions that regulates the control of constitutionality and the domestic legislations that permit to do so. The analysis of each country will be conducted in order to give a contrastive description with respect to the Dutch model, presented in Chapter 3. Eventually, there will be ground to evince similarities with these models, or to highlight the major discrepancies.

As we frame the context of judicial review at national level, in Chapter 5 we take on the elements of influence in current constitutionalism by analyzing the pressures exercised by international treaties, specifically the ECHR, and the European courts, the ECtHR. The influence of international treaties, and their deriving courts, seems to be amplified by Article 90, that set Netherlands as a pioneer in international law. Nevertheless, to acknowledge the Dutch relationship with the ECHR and the entrenchment of fundamental rights, it has to be taken into account the Dutch minimalist reading of the ECtHR's judgements, that goes in the opposite way with respect to the approach enshrined by Netherlands towards international law. The influences brought by international treaties are progressively attacking the long lasting Dutch judicial model. The prohibition on the judicial review of acts of Parliament is not exercised when the acts are vis-à-vis with international legislation, but further progresses can be done in order to permit a

mechanism of judicial review at national level, as suggested for instance by the Gerards proposal.

Given the outlines provided in chapter 2 to 5, it is finally possible to determine the answer to our research question, that is whether the Dutch system is a model of its own or not. In assessing my thesis on the subject, in chapter 6 we will start from the theories on judicial review. Starting from the polarization of judicial review, we will shift to Gardbaum's third model. The hybrid model proposed as an alternative path to judicial review has gained prominence since a better recognition of fundamental and human rights, with their consequent entrenchment. This acknowledgement is very important as debunks the polarized view on judicial review, sustained for instance by Tushnet, and admitting pluralism. Still, it has to be assessed the identity of Netherlands on the matter, that is, whether the Dutch model is unique, or only has peculiar features in a model that is not distinguishable from others. The answer to this question will have to take into account the process of globalization in constitutional law, that is conveying different nations under the same process of standardization of constitutional law, where system are more similar, or even equalized, given the pressures coming from international entities, but also civil society organizations and NGOs.

Finally, in the conclusions, we will look for possible developments in the Dutch system. As we will infer, there are solutions to be analyzed such as the Gerards' proposal and the "Halsema" one. It has to be determined which model would fit more the Dutch system, which nevertheless has to be changed, starting from a constitutional amendment to Article 120. The most suitable choices seem to be the adoption of the Kelsenian model, or the hybrid model proposed by Gardbaum, that combines ex ante and ex-poste review. As a theoretical dispute may arise from the assessment of the best model for Netherlands, most of the work of reforms and renovation should be done at the institutional level, if that is the path that Netherlands desire to take.

## 2.THE EUROPEAN SHIFT TOWARDS CONSTITUTIONAL JUSTICE

### 2.1 INITIAL SETTING UP OF MECHANISMS OF CONSTITUTIONAL REVIEW OF LEGISLATION:

The idea that in an organized society there is the need for an institutional system that protects and grants the rights safeguarded by the Constitution, accompanied humanity since quite the beginning. As far as we know, the first successful attempt to deliver this form of justice takes us back to the age of Ancient Greece[9]. Around the 6th century the *polis* of Athens enters in its first democratic cycle, having updated its form of government from the aristocratical power[10]. Nevertheless, the Athens democracy has to be understood as a prototype: for example, the participation does not recall our concept of universal suffrage, but instead guaranteed the access to the political life only to adult, males and citizens[11]. In any case, the Athenian democracy developed efficiently the practice of the judicial review through the *Dikasteria*[12]. This practice influenced many democracies of the future, as in the case of the American judicial review, and even before with the project of Sieyès. In the French case, during the embryonal stage and the theorization process of the French Revolution undergoing from 1788[13], Sieyes tried to propose a neutral constitutional jury, with the power to control the constitutionality of the approved laws and review the constitution. Again, the idea blossomed from the Athenian democracy has been taken by most of the countries as they reach the democratic form of government and the establishment of a system of constitutional justice has been supported by several international organizations dealing with human rights, including the Council of Europe and its Commission for democracy through law (Venice Commission).

A major shift towards constitutional justice in Europe happened at the end of the World Wars, so in the first half of the twentieth century. Even before, it was possible to the into account the cases of Austria and Czechoslovakia: the former adopted in 1919 the first

[9] Thorley, J., *Athenian Democracy*, London, Routledge, 2005, 10.
[10] Thorley, J., *op. ult. Cit.*, 10.
[11] Thorley, J., *op. ult. Cit.*, 74
[12] Werham, K., Popular constitutionalism, ancient and modern in UCDL Rev., 2012, 46, 96
[13] The publication of the first of the three *pamphlets* by Sieyes, namely the *Essai sur les privileges*, is here considered as the starting point of the theorization of the French Revolution.

constitutional court following the Kelsenian model, the latter instituted in 1920 the first court for judicial review of parliamentary legislation, though the Court was never in operation[14].

The US has to be included in the list, but first it is fundamental to distinguish the American understanding of judicial review. The Athenian interpretation sticks to the ideology of popular constitutionalism that sees the transfer of power of review to the people and their representatives, while the American one strongly believes in the judicial supremacy, hence courts and their judges have the final say on the interpretation of the Constitution[15]. The principle of parliamentary supremacy spread in Europe at the end of the World Wars in the verge of the anti-totalitarism wave underwent in Europe. Many governments reviewed their constitutions in order to restrain the executive power and create a strong framework of checks and balance. It is undeniable that America encouraged the propagation of the constitutional review given the post war scenario. The Kelsenian model gave to the postwar European countries the guidelines towards the achievement of a solid constitution, that would not be at the mercy of historical upheavals. In order to achieve this condition, Kelsen proposed the rigid model of constitution. His theory regarding the structure of the centralized model of judicial review of legislation and the reasons for the adoption of a rigid constitution has been explained in different pieces. According to our scope of interest, in the most topicals works such as «The function of a Constitution»[16], in which the need of a stable constitution that: must be conceived as the supreme authority, which is superior to the legal order arranged with hierarchical criteria, that can preclude the content of determined legislations, that must be rigid in order to

[14] Ginsburg T, Versteeg M., Why do countries adopt constitutional review? in The Journal of Law, Economics, & Organization. 2013;30(3), 5

[15] This view is confirmed by the criticism of Jeremy Waldron towards legal constitutionalism, in his works like: "Law and Disagreement", Oxford: OUP, 1999; "Disagreements on Justice and Rights", 6 NYU Journal of Legislation and Public Policy, 2002; "Legislation" in M.P. Golding and W.A. Edmundson (eds), The Blackwell, Guide to the Philosophy of Law and Legal Theory, Oxford: Blackwell Publishing, 2005. In these pieces Waldron stresses the unevenness produced by the judges' "superior voting weight" that overrules on the decisions of the citizens, limiting their representation. Waldron can be identified as a political constitutionalist: in his theories he selects the legislature as the main checking body of the Constitution. Other political constitutionalist that support this vision can be found in Bellamy, R., Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy, Cambridge University Press, 2007; and Tushnet, M., "Taking the Constitution Away from the Courts", Princeton University Press, 1999. While considering the latter author, it is important to stress that his point of view of political constitutionalism sticks to the context of the American model of separation of powers.

[16] In Tur R., Twining W.L. (eds.), Essays on Kelsen. Clarendon Press. 1986, 109--119

maintain its position of supremacy[17]. Another relevant work is «La garantie jurisdictionnelle de la Constitution[18]» where he stresses the importance of establishing an appropriate legal mechanism that is committed to the actions of the judges or of a specific body, without the possibility of suffering any contamination by the legislature from which the judiciary is independent (which tends to be more political).

A special mention must be given to one of his most prominent work, the «Pure Theory of Law», in which he held that the law must be separated from any ethical, political, sociological notion as the legal science is different from the legal politics. From this assumption it is possible to understand the logic of the centralized model of review of legislation, that entails and represents a core characteristic of the Kelsenian petrified constitution. It is possible to affirm that, in order to refrain any political contamination within the field of legal science, the review of legislation must be a competence of experts, where the judges can be intended as technocrats, and so scientists[19].Despite the influence applied, Europe decided rapidly to take its own path on Constitutional justice and judicial review. Also, thanks to Hans Kelsen, one of the major contributors to the setting up of ad hoc courts in Europe to review the constitutionality of legislation, author of the Austrian Constitution of 1920, the centralized model became the most used pattern in Europe[20]. At the beginning of 2000s, it was possible to count eight constitutional courts out of the fifteen European member states: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal and Spain. With the enlargement of the European Union in 2004, other ten states joined to the supranational organization, every new country do possess a constitutional court except for Estonia[21].Among the seven countries that opted out from the centralized model, it is possible to count Denmark, Finland (since 2000), Sweden as close to the American decentralized model, despite the Finnish Constitutional changes after 2004. The remaining four countries represents two different sets of exceptions: Ireland and Greece do propose a system which is not easy to classify, at the moment, for convenience

[17] Troper M. The logic of justification of judicial review. International Journal of Constitutional Law. 2003 Jan 1;1(1):99-121(5)
[18] Kelsen, H., La Garantie Juridictionnelle De La Constitution (la Justice Constitutionnelle), Barnéoud, 1928.
[19] This assumption can be deduced from the argumentation offered by Kelsen in «La garantie juridictionnelle de la Constitution» treated above.
[20] Comella, V.F., The European model of constitutional review of legislation: Toward decentralization? in International Journal of Constitutional Law, 2004; 2(3), 461.
[21] Comella, V.F., *op. ult. Cit.*, 462-463

it is fair to label them as "hybrid models" in that it includes the interplay between ordinary courts and supreme courts in upholding the entrenchment of the Constitution; later on this this work the Irish case will be analyzed in more depth. Before shifting on the last group of countries, it is important to mention Portugal as it applies a "hybrid model", while having a Constitutional court, characteristic of the centralized model. According to the Portuguese Constitution, despite the existence of the «Tribunal Constitucional», ordinary judges are allowed to dismiss legislation on their own[22].

The latter block of countries, namely the Netherlands and the United Kingdom, are unique as they do not have a system of constitutional review of legislation. In the Dutch constitution, article 120 prohibits judges from setting aside legislation on constitutional ground; but also, the British judges do lack of these competences[23]. Both cases are absolutely interesting for their uniqueness and in relation to the influence provided by the European Convention on Human Rights (ECHR) and the European Court of Human Right.

Notwithstanding the centralized tradition in Europe, nowadays it is questioned whether national courts of the member states are shifting toward the decentralized model[24], after having generally opted for a centralized tradition since the aftermath of the second world war[25]..

The reason for this change resided in the European law itself: as the member states must enforce and apply the legislation coherently to the primacy of EU law principle[26], the EU de facto dictates the national courts to conform and adopt a decentralized model of review of legislation with regard to EU law, as will be explained in section 2.2. In the next paragraph, a more deep insight will be given into the model of the Classical

[22] Constituição da República Portuguesa, art. 204

[23] Beginning in 1999, the United Kingdom started a process of decentralization with respect to the central character of the UK. Therefore, the power is transferred to the assemblies of Northern Ireland, Scotland, Wales from the central Parliament of London. The UK government still maintains its authority on certain matters such as the non-devolved ones, foreign affairs, defense and economic policies. Devolution is a practice that well integrated in the prassi and now represents a characteristic nature of the British constitution structure. It is important to mention that this pattern, evolved during the European membership, is unsure to last longer given the ongoing Brexit situation.

[24] Comella, V.F., *op. ult. Cit.*, 463-470-477

[25] Comella, V.F., *op. ult. Cit.*, 461

[26] Comella, V.F., *op. ult. Cit.*, 478

Athenian Democracy, where major stressing will be put on the *Dikasteria*, the Supreme Court, and on the *Graphē Paranómōn*, the judicial review.

### 2.1.1 PRECAUTIONARY PRINCIPLES OF CONSTITUTIONALISM IN ANCIENT GREECE

The word "democracy" appeared, according to the data available to historians nowadays, for the first time in Ancient Greece, more specifically in the *polis* of Athens, pronounced by the leader of the city-state: Cleisthenes. In 507 B.C. the leader proposed a pack of political reforms, namely called *demokratia*, rule by the people.[27] The newly proposed system aimed at the creation of three new institutions: the *ekklesia*, the *boule* and the *dikasteria*[28]. The first one consisted in a sovereign governing body dedicated to the legislation and to foreign policy; it represented the main assembly where all the Athenians citizens were invited to participate and vote with a ten days frequency[29]. It was remarkably important, not only for fitting the basic notion of democracy, but also because of its intertwined relationship with the other new institutions: a Boule committee, namely the *prytaneis*, regularly called the *Ekklesia* for meetings and votes regarding subjects present in the agenda set up by the *prytaneis.*[30] The *Boule* represented the deliberative body of the city-state, the draft of the deliberations that would be later needed to be approved by the *Ekklesia*. Aside from this main task, this institution regulated economic and financial matters, received foreign ambassadors with the collaboration of the *prytaneis*, consulted regularly the military generals might receive special powers by the *Ekklesia* during emergency periods[31]. As the body in itself, the Athenian Boule had two main precedents in the Athenian *Aeropagus* and in the Solonian *Boule*. The latter had been reformed by Cleisthenes, who increased the overall membership from 400 to 500[32]. Finally, the *Dikasteria* represented the Supreme Court of Athens, subdivided in a system of different popular courts, namely the *Dikasterion*[33]. During the two years of reforms,

[27] Dmitriev, S., *The Birth of the Athenian Community: From Solon to Cleisthenes*, London, Routledge, 2017.
[28] Tridimas, G., A political economy perspective of direct democracy in ancient Athens in Constitutional Political Economy, 2011, 22(1), 61-62.
[29] Werham, K., Popular constitutionalism, ancient and modern in UCDL Rev., 2012, 46, 80
[30] The Editors of Encyclopaedia Britannica, *Ecclesia in* Encyclopaedia Britannica, 2018
[31] Lanni M. & Vermeule A., Precautionary Constitutionalism in the Ancient World in Cardozo L. Rev. 893, 2013, 30, 5
[32] The Editors of Encyclopaedia Britannica, *Boule in* Encyclopaedia Britannica, 2018
[33] Werham, K., Popular constitutionalism, ancient and modern in UCDL Rev., 2012, 46, 76

Cleisthenes revolutionized the already existing body, changing the core nature of the court from the one of an appellate to a body with its original jurisdiction[34]. The membership to the courts was open to any citizen that satisfied the requirements of being male and over 30 years old, these people would be assigned to a specific panel or *dikasterion*[35].Following the judicial reform, another remarkable change characterized the new body: the court received the role of guardian of the constitution, namely *nomophylakia*[36]. The duty was before held by the Areopagus, a council with lifelong membership opened only to elderly people that served in high public offices and that was noble by birth, the so-called *archon*[37]. This shift represented a major blow of Cleisthenes to the precedent Athenian aristocracy and their oligarchic methods. The Dikasteria developed two main solution against jury tampering: all the trials had to be concluded on the same day of opening and litigants could not interfere with the selection of the jurors nor they could know the composition of the pool[38]. The fact these pools were formed by citizens, falls in line with idea that accompanied Greece since Cleisthenes and his *demokratia*, where everyone could intervene in the political activities, such as the contribution to a fair-decision making process, so embodying the concept of rule by the people. As mentioned above, the *Dikasteria* held the role of *nomophylakia* and so had the duty to perform judicial reviews regarding the constitutionality of the decrees of the Assembly; this scenario permitted the evolution and the practice of the declaration of unconstitutionality, namely the *graphē paranómōn.* This challenge could be asked before or after the adoption of the act by the Assembly, but in any case, the subjected decree would be halted until the resolution of the public trial. If the accusations were found to be valid, the declaration resulted in the invalidation of the act, but also in a condemnation for the person that proposed the wrongful decree. Regarding the access towards the legal mechanism, the appeal of *graphē paranómōn* was guaranteed to any Athenian citizen as in any other Athenian public lawsuit[39].

Different charges could be solved with a declaration of being against the law, allegations like procedural defect of an enacted law, or its substantive inconsistency with an already

[34] Sinclair, R. K., *Democracy and participation in Athens*, Cambridge University Press, 1991, 72-73
[35] Sinclair, R. K., *op. ult. Cit.*, 73-74
[36] Werham, K., Popular constitutionalism, ancient and modern in UCDL Rev., 2012, 46, 76
[37] Werham, K., *op. ult. Cit*, 77
[38] Todd, S.C., The shape of Athenian law, Oxford: Clarendon Press; 1993, 84
[39] Werham, K., Popular constitutionalism, ancient and modern in UCDL Rev., 2012, 46, 99

enforced one, or the violation of democratic principles by a decree were all subject to it. This judicial practice can be intended as a legal evolution from the previous act of ostracism. The first use of the constitutional challenge is proven to be happened on the 415 B.C., while the last case of ostracism has been attended in 417 B.C[40]The consequentiality of the scenario is not always retained to be casual, indeed, scholars like Haven and Wolff back this idea and have been quite prolific on the matter. The Danish philologist reckoned that the shift had to been seen as a way to limit executive power, especially when individuals try to take over the community provoking political instability. Wolff shared Hansen's idea that the *graphē paranómōn* substituted ostracism as the main mechanism to block excessive power acquisition, but differently from his colleague, he also believed that the practice had been introduced in order to confer some political responsibility to the demagogues and a mechanism to block their decisions if made in a wrongful manner. In this case, the introduction of the constitutional challenge should not be seen in a cause effect relationship with the abandonment of ostracism, rather as a counter for the criticized demagogues that arrived after Pericles: as the author documented, they were criticized for using their powers only in speeches, as *rhetores*, but not on the ground in a pragmatical way[41].

Despite that, ostracism had been one the most prominent institutions in Ancient Athens, introduced by Solon with the scope of limiting the eventualities of tyranny. The mechanism consisted: first in the public questioning of the need of holding an ostracism; if so, then the citizens would vote in the agora for the person that needed to be sent out of the city. Despite the correlation, it is not possible to define this practice as a proper exile, in reality the subjugated person would maintain his properties in Athens and could come back to the *polis* once the 10 year-period ended[42]. The *graphē paranómōn* is usually compared to the modern model of judicial review and is believed to constitute one of the pillars of precautionary constitutionalism, as witnessed by Vermeule and Lanni in their studies[43]. Moreover, the Cleisthenian delivery of the practice resulted incredibly balanced because, not only limited wrongful acts and power centralization, but was instituted with

[40] The Classical Review, *New Series*, 1989, Vol. 39, No. 1, 71
[41] Wolff, H. J., "Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie (Sitzungsberichte der Heildelberger Akademie der Wissenschaften, philosophisch-historische Klasse), 1918, 18-23
[42] Sinclair, R. K., *Democracy and participation in Athens*, Cambridge University Press, 1991, 169-170
[43] Hansen, M. H., *The Athenian democracy in the age of Demosthenes: structure, principles, and ideology*, University of Oklahoma Press, 1999, 209

a lower degree of authority, not permitting to surpass the Assembly in the law-making. Precautionary constitutionalism is only one of the many branches that regards precautionary principles. Briefly, it possible to categorize health and environment risks as first order issues, while the political should be intended as a second order problem. In the application of this principle in politics, it is important to establish a clear framework that permits to understand the scope, the weight, the timing and the justification. The first principle aims to determine the scenarios of application, such as in case of abuse of power, or in worst cases dictatorships, majoritarian or minoritarian oppression and the abolition of the state[44]. The second principle establishes the degree of authority of the principle and the circumstances in which turn it down[45]. The third one concerns on when the constitutional check should be arising in the case of an uncertain risk[46]. In the fourth principles it is considered whether to act with ex ante precautions rather than ex poste remedies[47].

Following the listed principles, the Athenian judicial review falls among the elements constituting the core notion on precautionary constitutionalism by having a protecting function from uncertain wrongful acts aimed at concentrating power. Because both, the precautionary principles and their embodiment in the constitutional check, at the considered time were at in an early stage, they can fall into errors such as the overprotection or the insufficient protection of rights, jeopardization and perversity. In the latter case, the issue was already present at the time of ostracism and so relates also to the *graphē paranómōn*, but in a broader term entails the whole precautionary mechanism. It described the possibility of increasing the risks of power concentration through the use of precautionary mechanisms, and so orchestrated expulsions of authoritarian rivals as Pericles did[48].

The issue of jeopardization relates with the principles introduced with the new institutions of the Demokratia reform: the selection of the volunteers from a lot, then, they would be reallocated in random courts or offices by means of annual rotation; everything understanding of collegiality, so everyone had the same amount of power with respect to

[44] Vermeule, A., Precautionary principles in constitutional law in *Journal of legal analysis*, 2012, *4*(1), 184.
[45] Vermeule, A., op. ult. Cit., 184.
[46] Vermeule, A., op. ult. Cit., 184.
[47] Vermeule, A., op. ult. Cit., 184.
[48] Kagan, D., The origin and purposes of ostracism. *Hesperia in The Journal of the American School of Classical Studies at Athens*, 1961, *30* (4),399.

his colleagues. This structured mechanism to avoid power concentration has been criticized for mining the proper efficiency of the institutions and their operators, indeed the selection from a lot suggested that a choice made on random basis should not substitute the consideration of qualified skills. Also, the rotation had been put in doubt as it does not give the opportunity to build experience and knowledge on the assigned court, always giving the chance to new errors when moving from one body to the other. As the whole ideology of precautionary constitutionalism relies on a system of checks and balance, it will be seen in the next and paragraph the evolution of this model and its practices in a path towards amelioration of the equilibria.

In the next paragraph it will be noted whether the mechanisms of precautionary constitutionalism remained through the ages and the evolution of judicial review of legislation.

### 2.1.2 SIEYES' CONSTITUTIONAL JURY

Emmanuel Joseph Sieyes is academically known as one of the contributors to the constitutional theory of the French Revolution movement, but also as one of the redactors of the French Constitution of 1791. His progressive constitutional principles were officially heard at the Thermidor speeches, where he had the chance to explain his project of government[49]. The background of this proposal saw the overcoming of the period of Terror created by Maximilien Robespierre, with the Thermidor reaction marking the beginning of third year of the French Revolution. In this period, with the Jacobin constitution proposal pending at the time, the idea of a constitutional check had been already introduced in its fourteenth chapter, with the concept of «*Grand Jury National*», that pleased even Robespierre as he wanted to limit the legislative power[50]. The model proposed by Sieyes, in an attempt of building a better form of government from the ashes of the period of Terror, foresaw the institution of four main bodies: the *Tribunat*, which proposed the laws, the *Gouvernement*, exercising the executive function, the Législature

[49] Goldoni, M., At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power in *Oxford Journal of Legal Studies,2012, 32*(2), 212

[50] Fioravanti, M., Sieyès et le jury constitutionnaire: perspectives historico-juridiques in Annales historiques de la Révolution française, 2007, 349, 91.

that decided on the promulgation of the laws proposed by the *Tribunaut*, and finally the *Jury Constitutionelle* constituted by its 17 articles[51].

His three pamphlets helped the cause, especially the third one «Qu'est-ce que le Tiers Etat» where he seeks to transform the French Third State into the French nation. The core ideas of his constitutional model can be reassumed in representation and power distribution.

As said in the second speech at the Convention:

*"(...) division avec unité donne la garantie sociale, sans laquelle toute liberté n'est que précaire. (...) divisez, pour empêcher le despotisme; centraliser, pour éviter l'anarchie. (...) Je ne connais que deux systèmes de division des pouvoirs: le système de l'équilibre et celui du concours, ou, en termes à-peuprès semblables, le système des contrepoids et celui de l'unité organisée "*[52].

His pattern follows much more the organizational unit one as it recalls more the representative model, rather the British one. The pattern chosen by the French political thinker recalls the one of Classic Athens and the *demokratia* reforms of Cleisthenes but is motivated from different spirits. The social order of Sieyès has to be linked to the ideals of the Bourgeois Revolution, where every interaction is representative and expected to be mutual. In other words, every citizen must contribute to the social system without freeriding on others effort. Another remarkable difference with the Greek model regarding representation is that public offices were representative and held by selected personnel, not randomly selected by a lot. Despite the progressivity of the proposal, the project had been harshly refused by the Convention in each of the three speeches that explained it by the Convention. His ideology will receive much more consideration in the sixth year of the French Revolution, despite remarkable modifications. For the sake of our research, we're going to focus on his concept of constitutional jury, explained in the second and third Thermidor speech.

When presenting the new model of constitutional jury. Sieyes started by enucleating the three core principles of the approach, which consisted in: safeguarding the constitutional rights and values, considering every proposal that aims at a constitutional improvement,

[51] Fioravanti, M, op. ult. Cit, 93
[52] Moniteur, Séance du 2 thermidor an III, p. 1236.

offering with an equity check a possibility of appeal to civilians whenever there is a possibility of misconduct or ill decision by the justice operators.

The first of the three functions aim to limit constituted powers and to guarantee the respect of the law in the interaction between public authorities and citizens, in such a way that opens the call for human rights as one of the main achievements of the system. The jury cannot have a say when the constitutional violation is committed by a public representative, as they will find their natural judge with proper competences. By implying that, Sieyes aims to protect the acts that are discretionary, and so requiring reasoned judgement or political choice. The concept of natural judge is important in the rhetoric of Sieyes and can be explained when referring to the distinction of acts: the responsible ones will find their check in natural judges, contrarily to the irresponsible that are subjected to ordinary judicial exercise. So, the competences to the jury are recognized on constitutional violations of acts of the two houses of legislature, namely *Conseil des Cinq-Cents* and the *Conseil des Anciens*; violation on the electoral subject; infringements made by acts of the Tribunal de cassation and by the primary assemblies. Its opinion has always to be asked, indeed the jury cannot act with its proper initiative. The exercise requested to the jury had to be *ex ante*, it can be understood when considering that opinions are delivered regarding acts but not laws, and so on legislative proposal which are waiting for the promulgation. As the body retains that the legislation contains a constitutional violation, the act is declared void *ab initio* according to Article VIII of the project[53].

The second role played by the body consisted in being the catalyzing tool for the infinitive amelioration of the constitution. In order to understand this function, it is important to recall that Sieyes shares the idea of a progressive constitution: each social generation must have a say on conforming the constitution according to the times and adapting it to the social path taken by society at that moment[54]. On the other hand, the *abbé* understood the risks of a too moldable constitution and for this reason foreseen a rigid procedure for the modification of the constitution to avoid any abuse of the same body. Every ten years the organ would publish a book containing the proposals of amelioration, namely the *projet d'amélioration de l'acte constitutionelle;* it will be presented before the two legislative

[53] Goldoni, M., op.Ult. Cit., *32*(2), 217-218
[54] Goldoni, M., op. ult. Cit, 2012, *32*(2), 220

bodies for consultation and three months later, at the annual primary assemblies, the latter will deliver their positive or negative opinion on the modifications proposed and will act only on consultation without the possibility of changing the agenda. In case of a negative result, the constitution would not be subjected to any modification for the following ten years; conversely, if the proposal is accepted then the legislative bodies will receive the authorization for proceeding with the amendments[55].

The last function regards the control of equity on judgements subject to ordinary jurisdiction. The operational range of this principle is set in articles XIV, XV and XVI: the former regulates the methodology of formation for the *ad hoc* body, where one tenth of the of the jury members is randomly selected. The second states that the temporary body will have a say only on natural equity judgements, which will be exercised by the court that issued the request or by one chosen by the constitutional jury. Moreover, it can answer to the official questionings posed only by different tribunals, intervening on the matter as they lack competences, or of the application of positive law, but also in the case in which they are unable to judge against their own conscience[56].

The sixteenth article concerns the communication of the judgements of natural equity, that will be announced during the months of meeting of the *Conseil du cinq cents,* conversely the jury cannot have an independent say on equity checks. As highlighted by Clavreul in her work «*L'influence de la theorie d'Emmanuel Sieyès*", it is possible to understand this peculiar body as a tribunal of human rights that acts when the ordinary tribunals recognize a lack of positive law or a wrongful act. This judicial reasoning recalls the methodology followed by the British model of common law, but still they diverge as, in the case of United of Kingdom, the tribunals would have to appeal to a jury acting as superior court of human rights. Obviously, this pattern cannot be applied in the French arrangement as the presence of such high court would nullifying the presence of the constitution and of its constitutional check: if a state admits the eventuality of appeal to natural law, it will automatically deny the supremacy of its written constitution.

Notwithstanding the dedication profused by the *abbé,* the model proposed has been

[55] Goldoni, M., op. ult. Cit, 2012, *32*(2), 220

[56] Goldoni, M., op. ult. Cit, 32(2), 223-224

harshly refused by the Convention and never saw the light in its core conception. The major critics were addressed towards the notion of natural equity and the complexity of the first provision. Regarding the latter, perceived as a complex mechanism, it raised some doubts on the *ex-ante* form of revision. In article IV it is written that:

«The acts declared to be unconstitutional by the jury are null and cease to be valid *ex-tunc*.[57]»

According to the standard legal definition of *ex-tunc* judication, it is applicable on already existing laws and acts with the retroactivity principle. Also, Sieyés never specifies between *decrees* and *loi* in his work, provoking even more confusion. One of the major contractors of the model, Paul Bastid, defined the pattern as an incontestable disorder during the opinions hearing of the 18th Thermidor[58].

The other critic verted on the natural equity check: the idea that judges could exercise an arbitrary decision boosted the general fear of seeing the overcome of the legislative competences by the judicial sector. For these reasons, the proposal saw their constitutionalizing only in the fifth year, despite having suffered major alterations. Speaking of the whole *jury constitutionnel*, its criteria of composition and appointment do share some characteristics with the American model. Contraposed to the random selection happened in Classical Athens, Sieyes dedicated much focus to the procedure of selection of judges, selected from qualified pools and with the consent of the legislative body as in the case of Justices' appointment to the American Supreme Court. Other resemblances can be evoked when considering the second provision of the *jury constitutionnel* that affirms the duty of the jury towards infinitive amelioration of the constitution. This concept will be seeing the light again with Thomas Jefferson during the draft of the US Constitution, as the politician will go against the impossibility of a time locked constitution taking inspiration from the French model.

[57] Goldoni, M., op. ult. Cit, 32(2), 218

[58] Bastid P., Sieyès et sa pensée. Slatkine, 1978, 436

Despite this peculiarity shared, the American model of judicial review of legislation firmly stems from the model evolving in Europe. The Marbury vs. Madison case made an historic mark towards the decentralized model of constitutional safeguard, as we are going to elaborate on the next section.

### 2.1.3 MARBURY V. MADISON: THE AMERICAN MILESTONE IN CONSTITUTIONAL JUSTICE

On the 24th of February 1803, the Supreme Court of the United States ruled out a declaration of unconstitutionality towards an act of the Congress for the first time ever[59]. The unanimous opinion delivered by the Chief Justice, John Marshall, is believed to constitute one of the pillars of American constitutional law, as the Supreme Court repealed an act of the Congress retained unconstitutional for the first time, recognizing the power of judicial review[60].

President John Adams, during the lame duck session of his presidency, appointed Marbury as a justice of the peace. His successor, Thomas Jefferson became President of the United States did not permitted to Secretary of State Madison to finalize the appointment of Marbury. Marbury sued Madison by means of a writ of mandamus in the Supreme Court, in order to receive the commission. After having examined the case, Chief Justice John Marshall stated that the provision of the 1789 Act[61] ensuring to the Supreme Court the competences to release a writ of mandamus was unconstitutional. It is fair to clarify that the Judiciary Act of 1789 changed the original jurisdiction of the

[59] Urofsky, M.I., *Marbury v. Madison in* Encyclopaedia Britannica, 2019

[60] Before the US Supreme Court, the power of judicial review was first discussed in 1610 at the Court of Common Pleas for the Bonham case that, despite being implied by the Chief Justice, Sir Coke, did not come to realization in the English system. Sir Coke in his judgement held the supremacy of the English common law in England, specifying that the Parliamentary prerogatives depends from the precedents, fundamentals in a common law system.

[61] The Judiciary Act; September 24, 1789. The act, signed by Washington, separates the country in different districts. Each of them is comprised with a court, its judge and attorneys. The legislation established the position of attorney general of the US, the head of the Department of Justice. Since then, the Supreme Court would count on the chief justice and five associate justices. The act conferred to the Supreme Court the power to settle litigations between states and foreseen the compulsory review of legislation by the Supreme Court on judgments issued by the highest court of the state if: the validity or the relationship within the Constitution of a treaty or statute is questioned.

Supreme Court. Before the legislation, the Constitution, at Article III (2), foreseen the body's original jurisdiction in the eventuality of cases that involves ambassadors, public ministers and consuls, or see a state as a party. After the new legislation, the original jurisdiction of the Supreme Court becomes exclusive in suits between involving two or multiple states, between a state and a foreign government, and in cases affecting ambassadors and public ministers. It has been recognized to the Court: the authority to review legislative and executive acts, judging on their constitutionality, as provided for by Article III of the Constitution and the supremacy clause (Article VI); and recognized the Supreme Court as the final interpreter of the Constitution[62].

Even if the case is regarded as a judiciary milestone, it has to be noted that the trial and its outcomes are only the final result of a much more complex reasoning on the degree of democracy that should feature judicial decisions verting on political matters, such as Madison's judicial review vision. By analyzing the process towards the independent constitutional path, it is important to stress that the fundamentals were built on the verge of the approval and ratification of the Constitution of 1789; the Madison vs. Marbury case is more likely to be understood as an evidence of acceptation of the new judicial branch as an autonomous and independent cooperator of the legislative one. Before the Constitution entered into force, the role and competences of the judiciary were seen completely different, recalling the prototypical pattern of the Athens, as it supported popular constitutionalism[63]. This legal position was supported by the federalist reformers, who, as Madison, fought for the establishment of a democratic institution that would not be completely subjected to popular decision. The core notion of their governmental view is regrouped in "The Federalist", a six handed work by A. Hamilton, J. Madison and J. Jay containing 86 articles aiming at explaining the shift marked by the new proposed constitution. From this collection we will now select, in order, the most important articles in order to analyze the reasons for the progressive shift towards the complete autonomy of the judicial branch. One of the first obstacles faced by the reformers was to explain the reasons for preferring a court led by "technocrats", experienced judges rather than one subjugated to popular decision. In the essays number 6 and 15 of the Federalist Papers,

[62] Urofsky, M.I., *op. ult. Cit.*
[63] As supported by Werhan in his work "Popular Constitutionalism, Ancient and Modern."

Hamilton arguments the nature of the opinions released by popular assemblies, like the *Dikasteria* in the Athenian precedent, as the people constituting them might take a choice vehiculated from emotions and feelings rather than being led by impartiality and specific knowledge, as in the case of institutions led only by judicial operators[64]. As proven in essays number 48 and 71, the reformers fear that in an exaggerated attempt to render legislature more representative, the government might help the diffusion of popular tyranny[65]. On the matter of representation in republics, Alexander Hamilton states, in article umber 48, that:

« […]it is against the enterprising ambition of the legislature that the people ought to indulge all their jealously and exhaust all their precautions.[66] »

Professionalism relates to the idea of independency, without it, the body would not be able to function properly, and so there would be reasons to make the judiciary open to counterchecks, such as popular decision. The direct control of citizens can be avoided by a good and wise exercise of the conferred powers.

Judges are motivated to perform efficiently not only by the honor of the appointment by itself, but also because of principles like good behavior, life tenure and the impeachment; all intrinsic to each other. The first notion comes from a British practice introduced in a regime of common law. The explanation of its application can be found in the Federalist at essay number 39 and 78, and it means that the Constitution allow federal judges to hold their offices without the possibility of being removed but can be impeached following their misconduct[67]. The idea of life tenure has to be linked to the same British practice mentioned before; the Reformers believed that the promise a of a high office accompanied by a wealthy salary would ensure the professionality of the judges. More specifically, Hamilton brightly explain the reason for applying life tenure:

« […]a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a

[64] Madison, J., The federalist no. 6, November 1787 22; Madison, J., The federalist no. 15, December 1787 1
[65] Madison, J., The federalist no. 71, March 1788 18
[66] Madison, J., The federalist no. 48, February 1788 1
[67] Madison, J., The federalist no. 39, Jan 1788 18; Madison, J., The federalist no. 78, May 1788 28

tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.[68] »

Finally, the principle of impeachment was introduced as a mechanism of ex-post control of the conduct of the federal judges made by the Congress, as they could not be discharged from their office otherwise. Hamilton takes on the subject in the articles number 65 and 66. In the first one he defends the adoption of the Senate as the court of impeachment for public officials. Despite recognizing that even his solution would encounter issues such as politically motivated trials and partiality. The writer refuses to see the court in other available options: The Supreme Court is retained too small and unable to provide an impartial judgement to removed officials, while the idea of a separate body is simply considered too expensive[69]. In essay number 66, Hamilton explains the mixing of judicial and legislative power specifying that both houses of the Congress are entitled of the judging, moreover he retains this situation necessary as the Congress hold the executive branch. He replies also to other critics concerning the impartiality of the court, reassuring on the impossibility of an aristocratic behavior of the body as the Congress has the tools to countercheck it; according to him, senators will be impartial in the presidential appointees and in the ratification of foreign treaties[70].This belief is strongly stressed afterwards, in essay number 78, where Hamilton specifies that judges must be enlightened by "independent spirit" during performing their duty, this condition is required to guard the Constitution that has to be intended by the judges as fundamental, primary law[71].

After having taken in consideration many facets of the reformers' model, we eventually take into account article 49, as it enucleates the theory for the separation of powers and the detachment from the popular judgement.. Hamilton in his piece challenged Jefferson's idea of popular convention, saying that this kind of body would undermine the balance among different institutions created in the new Constitution[72]. Moreover, as expressed in essay 6 and 15, popular assemblies would emotionally evaluate evidences for judgment and, as reinforced in essay 49, they could not fully comprehend the matter of the

[68]Madison, J., The federalist no. 78, May 1788 28
[69] Madison, J., The federalist no. 65, March 1788 7
[70] Madison, J., The federalist no. 66, March 1788 8
[71] Madison, J., The federalist no. 78, May 1788 28
[72] Madison, J., The federalist no. 49, Feb 1788 2

judgement as popular assemblies do not convey specialized operators. This change has been majorly influenced by the Lockean theories, from which the Reformers inspired. Thomas Locke's social compact theory characterized much of the American liberal constitution model: the philosopher made a clear separation between the state and its citizens, enucleating that the first responsibility of the former consists in the protection of the rights that the latter possessed under natural law. The diffusion of the Lockean liberal though brought American to the conceptualization of individualistic constitutional and legal tradition, where rights are individual and inalienable entitlements of the citizens that must be protected by state infractions. This vision explains the separation between law and politics wanted by the reformers, strongly drifting from Aristoteles school of thought in which the state and the citizens are in a mutual relationship, as the polis cannot exist without the cooperation of its citizens.

All the work done by the Reformers on the judicial branch saw its realization in Article III of the Constitution of United States, the one used in the Marbury vs Madison case. The US model marked a different way of understanding the relationship between the judicial branch and democratic bodies, thereby forging the decentralized model of judicial review.

## 2.2 THE ROLE OF THE COUNCIL OF EUROPE AND OF THE EU IN CONSTITUTIONAL TRANSITIONS AND THE SYSTEMS OF CONSTITUTIONAL ADJUDICATION

As mentioned at the beginning of section 2.1, the European framework progressively changed the patterns of constitutional justice of its member states and of the continent. The same European Union, through the different stages of development, changed its behavior towards national constitutional courts. At the beginning of its existence, the supranational spirit dominated the organization: this principle was explained by the need of dissipating discontent between states, after the destruction brought by the two world

wars[73]. Considering the conflicts aroused, Europe should have represented a communitarian framework in which national sovereignties result invalid before the superior European authority, hoping for the avoidance of further confrontations spurred by strong nationalism. These intentions can be observed at the time of the European Economic Community, in the case laws Van Gend & Loos and Costa vs Enel, where there is the foundation of the principles of the direct effect and of the primacy of EU law. The community method was marked by a vivid mistrust towards states and fierily opposed the De Gaulle's kind of vision of Europe, where, according to the late French President, international cooperation should be sought among member states, but without sacrificing national sovereignty. The supranational approach dominated the continent until the 90's, when the community decided to increase their economic and political interdependence and so opting for an intergovernmentalism approach, where member states acquired more relevance at the decision and policy making level.

This shift is traditionally marked by the adoption of the Treaty of Maastricht and of the TEU later, but before that, signs of the change of approach can be seen in the principles that instituted the Venice Commission. The European Commission for Democracy through Law is an advisory body of the Council of Europe established in 1990 with the aim of guiding those countries exiting from the bubble created from the Berlin Wall and in the desperate need of improving their democratic functions. The commission always delivers non legally binding opinions on constitutional matters, international law and protection of fundamental right. The approach of mutual cooperation is denotable in the working method: the appointed rapporteurs confront with national authorities, then they provide a draft opinion on the degree of democracy of the legislation and finally the draft is discussed and adopted at the Venice Commission. This method does not pretend to impose to the countries in need to stick to dictated standards, but rather seeks to cooperate with them in order to ameliorate their functioning while benefitting the whole community.

[73] This doctrine is shared by different authors and is inspired by the Schuman Plan. A mechanism of coalition and peace achieved also by economic means, by intertwining the economic relations of the member states. This doctrine is supported by several authors: Gillingham, J., "Coal, steel, and the rebirth of Europe, 1945-1955: the Germans and French from Ruhr conflict to Economic Community", Cambridge University Press, 2004; Eichengreen, B., "Institutions and economic growth: Europe after World War II. Economic growth in Europe since 1945", 38-72; Eilstrup-Sangiovanni, M, & Verdier, D., *European integration as a solution to war* In European Journal of International Relations, 11.1, 2005, 99-135.The Schuman Plan has been inspired by Jean Monnet and Robert Schuman, supported by the communitarian vision of the German chancellor Adenauer and the Italian Prime minister Alcide De Gasperi.

The structure of the three pillars in the Maastricht Treaty is quite telling: the first one containing the willingness to develop a common market and a monetary union is accompanied by the second and third pillars that concern on cooperation and intergovernmental, putting the purposes in an intertwined relationship where one should not exist without the other[74].

With the entry into force of the Treaty of Lisbon in 2009, the EU introduced a new behavior to be followed by its member states. The treaty poses an equilibrium between the supranational and the intergovernmental approach, abolishing the pillars that created a scenario in which Member States had major relevance in intergovernmentalism while the Community stick to supranationalism.[75]

Other than the integrative function between the two understanding, the Treaty strengthen the right of initiative of Member states in certain sphere of European competences and introduced the «emergency brake» practice.

[76]. Since the establishment of the principle of primacy of EU law, it was clear that some changes should have been brought to national courts to conform to the new approach. That has been evident in the «Amministrazione delle Finanze v Simmenthal SpA» EU law case: in its judgement the ECJ stressed the supremacy of EC law, recognizing that national judges can rightfully set aside national legislation if it interferes with the one of the European Court without waiting for a declaration of unconstitutionality that invalided national law[77]. From this judgement, it is easy to understand that the European Court of justice implies the compulsory adoption of the decentralized model of judicial review of legislation to conform to EU and EC laws. Another reason for decentralization can be seen in considering the protection the human rights. This duty has been fulfilled by the members of the Council of Europe, since the ratification of the 1950 European Convention on Human Rights. It is of our interest to denote that the European Court of Human Rights regulates only the actual violation of rights of the member state, not the

[74] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5
[75] Avbelj, M., "The Treaty of Lisbon: An Ongoing Search for Structural Equilibrium, Columbia Journal of European Law, Vol. 16, No. 3, pp. 521-530, 2010.
[76] Comella, V.F., The European model of constitutional review of legislation: Toward decentralization? in International Journal of Constitutional Law, 2004; 2(3), 477-478
[77] Case 106/77, [1978] ECR 629

method of compliance used by the member, which remains at its discretion[78].Nevertheless, if the methodology prevents the effective application of the Convention, the infringement subsists.

At the beginning the Court chose to adopt a «wide margin of appreciation» in deciding the range of application of a restriction of a fundamental right in order to safeguard other rights of the society[79]. In the following years the Court started to restrict its standards as a response to the lack of compliance shown by member states, still the margin of appreciation is a tool appreciated by the Court. The Convention suffered some resistance from some national courts: given that the Convention has the same nature of an international treaty, some of them receive the convention as a tool to overcome national legislation; but also procedural inefficiency as some state do not foresee the possibility of setting aside national legislation when it interferes with the protection of fundamental rights included in the Constitution.

It is possible to infer that also the Convention requires the adoption of the decentralized model of judicial review of legislation: as in the case of «Amministrazione delle Finanze v Simmenthal SpA», any judge can set aside a legislation in order to respect the rights of the Convention. This process of decentralization, speaking of fundamental rights, can be avoided only in the case of the full integration of the Convention in the national Constitution, as Austria did in 1964. Keeping in mind that we are talking about a process, started but at in an early stage, and so of a possible evolution, the current practice of the centralized model still predicts the exclusivity of Constitutional Courts in reviewing acts upon their unconstitutionality.

Nevertheless, the predominant model of judicial review of legislation in Europe still remains the one offered by Kelsen; it will be depending also on the basis of the actions of the EU whether we will be able to see the complete inversion of the judicial trend.

### 2.2.1 DIRECT EFFECT PRINCIPLE

[78] Comella, V.F., The European model of constitutional review of legislation: Toward decentralization? in International Journal of Constitutional Law, 2004; 2(3), 482-483
[79] Comella, V.F., op. ult. Cit., 484

As in the case of the primacy principle, this fundamental principle of EU law, focal for European integration, is not present in any treaty but it is enshrined by the Court of Justice of the European Union. That happened for the first time in the «Van Gen den Loos» EU case law of 1963, where the application and the effectiveness of EU law has been regulated: the Court ruled out that, in addition to the obligation predicted for member countries, EU law with direct effect envisages rights for the individuals. This principle can be applied for conflicts arising between individuals or between the citizen and the EU country, as they can directly appeal to European legislation even before national courts[80]. Direct effect has to be distinguished between horizontal and vertical effect. The former concerns the liaisons between individuals, permitting to the citizen to invoke the European law in a conflict with another one. The latter instead grants to the individual the right of appealing to European provisions in a trial with the national state. When both aspects are respected it is possible to talk about full direct effect, while it is defined as partial when only the vertical is granted; both have been accepted by the Court of Justice. Another distinction has to be made before analyzing the EU case law, it is of our interest to understand the application of the direct effect principle within primary and secondary legislation.

In the first case scenario, already at the time of the Van Gen den Loos case the Court specified that obligations, coming from EU or the domestic legal order, must be precise, clear, unconditional and cannot call for additional measures. Consequently, to these requirements, in the «Ursula Becker v Finanzamt Münster-Innenstadt» case, the Court of Justice repealed the principle as the national court had already possibilities of implementation of the provision[81]. Regarding the relation with acts of secondary legislation, the practice of the principle depends on the nature of the legislation. Regulations, according to the Article 288 of the TFEU, always have direct effect; decisions, instead, will have it only when they concern member states; with international agreements, direct effect principle is granted only when the obligations satisfy the same requirements of clarity present in the primary legislation case, as established with the judgement of the «*Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg*» case. In the eventuality of directives, the Court of Justice observes

[80] CJEU, case 26/62, Van Gend en Loos v Netherlands, judgment of 5 February 1963.
[81] Ursula Becker v Finanzamt Münster-Innenstadt, 1982, ECR 53

the verticality of the direct effect principle when: it is necessary to protect the rights of individuals, the directive is clear and when the national court has not transposed the act by the deadline. Finally, opinions and recommendations cannot boast the principle has they do not have any legally binding effect.

### 2.2.2 THE VAN GEND EN LOOS CASE

In 1963, the logistic company Van Gen den Loos transferred chemicals from West Germany to Netherlands. The imported substance, the urea-methanal, required a special tax of an additional 10% on the value of the good at the customs. The company claimed that: the Dutch government violated Article 12 by imposing an additional custom duty between the countries, but also there was no ground for asking to pay this tariff at the customs given that the substance fell in a different category at the adoption of the Treaty of Rome[82]. On the other hand, the Dutch customs held that Van gen den Loos had only legal personality but not natural, and so it could not claim these rights. The national court decided to suspend the trial and to pose two questions to the CJEU: the first regarding the possibility of direct application of Article 12 on member states, and so if there was conveyance of individual rights that the court has to protect; secondly and only if it has direct effect, if the application of a 8% import duty would be unlawful increase of rate, infringing Article 12.

On the former question, the CJEU specified that Article 12 of the EEC Treaty had direct effect and represented a negative obligation, keeping in mind that of the main goals of the treaty was instituting a common market, stressing that the EU legislation should prevail on the domestic one upon the national sovereignty given to the Community. On the latter interrogation the European Court decided to avoid to judge on the basis of a lack of competences and gave back to the national court the inquiry[83].

[82] Article 12 of the Treaty of Rome declared that « Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other. »
[83] CJEU, judgment of 5 February 1963, case 26/62, Van Gend en Loos v Netherlands, ECLI:EU:C:1963:1

Subsequently to this judgement, individuals have been able to appeal to Communitarian law before national courts, avoiding the additional step of addressing directly to the ECC and, by this, diminishing the volume of the European bureaucracy.

### 2.2.3 THE INFLUENCE OF THE ECHR IN CONSTITUTIONAL JUSTICE OF EU COUNTRIES

While analyzing the sources of influence in constitutional justice of European countries, a special remark has to be done on the weight of the ECHR in the matter. Starting from the basis in which we acknowledge that European legislation and the ECHR law are different, the two normative frameworks share some principles, as a result of the extension of those particular characteristics, such as the direct effect principle and the primacy, firstly owned by the EU law[84]. To understand properly the degree of influence, it is worth to clarify the different types of relationship among the ECHR and the domestic legislations. Sticking to Montanari's classification, explained in his work «I diritti dell'uomo nell'area europea fra fonti internazionali e fonti interne», it is possible to individuate three major patterns of adaptation and understanding of the ECHR law. One of the behaviors is defined by the nature of two monist countries: Austria and Netherlands. In this context, the ECHR is classified with constitutional hierarchy. While the Dutch case will be analyzed deeper in chapter 5, it is possible to specify on the Austrian case that the ECHR enjoys a double nature in the Austrian legislation. While the Convention maintains its status of international treaty, it has also been turned into a law with valency of constitutional legislation; as a result, the ECHR guards on those individual rights that are directly implementable before any kind of court and consequent judge. These rights can be considered before the Austrian Constitutional Court given their constitutional law status[85]. In the second scenario, the nation recognizes to the Convention the super-

[84] Martinico, G., Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, European Journal of International Law, Volume 23, Issue 2, 2012, 403

[85] Cede, 'Report on Austria and Germany', in Martinico, G., and & Pollicino (eds), The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective, 2010, 55, 63.

legislative status[86]. In the third eventuality, countries like the United Kingdom conferred to the ECHR a legislative rank. Despite this threefold condition, in the recent studies it has been noted an ongoing phase of convergence between the ECHR and national legislations, as pointed out by Martinico.

As in the context of EU law, the ECHR recognized domestic judges as "natural judges", they not only grant immediate intervention and adjudication on ECHR matters in the domestic system, but also the grants the recognition of superior legislation with respect to the national one. Starting from this assumption, it is possible to individuate three judicial practices that molds the national legislation[87], as in the case of EU law. Martinico enucleates in sequence: the consistent interpretation, the disapplication of domestic law and the counter-limits doctrine. For the sake of our analysis, we will focus more on the former two practices, as in the first one we analyze the relationship with the Human Right Act, and in the second one we inspect on the tool of the control of constitutionality.

The consistent interpretation of the ECHR legislation is the pragmatical result of the theoretical indirect effect of supranational legislation. As in the case of EU legislation, the domestic court can adopt different solutions in order to adhere to the European regime. The duty of consistent interpretation by the national jurisdiction ECHR is regulated by the national legislation, and so can take various paths. In countries like Spain and Portugal, the constitutional provision foresees the control on the constitutionality of international treaties. The Spanish legislation dictates the amendment of the conflictual act before the conclusion of the treaty[88]. The particular status given to the ECHR in the Spanish legislation is conveyed by Article 10.2, that predicts interpretative guidance in the fulfilment of human rights in constitutional matters[89]. In the Portuguese scenario instead, the treaty ratification must pass through the approval of the *Assembleia da República* by means of special majority[90]. Article 16 of the Portuguese Constitution confers a constitutional complementary status to international human rights treaties,

[86] Martinico, G., op. Ult. Cit, 404
[87] Martinico, G., Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, European Journal of International Law, Volume 23, Issue 2, 2012, 407
[88] Art. 95(2), Constitución española
[89] Art. 10 (2), Constitución española: "Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España".
[90] Art. 278, Constituição da República Portuguesa

opting for the interpretation of the Universal Declaration of Human Rights. Despite this implied exclusion of the Convention, the Constitutional Court recurred more than once to the ECHR for a deeper interpretation of the Constitution.

A different path, from the constitutional check described above, to achieve consistent interpretation is considered in the United Kingdom. The doctrine is well diffused in the British multilevel system as permits major flexibility among different legislations having different hierarchy, but also confers to judges the task of gatekeeper[91]. The practice stands on legislative provision under the HRA, which saw the inclusion of the Convention in the act in 1998. The consistent interpretation is granted by Section 3 of the Convention that predicts the conformed application as far as possible to the context and the domestic legislation[92]. In the recent years, the British practice started to accept the HRA, and so the Convention, as an essential constitutional element. This British shift in Constitutional justice can be noted in the Thoburn case[93]. Briefly, in the judgement it has been recognized the constitutional nature to a set of statute and laws that included the European Communities Act of 1972. This legislation, as the Human Right Act, belongs now to the classification of "constitutional" statute[94]. The judgement contains the influential effect of the ECHR on the domestic justice, modifying the understanding of the HRA, but also seeking to patch up the European primacy principle with the British characteristic parliamentary sovereignty[95].

Verting now on the element of our interest, we move our interest to Martinico's section on the judicial disapplication of domestic law, specifically on the French case. Also, in this practice, the ECHR share the domestic behavior attended with EU law. In both European regimes, certain national constitutions empower local judges to disapply domestic legislation that clashes with supranational treaties. In the peculiar case of the French legal system, there is no special mention on treaties concerning human rights. The broader category of international treaties is contained in Title IV of the *Constitution*

[91] Martinico, G., Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, European Journal of International Law, Volume 23, Issue 2, 2012, 409
[92] Section 3(1), HRA:" So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".
[93] Thoburn v. Sunderland City Council, 2002, 1 CMLR 50
[94] Martinico, G., op. Ult. Cit., 410
[95] Martinico, G., op. ult. Cit., 410

*Française* and its provisions can be extended to the ECHR too[96]. The superior hierarchy of international agreements is granted by Article 55 and the mechanism of control of the *controle de conventionnalité* is a duty conferred to domestic judges. France is not the only country to use the tool of the conventionality check: it is a practice predicted in different legal systems, such as the Bulgarian[97], the Czech[98], the Polish[99] and the Slovenian[100] one; but these differ from the French adoption as they entrust the control to the Constitutional Court, giving the chance to convey this tool with the one of the control of constitutionality. It is possible to infer that the complementarity of the two practices, permits to the Constitutional Courts of the aforementioned countries a deeper analysis of the proposed international treaty in order to experience a smoother adoption of the agreement. It is a truism to denote that the presence of ECHR modified the role of these Constitutional Courts, by extending their competences and admitting their duty on the control of conformity, conventionality. Therefore, it is possible to confirm the influence of the ECHR in the domestic constitutional justice.

[96] Martinico, G., op. ult. Cit., 413

[97] Art. 149 (1), The Constitutional Court shall: rule on the compatibility between the Constitution and the international treaties concluded by the Republic of Bulgaria prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party.

[98] Art 87(2), Ústava České Republiky: "Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment."

[99] Art. 188: "The Constitutional Tribunal shall adjudicate regarding the following matters:
(a) the conformity of statutes and international agreements to the Constitution; (b) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; (c) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; (d) the conformity to the Constitution of the purposes or activities of political parties; (e) complaints concerning constitutional infringements, as specified in Article 79, para. 1

[100] Art.160, : "The Constitutional Court decides: (a) on the conformity of laws with the Constitution; (b) on the conformity of laws and other regulations with ratified treaties and with the general principles of international law; (c )on the conformity of regulations with the Constitution and with laws; (d) on the conformity of local community regulations with the Constitution and with laws; (e )on the conformity of general acts issued for the exercise of public authority with the Constitution, laws, and regulations; (f)on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts
[...]In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.
Unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication on the basis of criteria and procedures provided by law.

### 2.2.4 PRIMACY OF EU LAW

The primacy of EU law principle foresees the superiority of European over national legislation. It constitutes a fundamental principle of European law and of European integration[101]. The assumption is not included in any treaty, but it is enshrined by the Court of Justice of the European Union. The Court act in this way for the first time in the «Costa vs. Enel» Eu case law of 1964.The CJEU sentenced that laws coming from European institutions have to be applied in the national legal system by the member states, in order to guarantee compliance. It is up to Member States' authorities to apply the European provision, while the contrasting domestic provision is not applied[102]. This approach is deemed necessary to guarantee to citizens the status of even protection under European law across all EU territories. Since its first application in 1964, the concept of primacy evolved through the years.

As recognized by Matej Avbelj in his work «Supremacy or Primacy of EU Law—(Why) Does it Matter? » in 3 different models of application: the hierarchical model, the conditionally hierarchical model and the heterarchical one. The three models can be understood as three different approaches that are intrinsic one to each other as each of them is the product of the evolution of the European integration, that mostly kept the same pace of the European Treaties. This progression through the years permits to shed doubts on the relationship between supremacy and primacy, of EU law, and to clarify that they cannot be considered as equivalent.

In the hierarchical approach the European law is considered as the supreme body of law in relation to national legislation, regardless of their internal hierarchy, and to all other bodies that constitute the superior one to which they are subsumed[103]. A concrete case can be found in the Spanish tradition, following the Statement by Constitutional Court no. 1/2004 of 13 December on Article 93 of the Spanish Constitution. The *Tribunal Constitucional* acknowledges that the law predicts Constitution itself imposes on the operation for the assignment conferral of the exercise of competences and powers to the

[101] Weiler, J.H.H., Constitution for Europe, OUP, 1999, 22
[102] CJEU, Case 6/64, Costa v ENEL, Judgment of 15 July 1964
[103] Avbelj, M., Supremacy or Primacy of EU Law—(Why) Does it Matter? in European Law Journal. 2011 Nov;17(6), 745

EU, as a result of the European Union and on the resulting integration of European Law into our own law as allowed thereby has legislation. This judgement recognized that supranational integration is a constitutional category and matter. Still, the *Tribunal Constitucional* reserves itself the ultimate possibility of intervention and of last say if the divergencies between the two legislations cannot be solved[104].The presence of the principle of direct effect result useless as every EU law, not only the directly effective ones is integrated to the national legislation. The non-conferred competences that should be under the jurisdiction of the member state, according to the principle of attributed powers, can become practice of EU, plus it may have the final say in case of conflicts for the conferral of the task as in the case «Kompetenz-Kompetenz[105], if the Constitutional Courts do not decide to vindicate the competences. The assumption of supremacy present in the hierarchical model brings to the formation of the principle of pre-emption, foreseeing that the members are not allowed to act in any manner in the subjects under the authority of EU. As in this approach, the supremacy principle is considered focal for European integration, there is no chance for considering a pluralist pattern that would seek an active relationship between the two parts.

The conditionally hierarchical model maintains the characteristic of the previous pattern: supremacy entails the concept of primacy, but also here there is no distinction in between the two[106]. Nevertheless, there are differences between the two approaches, in this scenario limitations to the supremacy of EU law are applied as it loses the status of absolute legislation. Supremacy can be vindicated if the case falls into the competences of EU, according to the principle of subsidiarity and proportionality. Furthermore, the absolute power of EU has been restrained in order to respect the Member States' national identity, as predicted in Article 4.2 of the TEU. Control on the degree of retroactivity of EU law has been posed in Article 351 of the TFEU: supremacy cannot be applied to agreements in between member states or with third countries accessed before 1958 or entered after it.

The conditionally hierarchical model differs from the previous model also on the consequences of the application of supremacy, as highlighted by de Witte in his work.

[104] Opinion 1/2004 of the Tribunal Constitucional of Spain
[105] Avbelj, M., op. ult. Cit., 2011 Nov;17(6), 746
[106] Avbelj, M., op. ult. Cit., 2011 Nov;17(6), 748

The author individuates two conceptions: a softer one, in which the national legislation is only set aside in case of conflict; while the stricter approach requires not only to disapply the national law but also to invalidate it[107]. Given these peculiarities, it is possible to understand the primacy in the model as a characteristic that influence other principles of integration, as in the case of the hierarchical pattern.

Finally, in the Heterarchical Model a different approach is considered. The two notions, supremacy and primacy, are distinguished in two different concepts. The former entails the higher hierarchy of laws in the domestic or EU legislative branch in their internal functioning, without hierarchy between them; the primacy principle instead is used in order to regulate the hierarchical order and the relationship between the two autonomous legal orders, both enjoying supremacy at the internal level[108]. The different understanding of this approach poses major relevance on co-operation and on the principle of loyalty as dictated in Article 4.3 of the TEU. The post-Lisbon period is remarked by the adoption of the heterarchical one, every position is respected as we can see with the disappearing of the pre-emption principle. Primacy differs from supremacy; hence shared competences are regulated by the assumptions of subsidiarity and proportionality.

### 2.2.5 COSTA V. ENEL

In 1962 Italy decided to follow the path of nationalization of public services and created the board for electricity «Ente Nazionale per l'Energia Elettrica», ENEL. This change from private to public requested to the clients to pay the symbolic bill of 1,925 lire. In 1964 the claimant, Flaminio Costa refused to pay the amount of money holding that he was entitled to pay the sum to Edison Volta, the old private electric company. Obviously, this action has to be understood as a protest towards the nationalization of the service, nevertheless ENEL decided to sue Mr. Costa. At the same time, the claimant prepared a written statement where he asserts that ENEL violates the principles established in the

[107]B. de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in P. Craig and G. de Burca (eds), The Evolution of the EU Law, OUP, 1999, 199

[108] Avbelj, M., Supremacy or Primacy of EU Law—(Why) Does it Matter? in European Law Journal. 2011 Nov;17(6), 750-751

Treaty of Rome, and for that reason the judgement of the ECJ was necessary. The Italian Constitutional Court held that the act that permitted the nationalization of the electric service has been promulgated way after the inclusion by the national legislation of the EEC Treaty. By enshrining the interpretation «*lex posterior derogat legi anteriori/ priori*», the Corte Costituzionale stated that the domestic law should prevail on the provisions of the treaty as it has been enacted later, while refuses to consider the application for preliminary ruling. Eventually, ECJ judgement completely opposed to the one the national constitutional body. First it recognizes the lack of competences in delivering a judgement on the conflict as it can be brought before the *Giudice Conciliatore*. Secondly, the Court stresses that with the adoption of the EEC Treaty, member states gave up part of their sovereignty in adhering to communitarian law, so the EU law must then be enforced at the national level too. Finally, the ECJ specifies that national legislations cannot change treaty provision because this would bring to the heterogeneity of the legislation and it cannot be considered communitarian law anymore[109]. For the sake of the uniformity of EU legislation across the member states, the Treaty of Rome has primacy over the national legislation and its provisions are binding and directly applicable.

## 2.3 DIFFERENT PATHS OF ADAPTATION

In the previous sections it has been exhaustively illustrated the process of formation and evolution of constitutional adjudication. Despite most European countries share the idea that constitutional adjudication is fundamental for the democratic functioning of the government and have to be subjected to national courts, different paths of adaptation applied among different countries, also in order to fix different issues raising from different national legislations. In the next paragraphs, indeed cases of different countries will be analyzed in order to understand the divergences of the conformation.

### 2.3.1THE FRENCH AND BELGIAN CASES

[109] CJEU, Case 6/64, Costa v ENEL, Judgment of 15 July 1964

The two countries agreed on the necessity for constitutional adjudications as they both were in need for a mechanism that would avoid conflicts between state institutions or between different layers of the government. As brightly noted by De Visser, «one of the functions of a constitution is to assign competences to different levels and organs of the State», still conflicts on the attribution of the competences normally arise in the constitutional sphere[110]. For this reason, countries such as Belgium decided to confer to the judicial branch the duty for the resolutions, as they firmly believe that these bodies would remain independent and impartial by resolving contentions according to the law, instead of entrusting subjective political assumptions. The two different examples that we're going to analyze concern horizontal allocation in the first case and vertical allocation in the second one.

This model results very appealing for federal forms of government, as in the case of Belgium. During the 1970s, the country underwent to a reform of state resulting in the instauration of the federal system. In this rebuilding process the government has been subdivided in three different entities that possess own legislative competences, namely the federal state, the communities and the regions. Unfortunately, this division of the competences was not protected by any form of domestic primacy principle, so the absence of hierarchy between the three levels of legislation can result in the arising of conflicts internal to the government. As a first step taken the Belgian government, in 1984 the *Cour d'arbitrage* has been instituted in order to resolve jurisdictional conflicts, but its operational range remained very limited[111]. The court of arbitration had competences only in ruling if the constitutional provisions of power redistribution were respected by the statutes adopted at one of the three levels of government. The court experienced an enlargement of its competences with the creation of the «School Pact»: a new constitutional provision entailing this agreement was created, and the body inherited the competences to have a check on the freedom of education, that is consequent to the constitutional principle of equality. The *Cour d'arbitrage* evoked the power to indirectly

[110] De Visser, M., Constitutional review in Europe: a comparative analysis. Bloomsbury Publishing; 2013, 55

[111] Favoreu, L., La Cour d'arbitrage belge in *Annuaire international de justice constitutionnelle*, 1992, 6-1990, 62-63

review every statute that goes against the aforementioned fundamental rights included in the constitution. In 2003, its role changed again as the body would have to check the compliance of every statute with any fundamental right included in the constitution. Because of its new portfolio and responsibilities, the court has been renamed in 2007 as *Court Constitutionelle*.[112]

In the French case, we need to go a little more backwards on the historical timeline, specifically at the time of the verge of the French Revolution. As we seen in section 2.2.2, since the beginning the reformers wanted to limit the judicial powers and avoid any disturbance to the executive power. On the other hand, the executive's actions needed limitations too, so a system of administrative courts culminated by the Conseil d'état has been created; still, the legislation had the self-limitation constitutional check. This particular solution raised doubts on the efficiency, for this reason the government always tried to seek for new solutions but always failed.

The situation had a drastic change with the new Constitution of 1958 drafted by the prime minister, Charles De Gaulle. The French leader was contrary to the self-restraint approach and perceived that parliamentary actions in the matter would only interfere with the executive operativity[113]. The constitution of the 5th French *republique* provided a new separation of legal competences between the two branches that strengthened the executive, while sacrificing the judicial one. The division of the adequacies was granted by the new judicial body named *Conseil Constitutionnel*, that had the function of judging laws *ex-ante* upon their constitutionality, and so whether they respected the division of powers marked by the new constitution or not. As in the Belgian case, the court enlarged its portfolio through the years: after a judgement of 1971 the court started to review law menacing substantive constitutional principle, fundamental rights included. Moreover, consequently to an amendment of 1974, the court have to review legislation not only when requested by the president, the prime minister, the National Assembly or the Senate, but also when requested by a minority of deputies or senators. In a parallel way, as the appellant increased the case did too, but through the years it has been noted a tendency towards the resolution of fundamental rights rather than mere issues of power attributions.

[112] De Visser, M., Constitutional review in Europe: a comparative analysis. Bloomsbury Publishing; 2013, 57

[113] De Visser, M., op. ult. Cit., 59

This trend found its apex in 2008, as the constitution underwent to a new process of reforms, when the *Conseil Constitutionel* received the powers for revising also legislations already promulgated and in force, following the request of ordinary courts[114].

### 2.3.2 THE GERMAN AND POLISH CASES

In this different scenario, countries like Germany and Poland conveyed on the necessity of mechanisms of constitutional adjudication as focal for the protection of fundamental rights and for the implementation of the rule of law. This process in such countries, but also for instance in Italy or Czech Republic, has been more difficult due to the presence of authoritarian regimes that obstacle the path towards a democratic functioning of the state. In this shift countries draft new constitutions that would take over the precedent ruling, in the fundamental legislation usually are included vows to the protection of fundamental rights and to respect the rule of law. As learnt from the past, especially in the case of Germany, governments coming from dictatorial aftermaths did not rely the legislature as ultimate guardian of the constitution and its rights. The rising for constitutional justice combined perfectly in between the two World Wars and the Kelsenian ideology that spread in the same years.

In the German case the process towards the modern constitutional justice has been bumpy and suffered backwards moments, founding their epicenter in the world wars that split in two parts the development[115]. Indeed, starting from the Congress of Vienna until the institution of the Third Reich, the country enjoyed a vertical separation of power between the Lander and the central government; in case of conflicts the decision would have been up to the Parliament or to ad-hoc constitutional courts as in the case of the *Staatsgerichtshof* in the Wiemar Republic. Its constitution of 1919 included a Bill of Rights, but it never explicitly conferred powers to the court to check whether laws comply with them or not[116]. With the arrival of the Nazi regime in 1933, all the efforts made by

[114] De Visser, M., op. ult. Cit., 60
[115] De Visser, M., op. ult. Cit., 63
[116] De Visser, M., op. ult. Cit., 63

Germany in the field of constitutional democracy became void, as practice such as constitutional checks became an obsolete practice.

The second German developmental period starts from the ashes of the total wars, where the state is firmly convinced of: the need of a solid mechanism of constitutional adjudication, the protection of fundamental rights by judiciary means, the weakness shown by the centralized model adopted during the Wiemar republic, so an independent body was needed to endorse constitutional justice. The Heerenchiemsee proposal containing these beliefs has been widely accepted by the Parliamentary Council in the adoption of the Basic Law in 1949 and resulted in the formation of the *Bundesverfassungsgericht* in 1951[117]. Its operational range of action is defined by the *Bundes denkschrift*, where the organ stresses its constitutional nature and places itself on the same hierarchical level of *Bundestag*, *Bundesrat* and the Federal President, as prescribed by the constitution. Because of its precise structure, instrumental access to the courtroom and clear operational field, the *Bundesverfassungsgericht* is retained as one the best model of constitutional adjudication in Europe, from which not only many countries but also the EU inspired later.

Before starting the analysis on the Polish case, it is fair to mention that the following consideration does not take in count the recent modifications of 2015 to the Constitutional Court, brought by the currently governing party Law and Justice. Briefly, the party worked, in two different stages, on the control and subjection on the Constitutional Court. Sadurski defined the process as a « a comprehensive assault upon liberal-democratic constitutionalism [118]». The Law and Justice party decided in the first part of its strategy to attack essence of the Constitutional Court, bringing it to a condition of "paralysis"[119], in which the Court is no more able to oppose to arbitrary power. This "institutional illness" has been reached by two main actions: the former is the disempowerment of the constitutional body, the second one resides in the composition of the KRS. The composition of the National Council for Judiciary is linked to the one of the Supreme Court: new cabinets characterized by political connotation are now included in the body

[117] Vanberg, G., *The politics of constitutional review in Germany*, Cambridge University Press; 2004, 64-75
[118]Sadurski, W., "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding", Sydney Law School Research Paper, No. 18/01, January 17, 2018, 16
[119] Sadurski, W., op. ult. Cit., 18

and are completely constituted by members of the KRS, which at the same time are members of the governing party. This is another major example of the assault on the democratic constitutionalism mentioned above. Once this condition of stalemate has been reached, the ruling populist party started to use in a prolific way the Constitutional Court in order to block any intervention of the political opposition. The party switched its behavior from an initial approach towards the dismantlement of the Polish Court, to an active and positive cooperation with the same body, likely due to the realization of the importance of the role of the Court and its potential as a protector of the parliamentary majority.

Particularly, the changes brought in the first part of the strategy were not ignored by the European Commission, which on the 2nd of October 2018, filed an action for failure to fulfil obligations before the Court of Justice. According to the Commission, the reasoning can be found in the supposed infringement of EU law by the Polish government caused by the modifications brought to the retirement age of judges of the Supreme Court and by empowering the President of the Republic with the capacity of extending the judicial activity of the judges of the Supreme Court. Immediately after, the Commission requested to the Court to suspend the domestic legislation regarding the lowering of the age of retirement of Supreme Court's judges, granting the continuation of the tasks and work to the judges affected by the legislation and avoiding to take any provision on the appointment of the judges. Despite the fact that the Commission's request seemed to have rightful ground, the Court had to assess the requests of the body and clarify the nature of the Polish infringement. According to the Advocate General, Evgeni Tanchev, there is no rightful ground to accept the Commission appeal made on the basis of Article 47 of the Charter; while the request based on the second subparagraph of Article 19(1) is deemed reasonable and valid by the Court. In his delivered opinion, Tanchev stresses the importance of judicial independence, which is no more granted by the changes brought by the Law and Justice. As a matter of fact, this compulsory condition is uncertain due to the possibility of removal of those judges, affected by the legislation, from their office. According to the European regime, the dismissal from an office is contemplated only in extraordinary cases such as wrongful behavior; while early retirement is granted in the eventuality of medical needing and its provision on the compulsory age of retirement cannot have a retroactive valency. Therefore, the Advocate General confirmed the

infringement of the above-mentioned principle of "irremovability" established in the second subparagraph of Article 19(1) TEU. Consequently, the Polish government backed the authority of the President of the Republic granted by the *Konstytucja Rzeczypospolitej Polskiej*. This claim was denied by Tanchev, which dictated the following:

« […] the system of guarantees of judicial independence enshrined in Polish law and the criteria taken into account by the National Council of the Judiciary ('NCJ') in formulating its opinion are not sufficient to dispel the impression of the lack of objective independence of the Supreme Court resulting from the contested measures. [120]»

The Advocate General sentenced the violation of the conditions for the achievement of judicial independence, but it has to be noted that Tanchev's opinion is not binding. Advocate General's opinion is independently conceived and has the task of furnishing possible solutions to the case, a "coadjuvant" function exercised while waiting for the result of the pending judgement, a duty reserved to the Court.

The polish case shares the same conditions of Germany, they both come from authoritarian regimes, but one is opposed to the other. Poland has not seen any trace of constitutional adjudication until the second half of the XX century, despite receiving the influences of Hans Kelsen during the 1920s. With a more favorable political habitat, in 1976 the state took its first step towards constitutional justice as the Council of State was recognized competent in checking the constitutionality of laws[121]. Despite the fact that these powers never came into effect, in 1980 the regime instituted the High Administrative Court with the scope of checking sub-statutory acts and decide upon their conformity with the constitution and the parliamentary acts.

The wave of political freshness brought by the *Solidarność* movement considerably supported the institution of a constitutional body and in 1982 the Communist government created the Trybunal Konsty[122]. The organ resembles in its nature the Austrian Kelsenian model and the German *Bundesverfassungsgericht* but was different in the fact that judicial power still experienced constraints due to the communist doctrine. The court did not enjoy

[120] Court of Justice of the European Union, Press Release No 48/19, Advocate General's Opinion in Case C-619/18, Commission v Poland Luxembourg, 11 April 2019
[121] Provision included in the Polish Constitution 1952, Article 30(3)
[122] De Visser, M., Constitutional review in Europe: a comparative analysis. Bloomsbury Publishing; 2013, 71

totally binding effect of its decisions: the judgement of parliamentary acts was scrutinized by the Parliament; the body could accept it or overturn it by the means of a 2/3 majoritarian vote[123]. This understanding remained valid even after the fall of Communism in Poland in 1989: the constitutional court survived the transformation and enjoyed an enlargement of its competences, but still depended from the parliamentary decision on unconstitutional acts. A drastic change of this understanding will arrive only with the new Constitution of 1997, when the overturn procedure of the Parliament has been abolished[124].

## 3. THE DUTCH PECULIAR APPROACH TO CONSTITUTIONAL ADJUDICATION

### 3.1 THE LEGAL CULTURE IN NETHERLANDS

Netherlands already proved to be a unitary country provided with a well-articulated legal system. As the constitutional consciousness developed through the time in an incremental way, the legal culture followed the same path but maintaining its core approach. The Dutch Legal culture can be reassumed in pragmatism, soft approach and *Poldermodel*[125]. The latter term refers to the consensus decision-making typical in Dutch economic and social policies during 1980s and 1990s, that can be summed up by labelling it as a practical recognition of pluriformity[126].

The former is inherited from the Dutch cultural tradition of seeking solutions in a practical way without lingering on ideas and suppositions. The basis is applied in government functioning, as we can see with the informal meetings taken outside the institutional premises. This solution is used in order to avail obstructionism in the Chamber, so that preserve the cohesion of the cabinet, usually deriving from a governmental coalition, and

[123] Provision included in the Polish Constitution, Article 33(3)
[124] De Visser, M., Constitutional review in Europe: a comparative analysis. Bloomsbury Publishing; 2013, 72
[125] Chorus J., Hondius E., Voermans W., Introduction to Dutch law, fifth edition, Wolters Kluwer, 2016. 18-20-21
[126] Sanders, E, Poldermodel, NRC Handelsblad, 22 April 2002

consists in meetings between the leaders and the spokesmen of political parties and the formers and the prime minister[127]. The adoption of this practice is coherent with the pragmatism of limiting any possible clash that could menace the homogeneity and continuity of the cabinet; but also sticks to the practice of *depolitisering*[128], and so the habit of separating social issues from the political ones. The presented example explains that in the Dutch culture the notions of negotiation and compromise are correlated and intrinsic to the one of pragmatism, in an attempt to pursue a politics of pacification as defined by Lijphart.

The Dutch notion of "soft approach" represents a major factor in the rule making, implementation and enforcement. In the drafting stage, the formulation of the act must be as conscious as the subject treated and should appeal consensus when the decree can result controversial. According to this notion, if the promulgation of a law is deemed to be risky or not suitable for the present national scenario, it is postponed and "put in the fridge" as Lijphart says in *ijskastpolitiek* definition[4], suspending the promulgation of the act with the possibility to reanalyze it later. Regarding the soft approach, it is important to denote that historically the Dutch tradition followed the idea of discouraging and preventing the infringement of acts with persuasive mechanisms, rather than punish the violation afterwards.

The latter element featuring the Dutch legal culture is applied for regulating public infrastructures and services. The *Poldermodel* represents a consensus style of decision-making born with the Wassenaar Accords of 1982, where unions, stakeholders and the government met for the creation of new economically revitalizing solutions[129]. In a harmonic environment, public services cannot be individually suited or preserved; it takes the whole community to safeguard and make the mechanism of public facilities work, as pistons in an engine. In this model it is presumed the willingness to cooperate among different people, in order to strive for the common benefit; this desire should work because of the coercion created by common benefit and interdependent relations. The model eventually gained consideration during the 1990s, when it was considered as an

[127]Besselink, L. F. M., The Kingdom of the Netherlands In *Constitutional law of the EU member states, Kluwer,*2014, 1220
[128] Depoliticization in Dutch
[129] Van Riel, E., Akkoord van Wassenaar keerpunt in relatieregeringensociale partners, versie 9, SER Magazine, 2010

additional path to the standardized ones of capitalism and socialism. Unfortunately, the high fragility of the model given by the dependence to the community did not permit the long-standing success of the model and eventually harmed the Netherlands; possibly because stronger mechanisms of coercion were needed to guarantee the respect of the agreements.

## 3.2 THE *GRONDWET*

The Dutch constitution of 1848 has been for long time subject of study in constitutional and international law. The main reason resides in the peculiarities of the *Grondwet voor het Koninkrijk der Nederlanden*, that appears even more interesting given its different stages of development. Due to the incremental nature of the Constitution[130], featured by conventions and successive acts, the fundamental text has consolidated through multiple steps. Nevertheless, among the most authentic features of the Dutch Constitution we can consider: the impossibility of constitutional review of acts of parliaments, the openness towards international law in contrast with the feeble domestic constitutional identity, parliamentary sovereignty and a weak understanding of the rigid Dutch Constitution - weakened by the low relevance given to the constitutional text by the citizens and the institutions, better illustrated in section 3.4.1.

### 3.2.1 THE ORIGINS

The Dutch constitution finds its origins in a linear way by the historic timeline, going at same pace of national history and socio-political changes. Unlike those countries that found their constitutional origins in revolutionary moments, such as France, as seen in section 2.3.1, the linear and steady evolution of the Dutch Constitution makes it difficult

[130] As defined by Besselink in Fundamental Structures of the Constitution of the Netherlands, the incremental nature of the Constitution is referred to the continuity of the constitutional text, which is influenced by the cumulative events in the Dutch history. Eventually, constitutional conventions, such as the impossibility for the Senate to block a legislation only on political reasoning, consolidated during time, bringing new unwritten changes to the constitutional approach, that mostly operate when the cabinet is created.

to date back to its first original democratic version, but the starting point can be placed in between the issuing of the 1814 version and the one of 1815[131]. The adoption of a new version was triggered by the irregularities arose in following the procedures for constitutional amendment: the revised form of 1815, indeed, was needed as to take stock of the annexation of Belgium by the State of the United Netherlands according to the Congress of Vienna, and as resulted from the consultation between Belgian and Dutch representatives. With the new geographical reality, William I became king of the "Kingdom of the Netherlands", and eventually found his legitimacy in the Constitution of 1815. Belgium subsequently left the Kingdom in 1840, requiring the drafting of a new *Grondwet*, which will feature more democratic features with respect to the ones of 1814 and 1815, both far away from the modern assumption of democratic constitution given the obstructive presence of a monarchy that limits the popular rights and the parliamentary power. Still, with the 1840 Constitution, William I maintained his autocratic rule as the constitution foresaw complete freedom of action and legislation by means of royal decrees[132].

### 3.2.2 THE FIRST DUTCH DEMOCRATIC CONSTITUTION: THE VERSION OF 1848

The system began to change with the introduction of criminal responsibility of ministers, that paved the way to the adoption of political responsibility in the Constitution of 1848. With the amendments of articles 75 and 77 of 1840, ministries were deemed responsible for all acts assisted or performed that would harm the Constitution or an Act of Parliament; in case of infringement, or what purports to be, the Supreme Court is the body with the duty of solve these cases[133].With these amendments, the authoritative decision-making process until then followed of the king could no more be practiced; forcefully ministers would be involved as both acts of parliaments and royal decrees needed their countersignature. By seeing his sovereignty undermined, William I abdicated to his son in 1848. The latter asked in 1848 for an opinion of the Lower House, the second chamber,

[131]Besselink, L. F. M., The Netherlands, Fundamental Structures of the Constitution of the Netherlands, 2006, 2
[132]Besselink, L. F. M., op. ult. Cit, 7
[133]De Lange, R, *Political and Criminal Responsibility* in *Electronic Journal of comparative law*, vol 6.4, 2002

on whether a deeper reform to the constitution was needed or not. This move has not to be taken has a pure act of kindness of the sovereign; instead it has to been understood in the context of profound change that Europe experienced in the second half of 19th century. The international environment of revolutions and uprisings in several European countries, that sought to banish the authoritative rule of their sovereigns, made understand William II that losing some of his superior jurisdiction was a better compromise than giving up the throne.

A committee for the drafting of the new Constitution had been appointed by the King and led by Thorbecke, a liberal statesman. The final proposal foresaw the method of appointment of members of both Houses by means of direct elections, political responsibility of ministers and the possibility of dissolution of the Houses by royal decree. The amendment will be accepted later the same year, finalizing major changes in the structure of the Constitution and of its government.

### 3.2.3 THE MODERNIZATION OF THE *GRONDWET*

Only in 1860s the governmental framework will assume a mature parliamentary form, on the occasion of a conflict arose on the budget for financing Foreign Affairs: the range of political ministerial responsibility had been applied to any practice of sovereign power[134], strengthening the checks and balance activities of the Parliament; furthermore, when this body expresses a motion of censure, the cabinet had to quit[135].

In its incremental progression, the Dutch Constitution only saw the reaching of the democratic right to vote with the universal suffrage in 1917, broadly in line with other European Constitution. This political and social barrier to political participation in public life stood up for a long time consequently to the "*de schoolstrijd"*. This was the name of the Dutch school struggle lasted from 1848 to 1917 and concerned over the methods of public financing of the schools, constituting a major factor of bargaining in the admittance

[134] Besselink, L. F. M., The Netherlands, Fundamental Structures of the Constitution of the Netherlands, 2006, 11
[135]Besselink, L. F. M., op. Ult. Cit., 11

of the universal suffrage. According to the constitution of 1848, no state subsidies could be offered to schools that do not fall under public authority[136]. The equalization of the financial subsidies was eventually reached with the constitutional amendment of 1917, that also led the way towards the achievement of general male suffrage and proportional representation, in a political compromise that molded the Christian party on the suffrage by ensuring subsidies to Christian schools. Finally, in 1922 the *Grondwet* recognized the right to vote to female citizens, and so enshrined universal suffrage. The amendment of 1917 also modified the powers of the Parliament in international matters. Once again, with the amendment came a new limitation to the executive powers: declarations of war and finalizations of treaties must be approved by the assembly. The new conduct foresaw the attempt of conflict resolution by pacific means before considering the actual conflict; but on the other hand, the reform failed to effectively increase the powers of the Parliament on international treaties: soon the government restricted the Parliament's operational range by distinguishing the concept of "treaty", for which parliamentary authorization to ratification was required, from the one more broad of "international agreement" that only needed to be notified to the Parliament, with which most of the acts were labeled[137].

Starting from this major turning point of 1917 that gave the foundations to the modern constitution of Netherlands, the *Grondwet* underwent different stages of minor amendments, and eventually consistent attempts of modifying its structure.

## 3.3 ADAPTATIONS AND ATTEMPTS OF MODIFICATION

After the traumatic times of the Second World War, which saw the expatriation of the Dutch government in London since 1940, the constitutional texts regained priority in the Dutch government agenda Even though prominent changes to the Constitution were reached only by 1983, from 1950s the Netherlands experienced a period of constitutional fervor and ideology ferment by means of Dutch State Commissions. The *staatscommissie*

[136]Besselink, L.F.M., op. ult. Cit., 12
[137] Besselink, L. F. M., The Kingdom of the Netherlands In *Constitutional law of the EU member states, Kluwer*,2014, 1197.

is an ad hoc advisory body requested by royal decree. The Commissions of 1950 and 1966 resulted in a failure in terms of mere achievements, as their proposal had always been refused by the Parliament; the only exception is represented by the constitutional amendment of 1953 that enlarged the parliamentary scope of action in international matters, fixing the malicious provision of 1922. In the first *staatscommissie* the main aim was to release a report on the possible subjects of revision of the Constitution. The second one resulted from the European turmoil of the second part of the 1960s, but especially from the pressures induced by the *Democraten66* committee. The committee of 1967 intensively investigated on the method of appointment of the prime minister by means of direct elections and on the consequent modification of the proportional representation proportional ratio, in force since the enforcement in the Constitution of universal suffrage of 1917[138] . The commission finally decided to maintain the proportional system but suggested the introduction of electoral districts in the elections of the Lower House, but the proposal was not been accepted by the Parliament.

In 1972, without the need of the *staatscommissie,* the *Grondwet* underwent another reformist attempt, which revealed to bring only minor changes and esthetical solutions, such as the modernization of the language of the text. It is important to remark that in this process of constitutional *maquillage* and maintenance, the chapters of constitution had been reorganized with the introduction in the first chapter of the fundamental rights, because of the *Cals-Donner* Commission bids.

With the amendment of 1983, the Constitution was given the structure that still keeps today: since then minor modifications to the *Grondwet* had been approved[139], without aiming at redefining the core fundamentals and maintaining it as the version currently in force.

[138] As specified in Besselink, L. F. M., The Kingdom of the Netherlands In *Constitutional law of the EU member states*, The committee proposed a new version of Art.42 of the Grondwet stating in his first paragraph that: " Elections are based on proportional representation within the boundaries established by act of parliament. An act of parliament can provide that with a view to elections of each of the houses of parliament of the country shall be divided into separate electoral districts in each of which at least ten members shall be elected."

[139] Article 139-142 of the *Grondwet* regulates the procedures for the revision of legislation. The procedures are contained in article 137,138,139 that define the mechanism for the first reading, the second reading and the ratification.

It is a truism to remark that with the new geopolitical scenarios erupted from the process of the decolonization, changes to the Charter of the Kingdom of Netherlands and the *Grondwet* were necessary: the shift of authority, or in some case the independence reached by ex-colonial country, required the cancellation of any referral to the former colonies from the two documents and the abolition of the obligations deriving from them[140].

Before moving to the current legal and judicial system of the Netherlands, we take in consideration three topical cases of constitutional modification that have to be analyzed a little deeper to better understand the development of the Grondwet.

### 3.3.1 *STAATSCOMMISSIE-CALS/DONNER*

As mentioned above, the *staatscommissie* Cals/Donner of 1967 focused mainly on the revision of the electoral legislation, which failed, and then gave prominence also to the general revision of the Constitution, task addressed by the sub-committees.

It originates from the decision of the Prime Minister De Jong to establish an *ad-hoc* state commission for the revision of constitutional and electoral legislation[141]. In his installation speech, the Prime minister stressed the constitutional function of this body and that this organ is the result of the popular request for a constitutional renewal. This *staatscommissie* is peculiar: it was meant to be a tool for the enhancement of the communicative relationship between the Parliament and the citizens and it has not to be understood as the traditional form of *staatscommissie*, that involves running politicians, given the fact that the one of 1967 excluded active politicians, differently from the standards.[142] The committee evokes the names of its presidents: the former Prime Minister J. Cals and AM Donner, a lawyer.

[140]Besselink, L. F. M., The Netherlands, Fundamental Structures of the Constitution of the Netherlands, 2006, 17

[141] Acts of the Lower House,18/04/1967, 27.

[142] The Staatscommissie of 1967 included non-politic actors such as Dr. M. Albrecht (entrepreneur), Dr. N. Cramer (former parliamentary journalist, lecturer), DHM Meuwissen (scientific assistant), Dr. H. Daudt, Dr. D. Simons, J. Gruijters, Dr. H. Jeukens, J. van der Hoeven (professors).

The outcome of the commission's work is divided in three main reports: the first one concerning the electoral law and system, the second one on the revision of the constitutional text and the final one, released in 1971, which includes many provisions and reviews that will see the light in the general revision of 1983.

For the sake of our analysis, we pay focal attention to the role played by the second report about the constitutional codification of several fundamental rights, which lacked a proper constitutional framework in the previous versions of the *Grondwet.*

During the drafting of the second report, the commission decided to split into three different subcommittees, each of them taking over a specific constitutional subject. The first one focused on the review of fundamental rights, the Subcommittee II analyzed chapter 2 and 4 regarding the Parliament and the governmental functioning, while the last group evaluated chapter 5, on governance and legislation[143].The first task kept quite busy the whole *staatscommissie:* the plenary decided to suspend the activities until the releasing of the report of the *Subcommissie I*: this is quite revealing of the importance of its activity. After a first reading of their report in 1969, the government asked for another report, this time including the rights proposed by the government, to be read before the elections of 1971. In June 1970 the Subcommittee presented the refreshed report.

With the final report of January 1971, the task of the *Cals/Donner staatscommissie* was finally concluded after four years of activity. The final report handed by the commission to the Royals in 1971 will see its Second Report's recommendations already included in the constitutional revision of 1972, while the rest of them will provide the basis for the last substantial constitutional revision of 1983.

### 3.3.2 HALSEMA PROPOSAL

In 2002, Green's Party member, and now Amsterdam's first female mayor, Femke Halsema submitted a private bill in order to amend the *Grondwet*. The subject of the modification concerned the ban of the activity of constitutional review of legislation. The

[143]Eindrapport van de Staatscommissie van Adviesinzake de Grondwet en de Kieswet, ingesteldbij Koninklijk Besluit van 26 augustus 1967, nr 1, 1971.

bill renamed later as the "Halsema proposal"[144], aimed at reconsidering the use of this practice in limited contexts. According to the bill, constitutional adjudication of legislation should be applied mostly in the fields of civil and political rights, exempting the economics one as witnessed by the selection of ban exemption cases made in the first chapter of the Constitution[145]. This is also understandable by considering that the bill foresees the operational range of review limited to subjects of fundamental rights, without taking in consideration other topics that may conduce to conflictual situations, such as in the case of the legislative procedures and the exercise of parliamentary powers. The bill proposed the setting up of a decentralized mechanism of constitutional review, and so basically staying on the same page with the treaty review mechanism[146].

It then took until 2015 for the proposal to be considered at second reading, but the required two-thirds majority could not be reached, which once again brought the procedure to a halt. In 2018, the House finally decided that the proposal had to be deemed to have lapsed due to the long duration of the treatment.

To be more precise on the procedure followed, the "Halsema proposal" received the approval of the Lower House in 2004 and the one of the Upper one in 2008. The latter did not derive from a homogenous consensus: the bill passed with one vote of discrepancy and saw the government's support disappear. After this episode, the proposal waited for a long time for its second reading, as previewed by the *Grondwet* in Article 87. The second reading started only in 2015, but due to the low chances of reaching the 2/3 majority, the procedure stalled again. The topic came relevant once again in 2017, when an opinion on the status of the "Halsema proposal" had been requested by the Lower House to the Council of the State. The advisory opinion of the *Raad van Staate*, the Council of State, confirmed what had already been inferred by some members of the *Tweede Kamer*[147]: the bill has to be considered lapsed[148], expired in time. The reasoning

[144]Kamerstukken II, 2001/02, 28 331, no. 2.
[145]Kamerstukken II, 2001/02, 28 331, no. 2., Article II "However, laws do not apply to the extent that this application is incompatible with Articles 1 to 17, 18, first paragraph, 19, third paragraph, 23, second paragraph, 54, 99, 113, third paragraph, 114 and 121 […]". Therefore, the prohibition cannot be enforced on these provisions concerning civil and political rights.
[146] Parliamentary Proceedings II,2002-2003,28,331, no.9,16-18
[147] Lower House, second chamber
[148] Timing and deadlines for bill's proposals is established by the Presidium, as foreseen by Section 95 of Rules of Procedure, House of Representatives of the Netherlands, 27 March 2012: "After a bill has been

stands in the delay on the practice of second reading. The Council of State affirms that suspensions of the second reading can be admitted in special circumstances[149],, but this is not the case for the "Halsema proposal". The Council also insisted that of the Halsema proposal should be submitted by the President of the Chamber as soon as the new Parliament is summoned, in a regime of smooth handling[150]. The Chamber easily accepted the opinion of the Council and the bill was officially withdrawn in 2018.

It has to be considered that seven years in between the two readings is a considerable amount of time, in which policies and political contexts might have changed. Nevertheless, this is by no mean happened by accident, it is the deterrent role of the bureaucracy in the constitutional petrification process. The task played by bureaucracy might find positive acceptation in Weber's view: bureaucracy must be "an iron cage" that rely on teleological assumption and rationality[151], not considering external factor or pressures in their decisions. Also, bureaucracy can be understood as a tool to refrain any chance of aversion, a grant for order, by limiting or not conceding chances for governmental change[152]. Bureaucracies might tend to opt for policies that are more likely to be risk-averse, rather than strive for a riskier policy adoption, even if it consists in a better benefit for the community with respect to the riskless one[153]. Other reasons can be found for change obstruction to change, such as: political myopia, or short-sighted politicians that are not able to understand a process of change on the long term, the lack of legal and social awareness of politicians that are not prepared to take on certain subjects and prefer to leave things as they are, lack of leadership in the decision making, conservatism and the willingness of a country to maintain its status quo[154]. Therefore, despite seeking continuity and stability, bureaucracies might present resistance or deterrent tools that do not benefit the country.

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referred to a Committee, the Presidium may set a time limit within which the Committee must adopt its report [...]"

[149] As foreseen in Section 105 of the Rules of Procedure, House of Representatives of the Netherlands, 27 March 2012: "If the bill has been altered in the course of the debate or as a result of the voting, the House may decide to postpone the final vote until a following sitting […]"

[150]Parliamentary document 32,334, no. 11

[151] See Weber, M, The Protestant Ethic and the Spirit of Capitalism, New York, Scribner, 1958

[152] See Feeney, MK, & DeHart-Davis, L., Bureaucracy and public employee behavior: A case of local government. Review of Public Personnel Administration. 2009 Dec;29(4):311-26.

[153] Ritchie, F., Resistance to change in government: risk, inertia and incentives, 2014, 15

[154] Demir, I. & Aktan, C.C., Resistance to Change in Government: Actors and Factors That Hinder Reform in Government. International Journal of Social Sciences and Humanity Studies, 8(2), pp.231-244

### 3.3.3 THE LATEST *STAATSCOMMISSIE*'S RESULTS

In the last ten years, two relevant *staatscommissie* activities were produced and are worth of consideration in relation to the analysis of constitutional adjudication in the Netherlands.

The earliest one, of 2009, namely the *Thomassen Staatscommisie,* had been addressed with the task of considering possible review for the enhancement of the access to constitutional justice and of the relationship between treaty provisions and fundamental rights. Specifically, subjects of investigation were the introduction of a constitutional preamble, the need for a clearer contextuality of the restrictions of fundamental rights foreseen in the constitution, the synchronization of the European and domestic legislation for a better fit.

On accessibility, the *ad hoc* advisory body suggested that the *Grondwet* should be rendered in a simpler formulation, with clearer provisions and their limitations, and its articles reduced in numbers; while the preamble should be instead substituted by a general provision describing the status of the constitution.

On the treaty matter, the Committee advised to codify in the constitutional text the basic fundamental rights foreseen by certain international agreements[155]. For instance in the case of the ECHR the right to access to justice and to litigation, have to be codified in the Dutch constitutional text, , possibly in a broader formulation with respect to the one of the Convention, for a better functioning of the coordination of constitutional law with international law[156]. Finally, the *Staatcommissie Thomassen* suggests going through the procedure of approval by the States General for the adoption of treaties containing directly effective, binding for everyone acts. The work produced did not result in a consistent effective constitutional change, but still two of the opinions were turned into law on

[155] Thomassen Staatscommissie, 11 November 2010
[156] Thomassen Staatscommissie, 11 November 2010

March 2018[157]. One concerning the inclusion of a general provision[158] in the Constitution[159]; while the second one recognizes the enshrinement of the right to a fair trial in the *Grondwet,* applied to all legal disputes, establishing the minimal level of judicial protection in line with Article 6 of ECHR.

The most recent one of 2017 regards the status of the Dutch parliamentary form of government and its possible enhancement. The Rutte II cabinet of 2017 decided for the establishment of the *Staatscommissie parlementairstelsel*, with the investigative task on the degree of political involvement of the citizenry, the decentralization of governmental duties and on the influence brought by the rising European decision-making power[160]. The report provided in 2018, called «Low thresholds, high dikes», highlights seven main topics that will be worth of the consideration of the States General. The *staatscommissie* starts by evidencing that, regarding the adjustment of the electoral system, the individual and regional elements should be strengthened in the mechanism, declarations' threshold established for the creation of a new political party should be raised in order to avoid political discontinuity and fragmentation, and finally that more electoral physical polls should be used in area with low turnout, in order to boost the participation of the citizens. On the same page, in order to strengthen people's vote and will, the commission advised the introduction of a binding referendum to repeal legislation as the majoritarian vote expressed in the State General rarely mirrors popular opinion. Political parties are considered again in the committee when it is proposed to draft an *ad-hoc* act that would regulate their activities, banning those parties that represent a menace for the

[157]Bulletin of Acts and Decrees of the Kingdom of the Netherlands, 2018, 88

[158] General provision as intended in Section 2 of the *Eerste Kamer der Staten-Generaal, Kamerstuk 34516, nr. E, 2018*:" The general provision emphasizes the guarantee function of the Constitution in relation to fundamental rights and the democratic constitutional state. These include the framework within which the rest of the Constitution must be understood. The aforementioned clarification thus has significance in the light of the constitutional and legal function of the Constitution and sends out an important signal. That signal binds the constituent to the obligations arising from the general provision. It is precisely this relationship that has been made explicit that gives the general provision its function and added value compared to the current situation. The government agrees with members that the proposal alone is not enough to guarantee fundamental rights and the democratic constitutional state. More is needed for that, but the proposal does contribute to that. Moreover, the clarification in the general provision is in line with the government's view as expressed in the coalition agreement, namely that our Constitution is not a symbolic relic of the past, but a sign of the pride, freedoms, rights and duties that belong to the Netherlands, Dutch citizenship and the democratic constitutional state. The Constitution deserves maintenance and disclosure, to Dutch people and to newcomers. but the proposal does contribute to that."

[159]Eerste Kamer der Staten-Generaal, Kamerstuk 34516, nr. E, 2018

[160]This cabinet was created by The People's Party for Freedom and Democracy and the Labor party after the 2012 parliamentary elections.

constitutional democracy of the state, limiting the amount of possible donations to parties and politicians campaigns, also in order to operate in a more transparent environment.

Finally, the *Staatscommissie* evaluates other two possible major modifications: the right of delay of the Senate in legislation amendment, that will give the possibility to send back proposals to the Lower House and to have the final say on them; and the institution of the Constitutional Court[161]. The proposal to set up a Constitutional Court represents a turning point in Dutch judicial culture, but the reason for this new establishment is understandable when considering the impulse of update and standardization in constitutional law[162]. According to the proposal of the *Staatscommissie,* the Constitutional Court would exercise an *ex-post* review in order to establish whether a law is in conflict with the *Grondwet* or not. The body would be able to test constitutionality of legislations that infringe only determined spheres, like freedom of expression and religion, the right of privacy and to equal treatment[163]. The Court would also be able to review treaties that discord with the Dutch constitutional text If the body finds a violation, then the conflicting legislation is annulled. Moreover, the Constitutional Court would also decide on the ban of a political party and on disputes between board coming from diverse governmental authorities[164]. Despite having thought to the implementation of direct access to the Constitutional Court, the Staatscommissie suggests the establishment of mandatory preliminary ruling, mostly because of litigations costs with the adoption of direct access[165]. The Court would be composed by 5 members in charge for 12 years, coming

[161]Commissie Remske, Eindrapport«Lage drempels, hogedijken», 13-12-2018
[162] See Chapter 6 Section 6
[163] The full list is contained in the *Staatscommissie* report and evidences the following articles: 1 (equal treatment/discrimination prohibition); 2, fourth paragraph (right to leave the country); 3 (equal eligibility for appointment to public service); 4 (universal suffrage); 5 (right of petition); 6 (freedom of religion and belief); 7 (freedom of expression); 8 (freedom of association); 9 (freedom of assembly and demonstration); 10 (respect for and protection of privacy); 11 (inviolability of the person); 12 (inviolability of the home); 13 (privacy of communication); 14 (right to indemnification following expropriation); 15 (safeguards in relation to deprivation of liberty); 16 (no punishment without prior statutory determination of the offence); 17 (access to a court designated by law); 18 (right to assistance in judicial proceedings); 19, third paragraph (right to free choice of work); 23, second, third, fifth, sixth and seventh paragraph (freedom of education); 99 (exemption from military service on the grounds of conscientious objections); 113, third paragraph (sanction of deprivation of liberty only to be imposed by a judge); 114 (prohibition on capital punishment); 121 (trials to be held in public); and 129, first paragraph (direct election of members of the provincial councils and
municipal councils).
[164] Commissie Remske, Eindrapport«Lage drempels, hogedijken», 13-12-2018, 144
[165]Commissie Remske, Eindrapport«Lage drempels, hogedijken», 13-12-2018, 152

from the external juridical branch and the Dutch Supreme Court[166].. This feature needs to be strengthened given the recent lowering of the quality of legislation for wrongful legislation procedures and the increased number of legal challenges of citizens before courts given the high level of right's protection.[167]

## 3.4 A "PETRIFIED" CONSTITUTION?

The *Grondwet* is famous in the world for its constitutional longevity, the actual lifespan of the document is 205 years now. The reason behind this amazing achievement is political continuity, which has been possible also thanks to long-standing enforcement of the fundamental law. The continuum has been possible also to Article 120, the major tool that defines the rigid character of the *Grondwet*. The notion of flexible or petrified constitution finds its nature in the distinction made upon different constitutional amendment procedures[168]: a flexible one will provide modify the constitution through the legislative ordinary procedure; while the petrified ,in the Dutch adoption, have a difficult, and usually long in time, procedure for applying changes, in a more limited operational range[169], as in the case of Article 120[170]. Precisely, the notion of "petrified" constitution derives from Italian legal doctrine, that so labeled the *Statuto Albertino*[171]. At the beginning of its legislative life, this text expressively remarked the impossibility to change the document; conversely the text had been wholly suspended during the fascist era, even though the *Statuto* has never been emended.

Broadly speaking, rigid constitutions are written organic legislations deemed superior to ordinary law, that requires a special procedure for amendment, aiming to ensure

[166] Commissie Remske, Eindrapport«Lage drempels, hogedijken», 13-12-2018, 157
[167]Samenvatting Staatscommissie parlementairstelsel, 2019
[168] A.V. Dicey, The Law of the Constitution, Oxford University Press edition, ed. J.W.F. Allison, 2013, 69; Ryan, M, & Foster, S., Unlocking Constitutional and Administrative Law ,3d ed, Routledge, 2014, 16.
[169] The procedures are described from Article 137 to 142 of the Grondwet, prescribing two readings approved by both Chambers with 2/3 majority and the ratification by the King.
[170] Art.120, Grondwet: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."
[171] The *Statuto Albertino* was the constitutional text given by Charles Albert of Sardinia to the Kingdom of Sardinia in 1848. The Statute has been later adopted as the constitution of the newly formed unified Kingdom of Italy.

governmental and political stability and to prevent the majority in power from overturning alone the fundamental text. These solutions were seen as favorable against the temporary social changes or populist risings that would harm the democratic status, but also the historical legal heritage gained through the years, as in the Dutch incremental case. The advantages offered by rigid constitutional texts are no more retainable effective as proven by the scenarios seen in Hungary, Polonia and Italy; countries that are experiencing populist uprisings and governments and a worsening of their democratic status. On the other hand, petrified constitutions present a problematic nature due to the same ban on constitutional amendment; as there can be changes or events that absolutely requires a modification.

Conversely, it is possible to define a flexible constitution as a written legislation that do not enjoy full supremacy with respect to ordinary law. This different hierarchy permits opens a path towards the amendments and the practice of the judicial review of legislation, not always automatically included in the procedures as in the case of United Kingdom and Israel that foresees parliamentary review of legislation. The flexible model of constitutional text is much more incline to generational and social update, that usually strengthen the role of the citizens, taking part in the renewal process or trying to change the document according to their will.

The dichotomy must be understood as a consequence of a constitutional distinction of a higher level: generational change and constitutional independent self-determination. In the first case, we recall Rousseau's social contract theory and Jefferson's idea on generations bounded constitutions. In the other case, the right of self-determination of the constitution regardless the possible influence of the political and social context in which it is enforced.

In the former, the concept is clear in Jefferson's letter to Madison, in 1790, where he firmly states that constitutions should have an expiry date. The third president of the United States took this conviction from Rousseau's thought, and more broadly from the French Revolution. The social contract of the French philosopher foresaw a society functioning on the basis of the general will, a mechanism of social transformation in

which the desire of the individual seeks benefits for the whole community.[172]In the context of social transformation where «As the earth belongs to the living, not to the dead, a living generation can bind itself only[173]» it is easy to understand why Rousseau, but even Jefferson, insisted on the need of a constitution that molds according to the new exigencies of the new generations for the incoming and unpredictable future.

While constitutional self-determination and its perpetual nature can be seen during the ratification procedures of the American Constitution, where Madison counters Jefferson's proposal by identifying a three folded diversification of acts of a political society, with at the top the government's Constitution. In this given framework, contemporary citizens will have to deal with each other in a scheme where they derive their duties and rights from the one conceptualized by the ancestors. Indeed, Madison states that «There seems then to be a foundation in the nature of things, in the relation which one generation bears to another, for the descent of obligations from one to another[174]»

The *Grondwet* might fall in the "perpetual constitution" category. Also consider that,since 1814, Netherlands has been a Kingdom, so the choice of this rigid pattern highlights also the sovereign's will of giving the citizens a low level of engagement and participation the political life; law and politics remain for elites and technocracies, avoiding any kind of influence by the lower social classes.

With the pending *Staatscommissie parlementair stelsel* started in 2017, it has been suggested the introduction of the constitutional court. If the proposal is accepted by the State General, the nature of Dutch constitutionalism and of the constitutional text will change remarkably, admitting the existence of such institution as a constitutional court. Nevertheless, 200 years of constitutional approach and interpretation will not be vanished by a simple amendment. The rerouting towards a stronger rule of law has also to be understood in the new context of judicial globalization[175]. In our interconnected era, it is not rare to see judges contemplating foreign national legislation and case law for

[172]Living the General Will: Formation, Operation and Dissipation of General Wills in Rousseau and Intentional Communities, p.2
[173] Thomas Jefferson To James Madison Paris, Sep. 6, 1789
[174]James Madison to Thomas Jefferson, February 4, 1790.
[175] See: Silverstein, G, Globalization and the Rule of Law: 'A Machine that Runs of Itself?' in *ICON - International Journal of Constitutional Law*, vol 1, number 3 ,2003, 427-445; Cassese, S. The globalization of law NYU Journal of International Law & Politics, 2004; Kumm, M., The legitimacy of international law: a constitutionalist framework of analysis in *European Journal of International Law*, ;15(5), 2004.

inspiration, comparing different domestic methodologies and sometimes even for the resolution of a case. This is especially the case of the Netherlands, where both Highest Courts, namely the *Hoge Raad and the Afdelingbestuursrechtspraak,* intensively consult foreign constitutions and legislation, so enriching their legal knowledge but also measuring their quality standards with the ones of the selected countries[176]. Finally, judges use a comparative framework to analyze the evolution of the law, in the international environment, in order to understand its new requirements and how to cope with it, such as in the case of EU law indirectly forcing the adoption of the decentralized system of judicial review in the domestic court[177].

### 3.4.1 THE DUTCH UNDERSTANDING OF THE CONSTITUTION

The uniqueness of the *Grondwet* is not always appreciated by Dutch citizens, that actually deal with it as a matter of low importance or, to some extent, as if it were an "invisible" text. It is possible to infer this statement by looking at the results of the survey conducted during the 2009 studies on the Constitution led by the government. The majority of the citizens, 69%, deem the Constitution as a fundamental element in a democracy; only the 20% admitted not knowing it and the remaining percentage consider it of mild importance[178]. As witnessed by Oomen, they support its high relevance without knowing its content[179]. The fact that most of the people retain the presence of a Constitution essential does not automatically means that citizens are satisfied with it. The main sources of dissatisfaction are: 1) some remaining archaic formulations of the text that undermine the accessibility of the *Grondwet,* 2) the legal discontinuity given by the unwritten nature of the document that cannot give clearly provision on specific and relevant issues, 3) some constitutional and fundamental rights are not comprehended in the document not permitting the complete enshrinement of these obligations in the *Grondwet,* and

[176]Mak, E., Globalization of the National Judiciary and the Dutch Constitution, 9(2), Utrecht Law Review, 2013,41-42.
[177] Mak, E, op.Ult. Cit.,41; see also Chapter 2, Section ,2 of this research
[178]Oomen, B., Constitutioneelbewustzijn in Nederland: van burgerzin, burgerschapen de onzichtbareGrondwet, 2019, 71
[179]Oomen, B., op. ult. Cit., 72

consequently considered unpractical, unpragmatic and too rigid for a correct functioning.[180]

The government currently seeks to fix the relationship between citizens and *Grondwet* by looking at solutions for a more active citizenship and for a stronger rule of law. To strengthen the rule of law increases the visibility of the constitution.

As mentioned in the previous section, one of the means for corroborating the rule of law, understood as a practice to avoid arbitrary form of government and to foster equal rights among citizens is admitting the possibility of referendum to amend the legislation harmful to the Constitution. Interestingly, only the 27% of the population is satisfied with the current pattern offered by Article 120, stating that "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts[…]", while the 60% backs the idea that also ordinary judges should be able to review the acts adopted in breach of the Constitution[181]. This data permits us to look at the pending S*taatscommissie's activity* with moderate positivity, as the achievement of a stronger rule of law will give more visibility to the Grondwet and partially contribute to the mission of the Dutch government.

Still, at the present state of the Grondwet there are valid reasons to consider the constitution irrelevant as a living tool[182]and explain the development of the legal practice out of it. The peculiar prohibition on constitutional review does not apply when the Acts are reviewed *vis-à-vis* the provision contained by the ECHR[183] ,while the lack of precision in the constitutional provision often refers back to the justifications issued by the ECHR; allowing relatively greater consideration of this text with respect to the Grondwet, without precluding the superior hierarchical order of the Grondwet, but making the constitution obsolete and unused[184].

[180] T. Barkhuysen, De Nederlandse Grondwet geëvalueerd: anker of verdwijnpunt, Alphenaan den Rijn, Kluwer, 2009, p. 81-82
[181]Oomen, B, & Lelieveldt, H, *Onbekend maar nietonbemind: Wat weetenvindt de Nederlander van de Grondwet?* in Leiden Journal of International Law, ed. 83, 2008, 577-578.
[182] Gerards, J. (2016), The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It in *Revue interdisciplinaire d'études juridiques*, volume 77(2), 207-233
[183] Oomen, B., Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands. Revue interdisciplinaire d'études juridiques., 2016, 245
[184]Oomen, B., op. ult. Cit., 245

## 3.5 THE CONTROVERSIAL ARTICLE 120

Starting from 1848, the Constitution has prohibited the constitutional review of legislation. This provision is enshrined by article 120 that states:

«The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.[185]»

This provision underlines the strong position of the legislature in the Dutch constitutional system, which has the final say on constitutional interpretation. By any means however it can be said that Dutch laws do not undergo through a process of constitutional check. This action is taken in the preliminary stages, before the effective promulgation of the act takes place, by the Council of States with its advisory power and the States General, the Parliament. Section 120 is valid also for the Charter of the Kingdom of Netherlands of 1953, a document that regulates the relationship among the four countries constituting the Kingdom of Netherlands, Aruba, Curaçao, Netherlands and Sint Maarten, as a consequence of the *Harmonisatiewet*, as we are going to see in section 3. Nevertheless, the prohibition contained in Article 120 admits exceptions. For instance, primary legislation can still undergo to judicial examination according to article 93, by any judge in Netherlands, according to article 94, when it falls in the spheres of international law. Given the written nature of constitution and its openness towards international legislation, sometimes it is hard to distinguish the domestic from the international branch. When there is no intertwining between the legislations, the only way to bypass the prohibition on the parliamentary acts stated by article 120 is to recur to a constitutional amendment, as described meticulously in Article 137 and 138.

Eventually, Dutch law does not recognize the ban on constitutional review when the *contra legem* doctrine applies[186]. According to this assumption, a court can opt for the refusal of the application of the parliamentary act if it can spring in consequences not

[185]The Constitution of the Kingdom of the Netherlands, 2008
[186]Van der Schyff, G., *Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far? In* German Law Journal, Vol. 11, nº. 2, 2010, 277

predicted by the legislation. This is the case when the act can conflict or infringe the fundamental rights predicted in Chapter one, or in the case of tax laws, and the restriction of the right has to be intended, even if not voluntary, by the legislation and cannot be understood as a simple side effect of the ruling, otherwise too many cases would fall in this category and it would be used as a solution to circumvent article 120. Eventually, this might not be even possible as it can be questioned whether the *contra legem*[187] assumption contravenes Article 120[188]. The doctrine does not confer any powers to the judiciary to discard the provision wanted by the State Generals but permits to courts to distinguish the true meaning and interpretation of legislation from the misleading one actually resulting from the plain words of the parliamentary act. The reason for this procedure stands in the fact that by enabling this practice and the turning down of the parliamentary will a conflict with Article 120 would arise.

It is now of our interest to focus on a *contra legem* judgement that created the case law for the bypass of the ban. In the landmark case of 1978 regarding the discretionary power of tax administration in applying the tax legislation[189], the tax inspector raised the doubt whether the tax[190] should have been strictly applied, as the trust enshrined in the valuation does not conform to the unwritten legal principle of trust. The Supreme Court interpreted the case by informing that the court might dismiss the application of a generally binding, formal legal provision in the eventuality that a strict application of the law would discord with an unwritten legal principle. This conduct has to be applied in contexts where the infringement was not evaluated and the law conflicts in the peculiar case with the unfolded one. If the formal law is relentlessly applied, a *vulnus*[191].

Shifting our focus now on non-primary legislation, it is possible to denote that here the ban does not apply, even if the matter is included in regional, provincial or executive norms. Indeed, it is possible to courts to review such norms only when they do not also require the revision of an act of parliament in the procedure. On the opposite, when courts are not required to include the revision of an associated act of parliament, also known as

[187] The contra legem doctrine derives from the Latin words of "against law". The doctrine is constituted by the opinions of the jurists.
[188] Van der Schyff, G., op. ult. Cit, 278.
[189] Supreme Court 12 April 1978, no. 18 452, BNB 1978/135
[190] HR 12-04-1978, ECLI: NL: PHR: 1978: AC2432, n.t. M. Scheltema (Abbb contra legem I)
[191] ECLI: NL: HR: 1978: AC2432, Judgment, Supreme Court (Tax Chamber), 12-04-1978; ECLI: NL: PHR: 1978: AC2432, Conclusion, Supreme Court (Advocate General), 12-04-1978

parent act, they are not bound by article 120's ban. These circumstances usually take place with provincial and regional provisions under direct authority of the Grondwet, and so that do not need any action from the Parliament to legislate for the local or provincial level.

### 3.5.1 ON COSTITUTIONAL REVIEW: THE PROCEDURE.

Given the nature of the prohibition on constitutional review on of legislative acts, the only alternative for letting the Grondwet evolve is to seek the approval of constitutional amendments. The procedure is divided in two stages, enshrined by Article 137 and 138, which are listed in the eighth chapter of the Constitution and that focuses on the revision of the constitution. These articles are the main reason for the rigidity of the Dutch constitution. It is worth to recall that, according to Ryan and Foster, a constitutional text can be defined as rigid when there is particular path to be followed, that are legislative or constitutional impediments, in order to amend the constitution. The process of amendment can be hindered by recurring to national referenda or to special voting majority in Parliaments[192]. The first one requires the following: a bill, under the form of act of parliament, containing the proposal for a constitutional amendment must be passed, the Lower House may divide the long bill in single issue bills and shorter ones; once the amendment is approved the *Tweede Kamer*[193] is dissolved after the publication of the act of parliament containing the proposal for the constitutional amendment is published[194]; at this point a new Lower House has to be elected and the two chambers of the States General will proceed with the second reading of the initiative bill, after having passed the first one, and vote for its acceptation if a two-thirds majority is reached. Again, the *Tweede Kamer* will proceed to the division of bill into multiple ones if the document receives the two-thirds majority vote needed or if there is a bill proposed directly by the sovereign or someone on his behalf[195]. After this last provision, the procedure continues in Article 138, where it is stated that bills for constitutional amendment that passed the

[192] Ryan, M, & Foster, S, Unlocking Constitutional and Administrative Law, 3d ed.: Routledge, 2014
[193] The Lower and second Chamber
[194] Article 137(3), The Constitution of the Kingdom of Netherlands, 2008
[195] Article 137(5), The Constitution of the Kingdom of Netherlands, 2008

second reading, will see the introduction of further provisions by means of an act of parliament whereby: locate the adopted bill and the unamended provision one consequential to the other as requested by the procedure, divide the chapters, sections, articles and the heading according to the substantial changes made in the previous stage; then finally the adjusted bill will be presented before the State General and will be passed if reaches a majority of two-thirds of the members[196].This procedure is still loyal to Thorbecke's vision that sought continuity and stability in 1848, proving that the mechanism for the constitutional amendment in Netherlands is still complex and rarely successful[197] and so maintaining its status of rigid constitutional text according to Ryan's and Foster's vision[198].

As we have seen in the historic timeline of the Grondwet, major pressures have been repeatedly exerted through for an easier procedure of constitutional amendment and multiple options have been explored, as in the case of the Halsema proposal of 2002.Despite the several proposals made in the recent years, including the pending one of 2017, the Dutch judicial branch never experienced any substantial change.

The constitutional stall generated by the complex procedure for the amendment has never represented a big obstacle to the democratic performances of the *Grondwet*. That is, an explanation for the immovability of the Dutch government on the matter has to be found on the evidences that the Dutch system, with its openness to international law and its scarce constitutional activity , still works consistently and ranks among the best in the world for its democracy[199].

## 3.6 HOW DUTCH COURTS INTERPRET ARTICLE 120

[196]Article 138, The Constitution of the Kingdom of Netherlands, 2008

[197] On a lifespan of 204 years, the third oldest constitution in force in the world, the Grondwet has been amended only 5 times.

[198] Mark Ryan & Steve Foster, Unlocking Constitutional and Administrative Law, 3d ed.: Routledge, 2014

[199]It is possible to note that the 2018 Democracy Index of the Economist Intelligence Unit ranks the Netherlands as the 11th best democracy in the world recognizing its status of full democracy, see more at: The Economist Intelligence Unit, "Democracy Index 2018: Me Too?", The Economist Intelligence Unit, 13 January 2019.; while the Freedom House acknowledges the status of free democracy of the country by giving a total score of 99/100, see more at "Freedom in The World 2018" by Freedom House, January 5, 2018

In the previous section we gave a closer look to the procedures of constitutional amendment and how complex they can be. This can lead to the idea of the Dutch courts as "dusty" and out of practice[200]. With the provision contained by Article 120, the chances of having trials on constitutional subjects worth of the public interest are very rare. The legal parts cannot really try to back their argumentations on the basis of the fundamental rights enshrined in the Constitution, as the court could use another source for the resolution of the litigation, snubbing the *Grondwet*. Despite this mechanism, the Dutch courts still have important tasks and actually acted as proper constitutional adjudicators in certain occasions. In chronological order, it is important to remember the vital role played by the courts, for example, in the path towards the legalization of euthanasia, or when the Supreme Court finally declared no more possible for political parties to remove women from their representative offices.[201]

Despite their polyvalent nature, there are two landmarks Dutch judgments that guided the conduct of the Dutch courts through the years. The first one is the *Van de Bergh v. Staat der Nederlanden* judgement of 1961, which strengthened the prohibition of constitutional review, the unassailability of the legislation and of its review whether it is a formal or a substantive act. The latter corresponds to the *Harmonisatiewet* judgment, that established the impossibility of testing formal legislations against the Charter.

### 3.6.1 THE «VAN DEN BERGH v. STAAT DER NEDERLANDEN» CASE

The first judgement of our interest is the one delivered by the Supreme Court in the Van Den Bergh case. Van den Bergh was a member of the House of Representatives and, according to its view, because of that he was eligible to get a pension. On the matter, the General Old Age Pensions Act was promulgated in 1957 and predicted that the payment of the AOW[202] can be subtracted or withdrew when the person entitled took office as a

[200] See Gerards, J., The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It, Revue interdisciplinaired'etudesjuridiques,77.2,2016

[201]Gerards, J., The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It, Revue interdisciplinaired'etudesjuridiques,77.2,2016, 11

[202]The AOW is a basic state pension for people having the required AOW pension age and it is paid by the SocialeVerzekeringsbank (SVB).

member of Parliament. Nevertheless, the former MP lodged an appeal in cassation, justifying his discord by asserting that the AOW did not respect the constitutional procedures, not receiving a two-thirds majority by the States General and therefore lacking its legal force[203]. Given the events, it is questioned whether the constitutional review ban has to be applied to the procedural aspect of law-making too, the formal assessment. The *Hoge Raad* found that the appeal requests of van den Bergh was unfounded, as the validity of the law has crucial priority, provision enshrined by article 131, paragraph 2 of the old Constitution[204]. In this occasion, the Supreme Court also clarified that only two questions should be addressed to the formal assessment: the former, on the opportunity to consider the constitutionality of a law by interpreting the behavior of the States General; while the other focuses on whether the king has promulgated the act for its publication in the official Gazette. If both questions result in a positive assertion, then it is not essential that the act did not go through the standardized procedure of States General's approval by means of two-thirds of majority vote. Here, it is also established the practice that if the Chambers do not oppose to the new legislation, other bodies and branches have to accept it.[205]

It is interesting to see how in this context the Supreme Court severs the rigidity of the law, inviolable; while at the same time slightly enlarges the range of interpretation for the legislature regarding its procedural autonomy when the *Hoge Raad* refers to the first question to address on formal assessment.

### 3.6.2 THE HARMONISATIEWET JUDGEMENT AND THE RELATIONSHIP WITH THE CHARTER FOR THE KINGDOM OF THE NETHERLANDS

[203] Procedure foreseen for the revision of Acts of Parliament, Article 137 and 138 of the Grondwet. The AOW is part of the General Old Age Pensions Act and must undertake this procedure

[204]Article 131 of the Constitution of 1956 recites at paragraph one that "All proposals of law, adopted by the King and the two chambers of the States General, acquire power of law, and are proclaimed by the King." and in the second one that "the laws are inviolable".

[205]Van den Bergh/Staat der Nederlanden, Hoge Raad, 27 January 1961, NJ 1963/248, ECLI:NL:HR:1961:AG2059

The second case law that guided the behavior of the Dutch courts is the one of the Harmonization act of 1989, focused on the Charter for the Kingdom of Netherlands, the legal document to which the Constitution is subordinated and that regulates the political relationships among Aruba, Curaçao, Sint Maarten and the Netherlands[206]. The Charter includes provisions concerning and effecting on the whole realm, the most relevant subjects are foreign affairs and defense. The application of the act in multiple countries, at the same time, requires consultative role to the assembly of the distant countries and predicts that plenipotentiary ministers have to represent their state at *Binnenhof.* The competencies between the two texts are divided and whenever there is no provision intended by the Charter, then it is a matter subjected to the *Grondwet.* This assumption can be seen extended to the royal powers exercised in the Kingdom: if not differently provided, it is a subject matter of the *Grondwet*[207]. The *Statuut* can be said to maintain a federal character, granting a high level of decentralization within the Kingdom. The legislation aimed at establishing more expensive schools' tuitions, while regulating the status of those particular students that began to attend an additional study during the 1988/1989 academic year. With the promulgation of the acts, the relevant students would have to pay 700 guilders more with respect to the previous academic year and would have to renounce to their scholarship. The students questioned the application of the provision on their particular condition, indicating an infringement of legal certainty, enshrined in article 43of the Charter[208], but also of the principle of legal certainty derived from the unwritten fundamental principles of law, constitutional conventions. It is questioned whether an act can be applied in its procedural form when in conflict with the Charter for the Kingdom of Netherlands, known in Dutch language as *Statuutvoor het Koninkrijk der Nederlanden.* The Supreme Court replied by denying this possibility not only when in conflict with the Charter, but also when in discord with the unwritten fundamental principles of law. The Court then enriches its interpretation by admitting, as a valid

[206]Statuutvoor het Koninkrijk der Nederlanden, since now abbreviated in Statuut.

[207]Article 5(1)of the Statuut voor het Koninkrijk der Nederlanden dictates that: "The kingship with succession to the throne, the organs of the Kingdom referred to in the Statute, the exercise of the royal and the legislative power in matters of the Kingdom shall be regulated in the Constitution for the Kingdom insofar as the Statute does not provide for this."

[208] Article 43 of the Charter for the Kingdom of the Netherlands says at its first paragraph: "Each of the countries ensures the implementation of fundamental human rights and freedoms, legal certainty and the soundness of governance." And in paragraph two recognizes as a guardian of these rights the Kingdom: "Guaranteeing these rights, freedoms, legal certainty and soundness of government is a matter for the Kingdom."

exception, cases like the «Agricultural valuation» *contra legem* judgement of 1978, where the unwritten principle are deemed testable if the specific provision clashes with the unfolded rights. Apart from this rare circumstance, the *Hoge Raad* do no admit any other case in which the law can be tested against the Charter or the unwritten precepts, that is the degree with which Article 120 is applied to the Charter.

In this case we see the Dutch consistent judicial continuity, by mirroring, from the Van den Bergh case, the precepts enshrined for the prohibition of testing *Grondwet*'s acts and equalizing them in Charter. It is understandable as an act of synchronization of two sources of law, in their hierarchical order: the *Statuut can* have a higher legal rank with respect to the Grondwet, having acts that can be considered as constitutional norms[209].

## 3.7 THE BRITISH PARALLELISM

The United Kingdom is often compared and regrouped with the Dutch constitution and judicial system, in so far as they bock lack a system of constitutional adjudication. It has to be stressed that these are parallelisms rather than similarities.

Starting from the constitutional doctrine, it is widely known that United Kingdom do not possess a written and codified constitution. Indeed, the country finds its legal path in certain and peculiar judgements and provisions that guide the body of the state and its three branches. The unwritten constitution not only relies on these constitutional conventions; indeed, it is built on four different sources of law: statute law issued by the legislature, common law based on the practice of the judges, parliamentary assemblies, and works of authority; that are books released by constitutional experts and technocrats and proper influential weight in the shaping of the British legal path. In both countries, the governmental imprinting privileges the primacy of the legislature over the judiciary and the executive.

### 3.7.1 NON-PARTISAN BODIES: THE BRITISH ADOPTION

[209]Besselink, L. F. M., The Netherlands, Fundamental Structures of the Constitution of the Netherlands, 2006,30

As mentioned in the previous section, one of the fundamental characteristics of the United Kingdom government is its parliamentary sovereignty. This feature shapes guided by Dicey's understanding, that is: The Parliament is the competent body, according to the constitutional provision, for the adoption and unmaking of any type of legislation, while no other body has the authority to overthrow its saying[210].

As seen in the Dutch case, through the years the United Kingdom experiences a looser attitude towards the disclosed judicial limitation, majorly under influence of international law and under the European pressures regarding the method of compliance. In the recent times, the first main point of stir from the tradition had been represented by the accession of the of UK to the European Union[211]. At the present time the judiciary is not granted of enough power to dismiss statutes on a constitutional basis, as stated by article 9 of the Bill of Right of 1689. The task is left to the Parliament, assisted by the independent work of the House of Lords Constitution Committee. Indeed, this latter body was created in 2001, after the Wakeham Commission of 2000, and found its nature in constitutional subjects only; hence discharging the House of Lord from the task. Its practice is divided in the constitutional compatibility scrutinizing of each bill submitted to the House of Lords, and the activity of revision of law according to the constitutional framework.

In the former activity, the Committee questions the nature of the bill and whether it can mention or mine the principles enshrined in the UK constitutional system. If so, the commission can go further launching an investigation and asking to the responsible minister or body to provide further information. If there is ground for constitutional matters, the commission will then produce a report before the second reading in the House of Lords and wait for the government's reply, that must arrive within two months[212]. The nature of the report and the general interest of the commission is focused on the nature of the procedure rather than the provision in itself; that is its rightfulness, its relationship within the legal order and with the private and eventually if adaptations in the system are

[210] Dicey, A.V., Introduction to the study of law of the constitution, 10th ed, London, Macmillan, 1959, 39-40.
[211]De Visser, M., Constitutional review in Europe: a comparative analysis. Bloomsbury Publishing; 2013, 84
[212]De Visser, M., op. ult. Cit.,31

needed with the new adoption. The latter activity instead concerns the supervision of the constitutional matters on a day to day basis, given the incessant progression of an unwritten constitution. This procedure foresees the interrogation of governmental high officials on constitutional subjects until the body finds a prominent issue that is worth of a deeper inspection. The scrutiny is supported by *ad hoc* appointed temporary legal experts. As the matter is debated in the committee, the result is the final report issued to the body and addressed to the government. The executive has to give a response in which it explains how intends to behave regarding the issues evidenced by the Committee, or why it will not follow their guidelines. Finally, the report is handed to the House of Lord and discussed.

The profuse work of the Committee strengthens its reputation and, as a result, it is deemed a fundamental non-judicial actor, without which the Parliament could not keep up the constitutional tasks. Having posed a solid basis for its existence, the Committee is seeing now the expansion of its operational range; being just a part of the whole process of continuous constitutional evolution in the British environment.

From the judicial point of view, the evolution of the British understanding of constitutional review stirred from Dicey's one only in the last period. Starting from the Human Right Act of 1998to the Constitutional Reform Act of 2005, the British doctrine experienced the most critical changes to the culture. The changes brought by the first act will be treated in the following section. The judicial decentralization process undertook by the EU and the ECJ might hint that supranational organizations harm the domestic legal doctrine of its member states.

Nevertheless, the judicial function is now a duty of the Supreme Court of the United Kingdom, that due to the Act of 2005 replaced the judicial committee of the House of Lords. The body cover matters of constitutional importance and, following the Miller case judgement of 2017[213] ,it could be deemed to be the guardian of the constitutionality task exercised by the Parliament. In reality since the devolution of powers of 1998, both the appellate committee of the Houses of Lords and then the Supreme Court acquired the

[213]In this case, the UKSC sentenced the impossibility of starting the withdrawal procedure, contained in Article 50 of the TEU by means of notification of the Council of the European Union without first the promulgation of an Act of the Parliament that enables the executive to behave in the way described in Article 50 TEU.

function of control the of legislations coming from the regional assemblies, on the basis of the referred Devolution Act. Therefore, UK lacks a procedure of control of constitutionality on the acts coming from the Parliament of Westminster, but a similar mechanism of check is applied to regional laws.

### 3.7.2 DECLARATION OF INCOMPATIBILITY

In 1998, the UK issued the Humans Right Act, a law that permits the enforcement of the ECHR in the British country and that gives execution to the judgements of the Court. The Act of the Parliament incorporates the human rights foreseen in the ECHR in the British Legislation and apply them to each individual in the country, not only citizens. This integral tool for the protection of human rights stand on three main pillars: first, every UK legislation must try to be adopted in compliance with the HRA[214]; in case of a breach of the HRA by an act of Parliament the courts can judge the bill incompatible[215], and finally that no public authority can infringe the rights while conducing his behavior, and so the violated can challenge the offices for the unlawful actions perpetrated[216].With the inclusion of the substantive ECHR rights in UK law, the provision had to become directly effective in the domestic courts. According to this aim, it is possible to individuate two main characteristics of the HRA that permit this legal interpretation. The direct effect within the domestic legal environment is made possible by the conditions of compliance dictated by section 3 of the HRA and the enforcement is safeguarded by the possibility of a declaration of incompatibility or by other remedial tools, namely by awarding the

[214]Section 3(1) of the Human Right Act dictates: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
[215] Section 4 (1)of the Human Right Act dictates: "Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right."; Section 4 (2): "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."
[216] Section 6 (1) of the Human Right Act dictates: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

aggrieved with economic relief of other lawful remedy issued by authorized courts, as predicted by Section 8[217].

In the peculiar case of a declaration of incompatibility, the competent courts will have to notify the Government and the Royal Crown; while the English minister or other high offices of Northern Ireland Scotland can take part to the proceedings[218]. Before the adoption of the declaration the competent court must first try a method to accommodate the implementation of the HRA with domestic legislation, as described in section 3 of the Human Rights Act. Not every judicial body can express on these matters, as specified in Section of the Act, authority and duty are assigned to the High Court, Court of Appeal, Supreme Court, Judicial Committee of the Privy Council, and the Courts Martial Appeal Court; within the English and Welsh territory. Meanwhile, the Scottish government recognizes the practice to the Supreme Court, the Court of Session and the High Court of Justiciary. Finally, are considered also the Northern Irish High Court and Court of Appeals and deemed competent in issuing a declaration of incompatibility for Acts of the Northern Irish Assembly.

Once the declaration has been issued, it is up to the representative institutions and in general to the Parliament to decide how to act following this declaration. Therefore, it can decide to recur in appeal and try to overturn the declaration; or conversely the assembly can find the declaration rightful and opt for the resolution of the clash by amendment of the faulty legislation. This latter operation can be achieved by means of ordinary legislation, or according the "fast track legislation[219]" that allows ministers to adopt the remedies, enshrined by Section 20 of the HRA by the enactment, by enacting of the delegated legislations.

Nevertheless, the Parliament is still able to maintain its primacy status, according to the Parliamentary sovereignty characterizing the country. Indeed, the declaration has not

[217]Section 8(1) of the Human Right Act: "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." Section 8 (2): "But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings."
[218]Section 5(2): "in any case to which subsection (1) applies:(a)a Minister of the Crown (or a person nominated by him),(b)a member of the Scottish Executive,(c)a Northern Ireland Minister,(d)a Northern Ireland department, is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.
[219]A fast-tracked bill passes through all the normal stages of passage in each House, but on an expedited timetable.

legally binding nature. This step is yet still recognized to the only competent body according to Dicey's view, the Parliament.

## 3.8 THE ROLE OF THE PARLIAMENT

The nature of the Constitution of the Netherlands, with the prohibition on constitutional review of legislative acts, and the historical past of the country might lead to think as the Netherlands as the country that decided to confer the most of the powers in the legislature, limiting the operations of the executive and of the judiciary. Knowing that Netherlands possess a constitutional monarchy, it would still be possible to define it as a parliamentary form of government if it is considered that it relies on an unwritten rule of confidence[220]. It is here foreseen that in eventuality in which a cabinet, minister or a state secretary loses the confidence of the *Tweede Kamer*, the subject must dismiss his or her office. When the cabinet loses the confidence, it can recur to the dissolving of the House instead, then proceed towards new elections.

There is no certainty on whether the same unwritten rule applies to the Upper House and to the government because the *Eerste Kamer* has never took part to the formation of a cabinet until the present days, but also because of the fact that the States Provincial cannot be dismissed and so the dissolving of the upper house is deemed useless when a conflict springs between the body and the government.

Due to the homogeneity of the cabinets, explained above in section 3.2, it is possible to refer to the Dutch system as a <cabinet government>, that is a mechanism where decisions are taken by all the members of the body conjointly[221]. Nevertheless, the nature of the Dutch legislature, so consequently of its form of government, is enshrined by article 81

[220]Besselink, L. F. M., *The Kingdom of the Netherlands* in Constitutional law of the EU member states, Kluwer,2014, 1218.
[221]Besselink, L. F. M., *The Kingdom of the Netherlands* in Constitutional law of the EU member states, Kluwer, 2014, 1214.

of the Grondwet, where it is specified that the enactment of legislation is a joint duty of the States General and of the government[222].

Having clarified this position, it is now possible to see the division of the roles and tasks between the two branches of the State Generals, the bicameral legislature body.

Starting from the most important, the *Tweede Kamer* has the right of legislative initiative and it's the place where the bill has to be introduced first. First, the chamber discusses on the bill in a committee that prepares the inquiries for the government, then, after having received their replies, the preparation of the bill is considered concluded and the proposal reaches the plenary session. At this stage, more evaluation follows and so amendment proposals to the bill do. The final stage regards the voting for the approval of the act: if approved, the bill is passed by the Speaker of the *Tweede Kamer* to the Upper House, if not, the bill is deemed over and can be reevaluated only if it is brought by means of a new procedure. At this stage, the Upper House establishes a committee with the task of considering the bill and then proceed to the polling in the plenary session. Given the lack of veto or delay power, mentioned in section 3.3.3, the *Eerste Kamer* can only accepts or refuses the bill. In case of approval, the Speaker of the Upper House will send the legislation to the King for his promulgation[223].

The T*weede Kamer* has to be understood as a very active body that operates on a day to day basis, being discussing place on the creation or modification of a policy, but also can call ministers to account and usually recurs to the institution of inquiries.

The *Eerste Kamer,* which has a more remote nature not based on the daily events, other than revising and scrutinizing, hold consultations internally, within the States General, and externally, with the civil society organizations. Members of the Senate can propose inquiries to the government, but this task is usually left to the Lower House that is informally received as the supervisor of the governmental activities.

[222]Article 81 of the Constitution of the Kingdom of Netherlands of 2008 states that "Acts of Parliament shall be enacted jointly by the Government and the States General."
[223] This stage is compulsory for the promulgation of the act as dictated in Article 87(1) of the Constitution of the Kingdom of Netherlands of 2008, that recites: "A Bill shall become an Act of Parliament once it has been passed by the States General and ratified by the King."

The two chambers can operate collectively in the so-called Joint Session, or *Verenigde Vergadering*, and are understood as a single entity[224]. This event is deemed quite exceptional because recurs in particular days, like the *Prinsjesdag*, so when the new yearly parliamentary session is initiated; or in very unlikely circumstances, such as in the case where the sovereigns are not able to exercise their royal powers. In the latter case, it is a duty of the Joint Session to appoint a regent *ad interim*.

Having seen the main functions played by the parliament, it is possible to recognize its function of checks and balance towards the royal powers exercised by the King and the ones. Following the *Meerenberg*[225]case and normatively speaking, the legislature has been recognized with a relationship of primacy with respect to the executive. Despite the enlargement of parliamentary tasks and scopes through the different versions of the Grondwet, the role played is influenced by the presence of the government and of the King. To witness that, it is worth to stress that any promulgation can be concluded only by the ratification of the sovereign. On Dutch typology of sovereignty, it can be said, that as the UK, Netherlands can be said to embrace the doctrine of parliamentary sovereignty when courts give effect to the provisions accepted by the Parliament on any subject matter. The adoption of the doctrine of parliamentary sovereignty is not explicitly admitted in the constitutional text but is implied[226].

[224] Article 51 (4): "The two Houses shall be deemed a single entity when they meet in joint session.", The Constitution of the Kingdom of Netherlands, 2008
[225]HR 13-01-1879, W 4330
[226] Ginsburg, T, The Netherlands Constitution: Implications for Countries in Transition, University of Chicago Law School and James Melton of University College London

# 4. DIFFERENT APPROACHES TOWARDS CONSTITUTIONAL REVIEW OF LEGISLATION: A COMPARATIVE FRAMEWORK

In this chapter it will be possible to distinguish among the different patterns of constitutional review. We will here stick to the classical conceptualization that distinguish the centralized form from the decentralized one, both characterized by judicial supremacy. The Kelsenian, centralized, model foresees the convergence of the task of constitutional control under a unique organ, the constitutional court. On the other hand, the decentralized pattern, originating from the U.S. system, enables any judicial organ to perform a review of on the constitutionality of the legislation[227].

Both models can either opt for a strong or weak form of judicial review, a decentralized pattern can adopt strong or weak form and so does the centralized one. In the strong form of constitutional review, the former, the protection of the constitutional texts, its fundamental rights, and later the human rights inserted in, is a duty conferred to the Constitutional Courts, an ad-hoc body where these operations are centralized in. Their task is to dismiss or make void a legislation that is clashing with a constitutional provision, as these bodies act as the last and superior guardians having primacy in the interpretation of the Constitution.

In the other form of judicial review, it is foreseen the preeminence of the legislative branch, the Parliament. Here, it is the assembly that function as a guardian of the Constitution, with the cooperation of the ordinary judges, but without the need of the establishment of a specialized pool of judges in an ad-hoc body.

After having drawn this distinction, we investigate on the third new form of judicial review, that brings novelty to the traditional dichotomy on judicial review. Moreover, this new pattern can be consulted to understand the recent future of the Dutch legal system[228], as the influence of international treaties might bring the country to the adoption of the

[227] Cappelletti, M., Judicial Review in Comparative Perspective, California law review, 58, 1970, 1034

[228] Considering the attempted changes to modify the nature of constitutional review in Netherlands, it is likely to predict that Netherlands will have to change its legal approach given the pressure coming from governmental members; see Section 3.3

third model that combines *ex-ante* and *ex-poste* control[229].Given the factors of hybridization that are also present in the two cases, Italy and, a third form has recently established: the hybrid model of constitutional review. This denomination derives from Gardbaum, that in his work defines it as the "New Commonwealth model" that combines mandatory pre-enactment of the review of political rights to a weak form of judicial review[230]. The weak form of judicial review consist in both judiciary and parliamentary expression of powers: there can be courts with the power to review the constitutionality of the legislation, but they act without primacy or without having the final say on the matter, usually left at the legislative branch. Specifically, we are going to analyze the variation present in the Nordic countries' legislation, taking as case country Finland.

The scope of interest in this comparative section is to analyze the differences between the different models, highlighting the reciprocities and parallelisms that rise between one approach and the other due to a process of contamination, hybridization. This process can culminate in the formation of a hybrid model, as we can see in the Finnish case.

## 4.1 THE CENTRALIZED MODEL

The centralized model of review of legislation is a model generally originating from the European legislative understanding. Normally, it foresees the adoption of an ad-hoc court that have a pool of specialized judges on constitutional and legislative control. It opposes to the assumption of the decentralized pattern, where every judge is able to perform a control on the legislation. In the centralized one there is a much more technocratic approach. It originates from the Kelsenian model, proposed by Kelsen in the 1920 Constitution of Austria. Given the post II world war context, the doctrine has been well received by the European neighbors, that needed to strengthen the authority of the Constitution, in order to avoid any outbreak that the fundamental law is not able to control, as in the case of the German and Italian regimes. Moreover, the centralized model of review of legislation is peculiar, though not exclusive, of those countries embracing

[229] See Chapter 6, Section 6.5.2 and 6.6
[230]Fikfak, V., The New Commonwealth Model of Constitutionalism: Theory and Practice by Stephen Gardbaum, Cambridge University Press, 2013, 270

civil law and that rely on the three basic assumptions: the separation of powers, the avoidance of the stare decisis and the fact that ordinary courts are not always suitable for constitutional adjudication, also structurally speaking. Despite representing the European cornerstone for constitutional adjudication, the centralized model has lost effectiveness in the continent, seeing a progressive influence of the American decentralized model. To analyze this phenomenon, we now take in consideration the Italian case, that stands as a centralized review of legislation, but is progressively shifting towards a much more hybrid form in which many features of the decentralized one are present. This can prove that a polarized understanding of the judicial review of legislation could not be any more valid, in the way they were conceptualized back in time.

### 4.1.1 THE ITALIAN EVOLUTION: A CENTRALIZED MODEL WITH DECENTRALIZED GRANTERS

The Italian Constitutional Court is one of the living institutions that embodies the understanding of the shifting nature of the centralized model in the recent historical tradition. The *Corte Costituzionale* is considerable as one of the first post-WWII European Constitutional Courts, along with the *Bundesverfassungsgericht*[231].*That* is, the Italian model married the Kelsenian pattern integrated with the US decentralized approach[232].

This gradual change of nature is noticeable by taking a look to the approach and the difficulties of the Court at the beginning of its existence. The body has been included in the Constitution redacted in 1948 but started its office only in 1956. This eight-year block was a consequence of the political and social environment in which the *Corte Costituzionale* was conceived, not only in Italy but all cross Europe there was distrust towards the judicial branch; counterbalanced by the predilection for the rule of law and the role of parliament. Despite this resistance, the firm reasoning for the establishment can be found during the drafting process taken by the Constituent Assembly, in which it was decided to create a body with the duty of consider and pass judgement when it is put

[231]Cartabia, M., Of Bridges and Walls: The Italian Style of Constitutional Adjudication. Italian Journal of Public Law, 2016; 8:37.
[232]Cappelletti, M., Cohen W., Comparative Constitutional Law: Cases and Materials, MICHIE, 1979.

in doubt the constitutionality of the national and regional legislation, the legitimacy of the specific competence taken by a branch, or if an appeal against the President of the Republic is advanced[233]. Furthermore, the provisions embodied and ratified by the Constitution needed to be protected from any other legislation, even the Parliamentary one, given the supra-legislative status conferred to the Constitution, of which the Constitutional Court is the executor, by the constitutional dispositions. This will is mirrored by the constitutional section Title VI, Part II, namely the "*Garanzie Costituzionali"*.

The eight years of impasse between the institution of the constitutional court and the entry into force of the body finds its reasoning considering the fact that, in this span of time, Italy experienced a decentralized system of control of constitutionality. The adoption of the decentralized model for this brief period resulted unsuccessful and eventually strengthen the idea of opting for a centralized pattern with the establishment of a constitutional court[234]. The slow process of integration of the *Corte* experienced a change of pace with the gradual elimination of the old fascist legislations. Still in the 1960s, despite the conflictual relationship with the recently ratified Constitution, were still applicable[235]. Therefore, in this period, the *Corte Costituzionale* had to turn down the inconsistent and unconstitutional old provisions, operating also on the behalf of the Parliament in taking care of the omissions present in the process of implementation of the constitutional text. These tasks paved the Corte's way towards the acceptation and recognition of his role among the executive, judicial, legislative and the social environment; and lasted until the 1980s, when the implementation was almost fully reached. It has to be noted that another element of obstruction towards the office of the *Corte Costituzionale* was brought by the conservative behavior of the *Suprema Corte di Cassazione* in the treatment of its case law, in order to circumscribe the role of the constitutional court[236].

[233] Art. 134, Costituzione Italiana:" The Constitutional Court judges on: […] on the charges brought against the President of the Republic under the Constitution [see Article 90]."
[234] Barsotti V, Carozza PG, Cartabia M, Simoncini A., Italian constitutional justice in global context, Oxford University Press; 2015 October 26
[235]Passaglia, P., Rights-Based Constitutional Review in Italy, CONSULTA ONLINE, 2013, 8.
[236]Cartabia, M, op. ult. Cit., 3

Regardless of its non-linear process of formation and affirmation, the *Corte Costituzionale* had since its origins a demarked character and nature, with attributes that are essential and intrinsic to its existence, while other characteristics molded through the time, with the introduction of supranational legislations. Those peculiarities that saw a change of nature are accompanied by judgments that will be analyzed in the following section.

### 4.1.2 CORTE COSTITUZIONALE

Starting the analysis from the theoretical categorization, the Italian *Corte Costituzionale* born as a centralized system of judicial review of legislation, that accepts abstract and, or concrete cases, with regulated access. The *Corte Costituzionale* represents a "special judge[237]", even if it is not part of the judicial system as it an independent body. The method of appointment of its members differs from the one of other judicial categories and see the involvement of political entities. That is also a consequence from the fact that it is not listable among the ordinary bodies of the judicial field, and so it is a "specialized body[238]". Marrying the vision offered by Cartabia, vice-president of the *Corte Costituzionale,* the Corte can be conceived with a peculiar relational approach, Cartabia determines it as a "relational approach to constitutional adjudication[239]". The body act, as many other constitutional tribunals, with regard to the opinions and positions of external bodies and people. This behavior can be noted also internally, deriving from its composition. The appointed members of the *Corte Costituzionale* are chosen from different "cohorts"; indeed, it is composed by 15 members*:* five appointed by the Parliament, five by the *Presidente delle Repubblica Italiana* and the last five are selected by the supreme magistracies[240] of the judiciary field[241].The Court does not have an inclusive approach despite its exclusive functions, rather it requires contribution and

[237]Cartabia, M, op. ult. Cit., 4
[238]Cartabia, M, op. ult. Cit., 5
[239]Cartabia, M, op. ult. Cit., 5
[240] These are: Consiglio di Stato, la Corte dei Conti e la Corte di Cassazione; as respectively described in art. 100 and art. 104 of the *Costituzione Italiana.*
[241]Art. 135, Costituzione della Repubblica Italiana

involvement of other branches, as in the case of the appointment, with an attitude that can be intended as equalizing among the different parts composing the government. The reasoning behind this method of selection of the members can be found in the variation of the background knowledge, more than the need of balance. Judgements delivered by the Corte consider multiple points of view, given the composition, and do not push a towards an elitist interpretation of the judicial branch. This characteristic is linkable to one of the essential rules of procedure of the Corte, that is the "collegiality". According to this assumption, the Court and its justices must operate seeking cooperation, coordination, dialogue and collective agreement. Collective operativity is required in every step of the process of decision making undertaken by the *Corte.* This rigidity is proven by the adoption of a plenary panel for every single case, while in many constitutional courts they split into chambers for the treatment of the case. Another proof, of the strict rules of procedure in the context of collegiality is given by impossibility of individual voice of the justices; the Court must give a coordinate and univocal opinion, in order to deliver smooth judgements and opinion that makes the bureaucratic process smooth without the incumbency of conflicts.. In the final opinion on the matter it is noted that the Court must act:

«[…] *attraverso ponderazioni relative alla proporzionalità dei mezzi prescelti dal legislatore nella sua insindacabile discrezionalità rispetto alle esigenze obiettive da soddisfare o alle finalità che intende perseguire, tenuto conto delle circostanze e delle limitazioni concretamente sussistenti*.»

This regime is entrusted by Article 135 of the *Costituzione*, as in the method for the appointment of the members a condition of overall balance is not only sought but "forced"[242].The collegiality of the decision-making process grants:

«[…] *bilanciamento tra norme di rango costituzionale, quale ordinaria operazione su questa Corte è chiamata in tutti i giudizi di sua competenza*.[243]».

[242]Criscuolo, A., Relazione del Presidente della Corte Costituzionale sulla giurisprudenza costituzionale del 2014, 12/03/2015, 3
[243]Sentenza236/2011

The principles of collegiality and relationality did not mold during the time and proved to be an essential characteristic since the beginning of its office. Already in 1956, the Court established its own behavior:

A third essential principle of the Corte Costituzionale that did not suffer any modification is the role of the President of the Corte, which acts as *primus inter pares*[244]. His position does not translate into a hierarchical predominance with respect to the other components, as proven by the fact that his vote has equal value to the one of the other justices. This condition of parity results also from the method of appointment of the President: normally, as it is an unwritten rule, is selected on the basis of the seniority and so it is possible to infer that each justice has the possibility of being elected, even for short period in the case of the end of term. The shortness of the mandate is also conceived to stabilize the exclusive powers conferred to the President, namely the appointment of the *juge rapporteur*, that is required for each case, and the allocation of a second vote in case of parity during the judgement of a controversy[245]. With a short time, charge, there is not possibility of manipulation and so every decision cannot be interpreted as maliciously projected, but only for the sake of the office.

It is possible to access to the Corte Costituzionale by means of two different paths, namely the "giudizio in via principale[246]" and the "giudizio in via incidentale[247]". The judgement in main proceeding is a method of access, that can be exercised by the State or by the regions of Italy, as foreseen in Article 127 of the constitutional text[248]. The State and Regions enjoy of the same procedural tools, after the equalization conveyed by the reform of Chapter V of the constitutional text[249]. Before the reform, the State had 60 days to issue an appeal, while the regions had only 30 days[250]. Nevertheless, discrepancy between the

[244] "First among peers"
[245] Cartabia, M, op. ult. Cit., 8
[246] Judgment in main proceedings
[247] Incidental judgement
[248] After the modification conveyed by the *Legge Costituzionale 3/2001*. Since then, Article 127, *Costituzione Italiana*, predicts that: "Where the Government considers that a regional law exceeds the competence of the Region, it may bring the question of constitutionality before the Constitutional Court within sixty days of its publication. If the Region considers that a law or an act having the force of a law of the State or of another Region affects its sphere of competence, it may bring the question of constitutionality before the Constitutional Court within sixty days of the publication of the law or the act having the force of a law."
[249] *Legge Costituzionale 3/2001*
[250] As disposed by the former Article 127, *Costituzione Italiana*

two parts can be found in the fact that the State can challenge regional legislation on the basis of the infringement of any constitutional article. On the other hand, regions can contest only legislations in force as law of State that infringes the regional competences prescribed by the *Costituzione;* as proven by the judgement of the Constitutional Court on the appeal issued by Sardinia challenging the law of State[251]. The method of access granted by incidental judgement is of a different nature. The constitutional body can adopt the incidental method of review that, coherently to the principle of relationality, empowers ordinary judges with the role of "gatekeepers" as delineated by Piero Calamandrei[252]. According to this approach, it is the judge of the ordinary court to dictate whether the case can be accepted for constitutional review or not. The recurring to the incidental method of access is admitted only if the two requirements for the issuing of incidental judgement are satisfied: "*non manifesta infondatezza"* and *"rilevanza"*[253]. The first requirement predicts that the judge a quo has ensured that there are no elements that would make the issue appear manifestly unfounded[254]. The judge a quo has also to establish whether the question of conformity to the constitution is relevant or not, that is if the law put in doubt is the only legislation able to permit to the judge a quo to define the judgemen[255]t. As stated in Article 23 of Law n.87 of 1953, this method predicts that, during any judicial proceeding ,in the eventuality that the ordinary judge has to apply law which has not a clear constitutionality, and so can conflict with the *Costituzione*, the judge must first suspend the ongoing trial and pass the case to the *Corte Costituzionale,* which will have to rule on the constitutionality of the provision, and in the eventuality that it lacks constitutionality, review it. After the binding ruling of the *Corte* has been issued, the ordinary judge is then allowed to resume the trial and decide on the case, keeping note of the judgment released by the *Corte.*[256] *The judgement on the constitutional legitimacy,*

[251] Corte Costituzionale, Sentenza n. 274/2003

[252]P. Calamandrei, *Il procedimento per la dichiarazione di illegittimità costituzionale* in Opere giuridiche, Vol. III, Napoli, Morano, 1965, 372.

[253] It is up to the judge *a quo* to determine if these requirements are fulfilled, before forwarding the issue.

[254] Legge n. 87 del 1953

[255] Legge n. 87 del 1953

[256]Art 23, Legge 11 marzo 1953, n. 87: "Nel corso di un giudizio dinanzi ad una autorità giurisdizionale una delle parti o il pubblico ministero possono sollevare questione di legittimità costituzionale mediante apposita istanza, indicando a) le disposizioni della legge o dell'atto avente forza di legge dello Stato o di una Regione, viziate da illegittimità costituzionale; b) le disposizioni della Costituzione o delle leggi costituzionali, che si assumono violate. L'autorità giurisdizionale, qualora il giudizio non possa essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale o non ritenga che la questione sollevata sia manifestamente infondata, emette ordinanza con la quale, riferiti i termini ed i motivi della istanza con cui fu sollevata la questione, dispone l'immediata trasmissione degli atti alla Corte

*expressed by judgement on main proceedings or in the incidental way*, is the main competence of the Corte Costituzionale, still the constitutional court is responsible for other minor tasks[257].

Jointly to the incidental approach, the Italian constitutional review of legislation of the *Corte Costituzionale* embraces another feature that mirrors the principles of coordination and cooperation in full respect of ordinary judges The Constitutional Court operates on the basis of the doctrine of "*diritto vivente*[258]" (living law[259]), and so the Corte trusts the interpretation given by the ordinary judges, without overriding their understanding. The principle becomes a living right of a constitutional order, as hypothesized by Carlo Esposito[260], namely a custom confirming the principle is realized[261]. The mechanism aims to empower and reinforce the role of judges, establishing also a process of dialogue between Court of Cassation and the Constitutional Court, but also with supranational bodies like the Court of Strasbourg and of Luxembourg. The valorization of this doctrine comes from the empowerment of the judges and the establishment of multiple judicial dialogues. The "living law" is established as a source of continuous positive judicial tension, making possible to strive for new proposals and solutions in an international framework, given the involvement of the mentioned supranational courts. The Court analyzes the case only on the basis of the respect of the constitutional provision and clears the doubts on its understanding, by declaring a provision unconstitutional, making it null or void, without touching the interpretation given by the ordinary judges. In other, words, the law can be distinguished between theoretical and pragmatical, or in action. The Corte interprets the legislation on the basis of the latter approach, and so the law is understood on the basis of the application of the understanding of the textual norm by the judiciary. This approach, on one hand, is another proof of the cooperative method between the different Italian courts, while on the other, is a retainable approach given the complexity

costituzionale e sospende il giudizio in corso. La questione di legittimità costituzionale può essere sollevata, di ufficio, dall'autorità giurisdizionale davanti alla quale verte il giudizio con ordinanza contenente le indicazioni previste alle lettere a) e b) del primo comma e le disposizioni di cui al comma precedente. […]"

[257] The Italian constitutional court has further competences such as the conflict over attribution (art.134) and control over the admissibility of referendums (art. 105).

[258] Living law doctrine

[259] The notion of "living law" has been introduced with the *Sentenza n. 276, 11 Dicembre 1974*, that defines it as "[…] the jurisprudential system formed, in the absence of express provisions […]" but established more concretely since the '80s.

[260] Esposito, C., Consuetudine (diritto costituzionale), Enc. dir., IX, Milano, 1961

of our modern society and the consequent necessity for a progressive understanding of law, which is always in motion at the same pace of our progressively faster standards of living.

### 4.1.3 FURTHER ELEMENTS OF DECENTRALIZATION

#### 4.1.3.1 THE "INTERPRETAZIONE CONFORME A COSTITUZIONE"

Additionally to this route of access to constitutional justice and to the incidental one, which has been embraced by the Corte since the very beginning of its operations, from the mid-90s circa, the Court started to empower ordinary judges, and relieve the amount of work of the *Corte*, by asking to the ordinary courts to conform to the interpretation given by the constitution, without the need to pass through the Constitutional Court[262]. This principle called *interpretazione conforme a Costituzione*, further empowers the ordinary judges that have to read and determine the sense of the statutory texts in in accordance to Constitutional norms. This new method of access can give some relief to the Corte Costituzionale, which from time to time has experienced overloads of cases, many of them deemed not necessary by the Court's, and so causes a slower performance of the bureaucracy and, in general, a less efficient constitutional adjudication. This "U-turn" of the Corte Costituzionale has been received with some criticism, the approach which at the beginning sounded like an invitation is now becoming a must, forcing judges to an autonomous interpretation even in the case of evident inability of judgement. The constrained practice represents an obstacle to the preexistent norms that establish the incidental review of legislation. These are contained in the first Article of the «*Legge*

[262] Unless it is not possible to give an interpretation to the norm that is conform to the *Costituzione*; in this eventuality it is compulsory to forward the constitutional matter to the *Corte*.

*Costituzionale n.1*[263]» of 1948, but also in Article 23 of the «*Legge n.87*[264] »of 1953.From the judgement of the «*sentenzan.356*» of 1996, there is concrete proof of the new approach, that has lost much of its centralized character, giving more autonomy to ordinary judges, a behavior embraced in decentralized systems of review of legislation.

Nevertheless, the approach led to a reduction of the number of the cases brought to the *Corte Costituzionale*, which had started to suffer a progressive situation of overload with the rising number of disputes between the Italian State and its regions. Since the 70s, the disputes between these two entities started to accumulate. In considering this, it has to be noted first that this is more a presumption, while a proper factor of shift is given by the European legislative framework that is bringing all the member states towards a decentralized model of review of legislation. But, as this is condition is shared by almost every European state, the regional context is peculiar to the Italian state, and so it is worth to be considered.

#### 4.1.3.2 EU LAW

Firstly, among the reasons for the progressive decentralization of the Italian model of review of legislation it is worth to consider the impact of the European legislation on the member state. As already mentioned during our research, the need to adopt and conform to the communitarian law affected the pattern of constitutional review of the European countries. In the field of the judicial review of legislation, a relationship of competition between the *Corte Costituzionale* and the Court of Justice of the European Union derived from the increased range of competences that the EU has been acquiring in the last twenty

[263]Legge costituzionale 9 febbraio 1948, n. 1, Norme sui giudizi di legittimità costituzionale e sulle garanzie di indipendenza della Corte costituzionale, Art. 1: "La questione di legittimità costituzionale di una legge o di un atto avente forza di legge della Repubblica rilevata d'ufficio o sollevata da una delle parti nel corso di un giudizio e non ritenuta dal giudice manifestamente infondata, è rimessa alla Corte costituzionale per la sua decisione."

[264]L. 11 marzo 1953, n. 87, Norme sulla costituzione e sul funzionamento della Corte costituzionale, Art.23(b):"[…]L'autorità giurisdizionale, qualora il giudizio non possa essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale o non ritenga che la questione sollevata sia manifestamente infondata, emette ordinanza con la quale, riferiti i termini ed i motivi della istanza con cui fu sollevata la questione, dispone l'immediata trasmissione degli atti alla Corte costituzionale e sospende il giudizio in corso […]

years. Considering the competition risen in the enforcement of the European Charter of Fundamental rights, can be noted how the ECJ is able to build a case law and therefore "substitute" the *Corte Costituzionale*: the European body's preliminary ruling resemble the internal system for case referrals adopted by the Italian constitutional court, so the final choice on which body should be appealed might seem mere issue of convenience[265]. In reality, the main factor that determines the shift towards decentralization is the acceptance by the *Corte Costituzionale* of the "Simmenthal" doctrine; or that each court may independently disapply the national rule which is contrary to the European rule and then refer the matter to the Constitutional Court only in cases where the national rule is not directly applicable. Despite the establishment of the principle of primacy in 1964 after the Costa v. Enel case, the consequent acceptation of the spheres of competences of communitarian law by the *Corte Costituzionale*, and the legislative intervention such as the reform of 2001, the coordination and cooperation between the two Court has been a bumpy road. Through the years the *Corte Costituzionale* had to develop a much more cooperative position in confront to the EU law given also the degree of influence of the communitarian regulations is meaningful. Recently there has been a tendency towards a new centralization of the competences, converging to the *Corte Costituzionale*, after a period characterized by decentralization and empowerment of ordinary judgements. A proof of this tendency can be found in two recent judgements of the *Corte*: the judgement n. 269/2017 that has been reinforced by n. 20/2019. In the judgement of 2017, the *Corte* stresses its competences and seeks to converge the duties distributed to ordinary judges in the *Corte*'s direction[266]: with respect to the relation with the CJEU, the Constitutional Court notes that it has the final say in establishing whether the violated of provision is self-executing or not. In the same judgement, the *Corte* foresees the restriction of the use of the preliminary ruling, admitted only in those matters that are not already included in the question of constitutional legitimacy. This willingness to recentralize might create a boomerang effect. Already after the issuing of judgement n.269/2017 there has been a double institutional torsion given by the relationship between the legislator and the judges

[265]Passaglia P. Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way, Italian Law Journal, 2016, 419
[266] This willingness is stressed in *Sentenza n.20/2019, Corte Costituzionale*

conditioned by the artificial rewriting of the texts of the law by way of interpretation, but also the relationship between judges, reducing the cases of possible referral to the ECJ[267].

### 4.1.3.3 THE CONCRETE FORM OF REVIEW

Historically, the *Corte Costituzionale* always has had as a main feature the capacity of hearing ordinary courts' references. As we noted in the past paragraphs, this characteristic prompted an overload of bureaucracy to the point in which references constituted the sources for the judgement in the 90% of cases[268]. The legislative U-turn engaged by the *Corte Costituzionale* with the first of many reforms, the one of 2001, marked the beginning of the decrease of the amount of references and the consequently new role conferred to the judges. The change in the nature of the Italian judicial review is also given by the different context in which the Constitution is now perceived in Italy. The *Costituzione,* since its establishment has been recognized as the foundation of the legal system and its provisions determine the forging of the society and its values.[269]As suggested by Passaglia, the nature acquired by the *Costituzione* enabled the judges to treat it as a legislation and its direct application, abandoning the previous given conception of political document[270].This understanding is once again in line with the changes brought by the complex and multilevel world in which we are living. As in the case of the references in which a solution can be sought by an individual analysis of the case, the regime of enacted law must be regulated by the case law approach. The need for a flexible understanding of the enacted laws, in order to avoid hyper-regulation, results in a major relevance of the ordinary judges and their discretion in the application of the law[271]. The attentiveness towards the role of the ordinary judges, that until a few years before were

[267] Ruggeri, A., Rapporti tra Corte costituzionale e Corti europee, bilanciamenti interordinamentali e "controlimiti" mobili, a garanzia dei diritti fondamentali. Rivista Associazione Italiana dei Costituzionalisti, (1), 525

[268]P. Passaglia, *Les âges du contrôle de la constitutionnalité des lois par voie d'exception en Italie* in L. Gay ed, La question prioritaire de constitutionnalité. Approche de droit compare, Bruylant, Brussel, 2014, 573

[269]Passaglia P. Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way, Italian Law Journal, 2016, 423

[270]Passaglia, P., op. ult. Cit., 423

[271] Passaglia, P., op. ult. Cit., 424

seen as *bouche de loi* according to the French model that minimized their position, and their discretional power forged a new behavior towards them and the enacted law. The final outcome is the bypassing of the *Corte Costituzionale,* in line with the decentralized approach.

As demonstrated in the section regarding the disputes between the State and the Regions, the new understanding of the judicial legislative interpretation implies that the constitutional text is a source of law and must be treated according to its nature. This assumption is in line with Chief Justice Marshall's doctrine, that considers the constitution when deciding on conflictual legislations, given that he considers the constitutional text as the "paramount law of the nation"[272]. Therefore, to be considered as a fundamental norm, the constitutional text as to be conceived as the linchpin of the whole legal system. As a result, to this condition, the relevance of the legislative connotation and the ranking of the *Costituzione* has to be stressed, and so avoiding the multiple interventions of the *Corte Costituzionale* in attempting to guard the constitutional supremacy. Given that, a broad and large use of the constitution in the legal system permits to the Court, its original guardian, to intervene less on its adoption because of its more frequent usage[273]. Also, this is a factor to be considered within the reason for the shift towards the decentralized model and the progressive downgrading of the role of a Constitutional Court.

### 4.1.4 THE RECENT FUTURE OF THE CORTE COSTITUZIONALE

Despite the multiple factors concerning the *Corte Costituzionale* and the *Costituzione*, it is hard to predict the future of the constitutional body and of the national legislative system. Following the brilliant analysis provided by Passaglia, especially in his essay «Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way», it is still possible to make some remarks on the subject. Coherently to the position assumed during the analysis of the different steps of constitutional reforms that involved Italy, it can be noted that the interventions adopted

[272] 5 U.S. 137, Marbury v. Madison, I Cranch, 177
[273]Passaglia, P., op. ult. Cit., 429

did not resolve the issue regarding the model to adopt on the judicial review of legislation. The legislative back and forth resulted from the reforms still did not solve other legislative gaps that could help in managing the shift. On the contrary, it would be appropriate to determine the constitutional review of parliamentary elections, but also the ability of the parliamentary opposition to advance questions upon the constitutionality of an act[274].Nevertheless, another knot to untie remains the concrete review of legislation. The decrease of references induced by the *Corte Costituzionale* resulted in an oxymoronic situation where the body automatically marginalized itself by conferring more power to the ordinary judges. By limiting this condition, the outcome would be a legislative regression that would rend the previous works useless. The constraint on the ordinary courts could also be intended as an anachronistic move, if we consider the *Corte Costituzionale* as a tool for ensuring the respect of the fundamental law and the proper absorption of the constitutional text within the legislative and social system, given its novelty. Now that the *Costituzione* is deeply inserted in the legislative and social context, but also is now a subject for everyone and not only of specialists, it would be logical to remove any unnecessary element of assistance. On the other hand, the complete dismiss of the Constitutional Court would not be reasonable: the legal certainty concerning the stroke down of a legislation is better ensured by the power of a centralized character like the Constitutional Court rather than the say advanced by any ordinary judge that can be reversed[275].Despite this has always been the approach chosen in the Italian legislative tradition, the importance of the case law, prompted by the ordinary courts activities, has increasingly gained importance up to the point that the Italian assumption of legal certainty now consider also the case law reference, not only the enacted law[276]. If the degree of uniformity of the case law is deemed sufficient, then it would be worth to reconsider the type of adoption on the review of legislation, as suggested by Passaglia.

## 4.2 THE DECENTRALIZED MODEL

The decentralized model of constitutional review of legislation represents one of the two main approaches towards constitutional control. As we saw in chapter 2, this doctrine

[274]Ordinanza Legislativa n. 17, Anno 2019
[275]Passaglia, P., op. ult. Cit., 430
[276]Passaglia, P., op. ult. Cit., 431

originates from the United States, more specifically derives from the Marbury v. Madison case and Hamilton's productions too. In this model, the whole judiciary branch has the power to decide on the application of a legislation when clashing with constitutional provisions. The entire judiciary category is here considered as the one with the duty to interpret the laws in the concrete cases, without the need of a specialized body that coordinates and operates on the matter. This entails a solid preparation of the ordinary judges on a vast range of constitutional and legislative matters, as the solution of referring the issues to a pool of specialized judges, in an ad-hoc court, is dismissed. As said before, this model of American nature penetrated the European legislative system by influencing the method of judicial review, that in the old continent originated by the Kelsenian model, centralized. In the following paragraph we're going to analyze the case of Estonia, which not only takes inspiration from the U.S. by adopting the diffused model of judicial review, but also has parallelisms in the structure related to the figure of U.S. Solicitor General of the United States.

### 4.2.1 THE SUPREME COURT OF ESTONIA

Before focusing on the Supreme Court of Estonia within the framework of a decentralized model of judicial review, it is worth to contextualize the Constitutional environment in which Estonia is placed. The Estonian Constitution, the *Põhiseadus,* has been adopted in 1992 after the fall of the Soviet Union. In the aftermath of the independence and the parting from an authoritarian regime, the Eastern Europe country enacted a constitutional text that is completely binding and enforceable in the judiciary[277]. In the process towards the full reacquisition of independence and power after the 1991, Estonia inspired its legal order from the German system, to which it has been always close and related, specifically administrative, criminal and private law. Therefore, it is understandable how Estonia established the practice of constitutional and judicial review, under the diffused form which is peculiar to the U.S. and secondarily to Germany, both having a federalist form of government. Consequently, Estonia relies on the power of the entire judiciary branch

[277]Albi, A, & Bardutzky, S., National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law National Reports: National Reports, Springer,2019, 889

for the practice of review but involves also non judiciary actor in the process. These two characters are lawyers of the government that are separately appointed, with different powers, but cooperate in a parallel way to the activity of constitutional review before the domestic court[278]. As we are going to analyze the parallelism later, these two actors recall in their figure and tasks the character of the U.S. Solicitor General. Focusing now on the procedures of the activity for the Estonian judicial review, it is important to start from individuating the provisions that permit this practice. First of all, in Article 149 of the *Põhiseadus* it is contained the provision that recognizes the Supreme Court as the body with the highest legislative ranking in the country and that has the duty to safeguard the constitution by acting as a constitutional court:

« […] The Supreme Court is the highest court of Estonia which reviews rulings of other courts pursuant to a quashing procedure. The Supreme Court is also the court of constitutional review. […][279]».

Nevertheless, given the adoption of the diffused model of judicial review, it has to be stressed that also the ordinary courts are active in this practice, as mentioned in Article 152 of the Constitution:

«When determining a case, the courts refuse to give effect to a law or other legislation or administrative decision that is in conflict with the Constitution. […][280] ».

In the same article it is detailed the range of power of the Supreme Court in dealing with a legislation that clashes with a constitutional provision:

« […] The Supreme Court declares invalid any law or other legislation or administrative decision that is in conflict with the letter and spirit of the Constitution.[281] ».
It is now of interest to see how the Supreme Court can practically exercise the function of constitutional adjudication within a decentralized system of judicial review of legislation. The activity of judicial review is performed by any court and the Supreme Court, specifically a panel of the Court, as an appellate jurisdiction. The panel does not constitute a separate *ad-hoc* body that performs review of the legislation. It is called

[278]Maveety N, Pettai V., Government Lawyers and Non-Judicial Constitutional Review in Estonia, Europe-Asia Studies. 2005 Jan 1;57(1),94
[279]Art. 149(3), *Põhiseadus*
[280] Art. 152(2), *Põhiseadus*
[281] Art. 152(1), *Põhiseadus*

Constitutional Review Chamber, constitute the court of last resort in the domestic judicial system[282].This body is constituted by eight justices plus the Chief of Justice of the Supreme Court, but to operate it is sufficient to have at least three justice assigned to the case[283]. The appointment of the justices is regulated annually by the Supreme Court that selects *en banc*[284] two new justices for the panel and discharges at the same time the two eldest justices that compose the Chamber at the moment of the appointment procedure. It is possible to access to the Chamber in three different ways, two by including the political actors and one by appealing to the Legal Chancellor in order to perform the review of constitutionality.

A constitutional review can be initiated by the ordinary courts, by judiciary means. If a legislation in a proceeding is deemed unconstitutional[285], the courts will transfer the case to the Chamber. If the Chamber agrees on the unconstitutionality of the law, the provision become null and void.

Secondarily, the President of the Republic can begin the practice of constitutional review in its *ex-ante* form of control of a pending provision. The political actor can exercise a veto on the law, its consequent suspension and it is sent back to the Parliament. The *Riigikogu* can modify the legislation in order to resolve its conflictual nature or can decide to present again the unmodified law to the President by overriding its veto. At this point, the politician can decide to promulgate the provision or send the case to the Constitutional review Chamber.

In the third scenario, it is possible to initiate constitutional review by recurring to the Legal Chancellor. This case is admitted when there is an explicit request submitted by the Parliament[286]. This possibility, which was already included in the Constitutional Review Procedure Act of 1993, permits to the Chancellor to contribute and influence in the evaluation and judgement of the case. As specified in the Constitutional Review Procedure Act of 2002, the Chancellor of justice operates independently in the performing

[282]Maveety N, Pettai V., op. ult. Cit., 99
[283]Riigikogu, Constitutional Review Court Procedure Act 2002, Art. 3(2)
[284] By the full court
[285]Art.15(2), *Põhiseadus:* "[…] The courts observe the Constitution and declare unconstitutional any law, other legislative instrument, administrative decision or measure which violates any rights or freedoms provided in the Constitution or which otherwise contravenes the Constitution."
[286]Riigikogu, Constitutional Review Procedure Act 2002, Art. 10(1):" […] the Riigikogu upon submission of a request by the Riigikogu; the Legal Chancellor […]"

of constitutional review[287] and can perform it in the *ex-ante* control form or in the *ex poste* one. This feature, coming from the Nordic legislative heritage, realizes in the case in which, under request of an individual, the government or the Parliament, the Chancellor examines an already existent legislation that clashes with the constitutional rights. In the other case, it is performed an *ex-ante* form of constitutional review on a pending legislation by transferring the case to the Chamber.

### 4.2.2 THE PARALLELISM WITH THE SUPREME COURT OF THE US

As mentioned in the previous paragraph, it is interesting to compare the character of the U.S. Solicitor General with the two Estonian ones, namely the Legal Chancellor and the Minister of Justice, while the respective Supreme Courts works in different ways. The two works in a parallel way, with different appointment and having a different identity, the former is juridical, the other is political. From a comparative perspective, it is interesting to denote that, in Estonia, it takes two governmental lawyers to fulfill the tasks undertaken by the only U.S. Solicitor General.

On one hand, the Chancellor does not correspond to a governmental entity associable to a party *per se*[288], but is part of the court. It is appointed in an independent way with a term of seven years. On the other hand, the Minister of Justice represents a political actor in quality of n member of the governmental cabinet. The former is a prominent character in the activity if constitutional review as he can release advisory instructs and takes direct part to the process. It role is such important and influential that Maveety and Pettai call the Chancellor as the "Tenth Justice[289]", which is quite telling in describing the degree of influence that the judicial actor can exert on the Constitutional Review Chamber, as it tends to agree with the stance of the Chancellor on the constitutional issue. The term "Tenth Justice" comes from the work of scholars such as Caplan and Salokar, that, in the

[287]Art.1(1), Chancellor of Justice Act 1999: "The Chancellor of Justice is 2003 in his or her activities an independent official who reviews the legislation of general application of the legislative and executive powers and of local governments for conformity with the Constitution of the Republic of Estonia (hereinafter the Constitution) and the Acts of the Republic of Estonia."
[288]Maveety N, Pettai V., op. ult. Cit., 94
[289]Maveety N, Pettai V., op. ult. Cit., 102

American legal culture, so defined the U.S. Solicitor General given its influence exerted in the decision-making process of the Supreme Court[290].The influence exerted originates mainly from the position of the Chancellor as agent of the court, highly respected and autonomously working, as in the case of the Solicitor General. If on one side, this gives continuity and coordination among the reviewing entities, on the other hand the influence applied on the constitutional activity does not always permit to the Chamber to work autonomously. Not only the Chancellor can impose his leverage, the Minister of Justice can influence the adjudication with the cooperation, or in contrast, of the Legal Chancellor when both are asked to deliver an advisory instruct. Given his position of political entity in a governmental system with constitutional knowledge, he is in stance to exert influence, as the U.S. Solicitor General does on the basis of his status in the political regime. The Minister can function as a *ex officio* part in the cases in which the Supreme Court of Estonia request his opinion.

From this parallel structure with the U.S. system rises doubts of the same nature of the American model. Constitutional adjudication and review are conducted by a panel of the Estonia Supreme Court, but most of the decision-making process is up to the two governmental lawyers, the Minister of Justice and the Legal Chancellor. Assuming their impartiality in the judgement, it is undoubtful that the degree of influence, especially of political nature, mold the final decision. The cooperation between the two entities can result prolific if both parts agree on the constitutional case, otherwise it risks making more difficult the constitutional practice by returning back the decision to the Chamber that has to choose between the reasonings of the two parts.

### 4.2.3 ADAPTING THE PRIMACY OF EU LEGISLATION TO THE ESTONIAN DIFFUSED MODEL OF THE JUDICIAL REVIEW

After the accession of Estonia to the European Union in 2004, the government of the new member state had to conform to the obligation deriving from the communitarian law. Among the preparatory steps that Estonia had to undertake, in 2003 issued the

[290]Maveety N, Pettai V., op. ult. Cit., 111

Constitution of the Republic of Estonia Amendment Act, four amendments that aimed at calibrating the legislative domestic system within the EU legislative framework. Among these four, the second is possibly the most significant, as it states:

«When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.[291]»

Therefore, the constitution of Estonia must come second with respect to the EU legislation, mechanism controlled at the domestic level by the panel of the Supreme Court, that additionally safeguards also the implementation of ECHR rights, which can be included among the protected elements of section 15, as stated by the Supreme Court: «The violation of Art. 6(1) of the Convention, found by the European Court of Human Rights, also constitutes a violation of § 15 of the Constitution[…] [292]».

Moreover, the Supreme Court stressed that in accepting the primacy of the EU legislation, there will be no chance for any practice of constitutional review on the matter.[293]On secondary legislation, it is given again exclusive and total jurisdiction to the European body on the validity of the law, while it is a duty of the domestic courts to issue a reference in case of uncertainty. It is then defined the competence of the European Union with respect to the system of its member state but is not defined the degree nor the range of operations. It can be inferred, following the approach of the Supreme Court and the statements contained in the Constitution of the Republic of Estonia Amendment Act, that in matters of EU competence legislative and judicial power is unconditionally given to the European institutions. This situation favors a better coordination between the EU and Estonia, but certainly diminishes the status of the Supreme Court and its constitutional panel. There is ground to fear a progressive weakening of the Constitution, or "erosion" as said by Chief Justice Uno Lõhmus[294],and its continuous validity. If there is no possibility to exercise constitutional review in case of conflict with the EU legislation, consequently the constitutional text moves in the second ground. It is up to the Republic

[291]The Constitution of the Republic of Estonia Amendment Act 2003, (3)
[292]SCebj 06.01.2004, 3-3-2-1-04, para. 27
[293]ALCSCo 07.05.2008, 3-3-1-85-07, para. 38
[294]Albi, A, &Bardutzky, S., National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law National Reports: National Reports, Springer,2019, 938

of Estonia to choose whether to progressively move towards a federalist understanding of EU and accept the inactivity of the Supreme Court, or to root against the complete conferral of powers on the matter, in order to safeguard the existence of the Supreme Court, its Constitutional panel and the provision that it safeguards.

## 4.3 THE HYBRID MODEL

In the previous sections we have analyzed two examples of adoption of judicial review, one centralized, while the other decentralized. This distinction properly follows the polarized vision with which methods of judicial review are classified. Now, considering that we have taken into analysis two peculiar cases in which it is present a process of shift and contamination, that contrast with a polarized vision of judicial review, it is still not sufficient to call these countries as hybrid models. Following the classical doctrine, the third way in the polarized view is the hybrid model of judicial review of legislation. Normally this arrangement shares *ex ante* and *ex poste* combination, at the same time, features such as the wide and large diffusion of constitutional justice, distinctive of the decentralized practice, and elements like *erga omnes* efficacy and the centralization of the decisions depending on a specialized body, typical of the centralized model. Normally, it consists in the presence of a specialized body that not always comes with a binding final authority on the review of legislation; while at the same time in this model, every judge is interested in the enforcement of the control of constitutionality. Detaching from the classical version of the "New Commonwealth" form of review, we analyze another hybrid variation, that roots in the Nordic Law. In almost any system of the Nordic system, there has been a good development, and progressive detachment from the traditional view of Parliamentary supremacy. In Finland, this process led to the wary admission of the courts in the practice of constitutional review. It is defined "wary" because, as we can see in Section 106, the intervention of the Court is required only if a legislation is in evident case of conflict with a constitutional provision. Always Finland, shares the Nordic tradition of combining the *ex-ante* and *ex-poste* form of review. This new technique has to be understood as an improvement in the practice of protection of human rights, that foresees the cooperation between the Courts and the Parliament.

In the following section we will analyze first the discreet Finnish approach towards the Courts in the constitutional review by going deeper in Section 106 of the Finnish Constitution, then we will see more in detail the Constitutional Law Committee, the *ex-ante* and *ex poste* combination and the relationship of this model with the European obligations.

### 4.3.1 SECTION 106 OF THE FINNISH CONSTITUTION

Before focusing on section 106, that grants legislative primacy to the Constitution, a brief overlook on the Finnish system. Finland has a tradition of decentralized administration; indeed, it is called by Lijphart as a "unitary state[295]" and more specifically by Loughlin as a "decentralized unitary state[296]". Finland can be labelled as a parliamentary democracy with some semi-presidential features, better defined since the reform of 2000. For our scopes, it will be here considered from the reform, that admitted the possibility to perform constitutional review by exercising Section 106 of the Constitution. Before that, it was impossible for the courts to perform this practice, even if it is possible to denote the first signals of change already in the Opinion 21/1990 of the Constitutional Law Committee, where it is stressed the need for a conform interpretation of the law according to the Constitution. Additionally, as to most of the other member states like Netherlands, Communitarian law, binding human rights of the ECHR and international treaties permitted to the courts to review the Constitution, being included among the cases of EU law. So, the change with the reform of 2000 in Section 106 was much awaited, admitting primacy to the Constitution when in indisputable conflict with an Act of Parliament, by modifying the *ex poste* review while leaving untouched the *ex-ante* doctrine already in use in the past Constitution:

[295]Lijphart A. Patterns of democracy: Government forms and performance in thirty-six countries. Yale University Press; 2012 Sep 11, 178
[296]Loughlin, J., Regional autonomy and state paradigm shifts in Western Europe, Regional & Federal Studies, 10:2, 2000, 26

«If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution. [297]»

Pragmatically speaking, this legislation does not subvert the hierarchy between the *Perustuslakivaliokunta* Committee but realizes as a compromise between an abstract *ex ante* and a concrete *ex poste* form review[298]. As the approach embraced by Finland correspond to an *ex ante* model, the "*Perustuslakivaliokunta"* places itself as a fixing tool of the legislative gaps left by the abstract ex ante review in particular legislative cases. Nevertheless, the statement contained in Section 106 should also imply an automatic recognition of the primacy of the Constitution, and a consequent green light to any of its provisions. The stress on the "evident conflict" safeguard the latter approach, if conform to constitutionality, by suggesting the method of adoption and interpretation of the role of the Constitutional Law Committee within the Finnish legislative framework. Therefore, the *ex-poste* powers are really constrained to context of indisputable clash between the legislations.

The model of judicial review contained in Section 106 is quite unique, with positive features. The intertwining of the abstract *ex* ante and the concrete ex poste oblige the courts to prompt the application of the Constitution without having the final say on the matter and without the possibility of constituting a precedent as a case law[299]. The Section 106 does not allow the judiciary to dismiss a provision *per se,* but it is a duty left to the legislature.

Having defined the mechanisms consequent to Section 106, we will now focus on the activity and nature of the non-judicial body that safeguard the Constitution: the *Perustuslakivaliokunta* Committee.

### 4.3.2 THE PERUSTUSLAKIVALIOKUNTA COMMITTEE

[297]Section 106, *Suomen Perustuslaki, 2000*
[298]Lavapuro, J., Ojanen, T., &Scheinin, M., Rights-based constitutionalism in Finland and the development of pluralist constitutional review. International journal of constitutional law, 9(2),2011, 517.
[299]Lavapuro, J., Ojanen, T., &Scheinin, M., op. ult. Cit., 518.

Having framed the position of Finland with respect to the practice of judicial review, it is now possible to analyze the peculiar body of the "*Perustuslakivaliokunta* Committee". Starting by defining its nature, we can denote that the Finnish body corresponds to an interparliamentary, non-judicial and non-partisan commission. The former characteristic entails a political manner in conducing the operations, despite its work is independently carried out and in a non-partisan way, so without a biased approach. The Committee is composed by at least 17 MPs, according to Section 35 of the Constitution[300]. Their appointment depends on the party representation, depending on the one they are affiliated to, in the Parliament. The reelection of the MPs is quite frequent despite the method of vote by secret ballot, while the term last a whole parliamentary session. Section 35 regulates also the cadence with which the Committee is appointed, having the same time durations of the other three fundamental committees[301]. The establishment of these four is a constitutional requirement to the formation of the government, and the remaining three are: The Grand Committee, the Foreign Affairs one and the Finance one. The *Perustuslakivaliokunta* Committee's operative range is defined by Section 74, that recites:

«The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.".

The tasks of competence of the *Perustuslakivaliokunta* Committee are limited to the acts of Parliament, Constitutional provisions and international treaties. This legislative provision can be said to be conflicting, or at least blurring, with the one contained in Section 106 as it is not explicitly extended to international agreements, nor mentioned. In reality, the additional boundary contained in Section 74 has been well absorbed in Section 106.

[300] Section 35, *Suomen Perustuslaki, 2000:*" […] The Constitutional Law Committee, the Foreign Affairs Committee and the Finance Committee shall have at least seventeen members each. The other standing Committees shall have at least eleven members each. In addition, each Committee shall have the necessary number of alternate members […]"

[301] Section 35, *Suomen Perustuslaki, 2000:* "For each electoral term, the Parliament appoints the Grand Committee, the Constitutional Law Committee, the Foreign Affairs Committee, the Finance Committee and the other standing Committees provided in the Parliament's Rules of Procedure […]"

The practice of review on the mentioned legislations can be exercised in two different ways: in the first case, it is the Parliament that ,after having completed an introductory debate, may request, upon the agreement of the plenary, the intervention of the Constitutional Law Committee on the constitutionality of a bill. The second path to access the Constitutional Law Committee realizes when the conflicting act is of competence of a different committee, that is uncertain on the constitutionality of the same act, and to solve the doubt, the same committee need to receive during a statement containing the opinion of the "*Perustuslakivaliokunta"* on the issues on constitutional compatibility of the legislative proposal. The Committee analyzes the proposal in multiple steps. First, it is introduced by a formal hearing where its compatibility is discussed also by the opinion of external technocrats and civils. Then, there is an internal preparatory discussion for the writing of the report. Subsequently, in the general discussion there is the reading of the draft and the decision of the Committee on the matter. Again, it is fair to remember that the Constitutional Law Committee is a non-judicial body without binding powers, still its opinions are retained important in the constitutional framework[302]. Moreover, proposals that are deemed or substantively unconstitutional can turn into law. This particular category called "exceptive laws" are laws do not conform to the Constitution that can be exercised through the adoption of the qualified procedure for the constitutional amendment. In this procedure, the constitutional provision blocking the adoption of the legislation is dismissed without affecting the constitutional text. The practice of recurring to the means of "exceptive law" has been majorly diffused until the 80's, when it lost popularity as its abuse cause an obstacle to the office of the Constitutional law Committee. Consequently, the body is positively interested in delivering a proper analysis on the legislative proposal, by recurring to a new draft of the proposition rather than recur to the adoption of the "exceptive law" principle. With the constitutional reform of 2000, new boundaries have been put to the adoption of the principle of "exceptive law". To avoid any abuse, the principle is admitted only if it corresponds to a "limited derogation of the constitution", also called *rajattupoikkeus,* that are peculiar legislations usable only for the achievement of international duties.*[303]*

[302]De Visser, M., Constitutional review in Europe: a comparative analysis, Bloomsbury Publishing; 2013, 29

[303]De Visser, M., op. ult. Cit.,29

### 4.3.3THE HYBRID MODEL WITHIN THE EUROPEAN LEGISLATIVE FRAMEWORK

### 4.3.4 THE ABSORPTION OF THE ECHR LEGISLATION

The adoption and ratification of the European Convention of Human Rights in 1989 by the Finnish legislative system is deemed to represent a landmark in the history of the Finnish constitutional tradition. To the extent that Lavapuro, Ojanen and Scheinin consider this event as important as the adoption of the Human Right Act of 1998 in the United Kingdom[304], mentioned in chapter 3 of this research. The importance of the ECHR in relation to the Finnish domestic system does not reside in the mere protection of human rights, which was already granted by other treaties, like the ICCPR; it consist instead in the adoption of a mechanism of judicial control at the international level that permits to the individuals to go before the international judge if there is not possibility to exercise judicial remedies at the national level. This novelty resulted in the two different situations: in the first one, there is an international judicial court that could compete with the domestic courts in the protection of rights, and so the courts could lose prominence with respect to a centralized body of international justice; the consequential second one is the conferral of the binding and enforceable status to the human rights contained in the ECHR. On the first matter the Constitutional Law Committee intervened by clarifying the hierarchy of the convention, that is intended as an international treaty. The *Perustuslakivaliokunta* Committee stated that the ECHR will enjoy the same legislative condition of the ordinary legislations exercised by the Parliament[305]. Therefore, from this statement it is implicit that the Constitution enjoys a higher legislative grant, primacy, with respect to the convention ant its rights[306]. In an oxymoronic way, the Committee later stressed that the courts should act in a way that grants the protection of the human rights. This confusion on the elements of primacy in the domestic legislation has been faced by Finland in a similar way to the approach assumed by the United Kingdom.

[304]Lavapuro, J., Ojanen, T., &Scheinin, M., op. ult. Cit., 513.
[305]Lavapuro, J., Ojanen, T., &Scheinin, M., op. ult. Cit., 513.
[306]Scheinin, M., Ihmisoikeudet Suomenoikeudessa [Human Rights in Finnish Law], 1991, 259

Similarly, to the adoption of the Human Rights Act of 1998, the Finnish system opted for the interpretative mandate, in which it is prompt and preferred an interpretation that sticks to a friendly approach towards the protection of the human rights. On this matter, in the 2008 report of the Venice Commission on Finland, the body accepted the nature of the Finnish judicial system as long as this structure permits the effective protection of human rights; despite it always pushes for the adoption of the Kelsenian model.

### 4.3.5 THE INTEGRATION OF THE EU LAW

Finland entered in the European Union in 1995 and consequently integrated the communitarian law with its own domestic system. This resulted in the adoption of the peculiar features of European legislation: direct, indirect effect and primacy. The latter principle had not a smooth adoption as the primacy of EU law affected the entire Finnish legislation, with no exception to the *lex posterior derogate priori* principle[307]. This resulted difficult as in 1995 the prohibition on any activity of judicial review of the constitutional legislation was still a current provision. The power to perform constitutional review of legislation by courts came with the reform of 2000. It is quite curious to denote that a motion to approve this practice was already contained within the parliamentary document for the adoption of the European Economic Area Treaty of 1993, with the consequent empowering of the Finnish courts to review the domestic legislation in order to ensure their suitability with the EEA, and so EU, legislation[308]. Still on the fundamental European principles, the Incorporation Act of Accession Treaty of 1994 does not explicitly determine the effects of the integration of Communitarian law in the Finnish system, but the national courts positively received the integration by automatically accepting the European fundamental principles mentioned above.

Despite that, there is still competition between the two typologies of courts. Indeed, the Finnish courts showed resistance to the legislative subjugation towards the European

[307] "*Lex posterior derogat legi priori*: A later rule abrogates an earlier rule of similar status, unless otherwise stated in the provisions implementing the later rule." From: Raitio J.T., The source of law-doctrine and reasoning in Finland, US-China Education Review, 2012, 4

[308] Lavapuro, J., Ojanen, T., &Scheinin, M., op. ult. Cit., 514.

framework. In the *PerustuslakivaliokunnanLausuntoof 2001*[309], the Committee of Constitutional Law stated that the introduction of the communitarian legislation should not be faced as an element that weakens the national norms and standard for the protection of rights, therefore, it should not convey a diminishment in the ranking of the domestic courts and legislation. Following this statement, Finland did not fully integrate the European legislation. Evidences on that can be found if we consider that the Finnish government did not aligned with the Council Framework Decision 2002/584/JHA regarding the European arrest warrant and the surrender procedures between Member States[310]. Another element that proves the Finnish reluctance towards the European courts is the low number of references that the Finnish courts issued to the ECJ. As a matter of fact, the Finnish government is almost forced to present a preliminary ruling before the ECJ for any interpretation or matter of EU legislation. Already in 2010 Finland recorded only 64 references of this kind, an amount that is well lower compared to the standard of the other member states[311].

It is clear that the Finnish courts are reluctant to the idea of conferring most of their power to EU courts. Nevertheless, they well, but not completely, implemented the EU legislation that can be said to have favored the establishment of an approach towards judicial review. This can be said especially if we consider the valency of the Incorporation Act as represented the first steps towards the introduction of Section 106 of the Constitution.

## 4.4 THE COMPARISON WITH NETHERLANDS

The framework presented above shows different approaches towards judicial review, in order to better comprehend the different approaches towards constitutional law and constitutionalism among different countries of the world. Having presented a comprehensive framework, it results clearer to understand the approaches adopted by Estonia, Finland and Italy are all different: Estonia enshrines. Nevertheless, all the models presented do not exercise a pure form of the model of judicial review adopted. The choice

[309]PeVL 25/2001VP
[310]OJ L 190 of 18.7.2002
[311]Lavapuro, J., Ojanen, T., &Scheinin, M., op. ult. Cit., 516

of these countries is strictly linked to this condition, in order to progressively show the shift on constitutional approaches and matters, This process of shift and modification, that on one hand is natural given the continuous changes recurring in constitutional law, is contained in Chapter 6 but with this comparative framework already, there is ground to analyze common patterns. For instance, Italy, that traditionally adopted a centralized model of judicial review, is experiencing a shift towards a decentralized pattern, given the pressures coming from supranational legislation and from the acceptance of the "Simmenthal" doctrine[312]. Nevertheless, the continuous theoretical movements in constitutional law and international law are influencing Italy towards a recentralization and convergence of powers to the *Corte Costituzionale.* Communitarian law is, as in Netherlands, a major influence in the Italian jurisdiction.

Similarly, to Netherlands, Estonia followed a process of total implementation of communitarian law, demonstrating blind folded trust in the European legislation. As a matter of fact, there is no possibility to exercise constitutional review in case of conflict with the EU legislation. This process is opposite to the Dutch approach that accept judicial review of Acts of Parliament only *vis-à-vis* communitarian law. Notwithstanding the reversity of the approaches, the effect in both cases worsens the internal constitutional value. In Estonia the constitutional text moves in the second ground given the impossibility to review EU legislation when in conflict with the domestic norms. On the other hand, the resistance on the review of Acts of Parliament does not permit to establish a positive constitutional dialogue and leave courts inactive[313], weakening the constitutional knowledge.[314] Furthermore, Estonia adopts a decentralized model of judicial review that foresees the involvement of non-judicial actors, and so not adopting a pure form of review.

Finland is the most hybrid model in the framework, exercising both ex ante and ex poste judicial review. Finland opens up to hybridization. To permit the coexistence of both processes, the Dutch lawmakers shall find a legislation that fill the legislative gaps between abstract ex ante review and concrete ex post. Finland overcame this problem

[312] See section 4.1.3.3 of this chapter.
[313] Or the Supreme Court, depending on the approach that would be chosen by Netherland. See also Chapter 7
[314] Gerards, J, The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It, Revue interdisciplinaire d'études juridiques, 2016.

with the implementation of Section 106[315], and put in charge of constitutional safeguard the "*Perustuslakivaliokunta* Committee". The adoption of a non-judicial body finds Finland with the adoption of a hybrid model. The presence of a body that is a constitutional granter, but that has not mandatorily to be of judicial nature, is a solution that Netherland might want to adopt, especially in the recent times after an hypothetical change to Article 120, in order to ease and coordinate the process of constitutional review

Finally, this framework has to be understood as an aiding tool to contextualize constitutionalism in other countries, in order to understand whether communitarian influences apply selectively or broadly. The models analyzed in this framework have to be looked also as a possible model, a pattern that Netherland might, wholly or partially, adopt in case of an amendment to Article 120. Given the recent proposal of revision on the prohibition of judicial review[316], it might be possible to see the Finnish solution as the most likely to be adopted, as it would convey both *ex ante* and *ex poste* review. Optimism on the possibility of an adoption similar to the one of Finland is prompted also by the fact that Finland recently reformed its constitution to introduce Section 106[317], enabling the review of legislations approved by the Parliament. Therefore, as Netherlands, Finland has been a country that did not foresaw judicial review of legislation. Given the influence of European law, to be included in the process of standardization[318], Finland changed its approach in constitutionalism. This evidence might suggest that changes might soon happen in Netherlands, due to the external pressures coming from European law and the process of standardization.

[315] "If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.", The Constitution of Finland

[316] See Chapter 7

[317] Section 106 has been introduced with the Finnish constitutional reform of 1999.

[318] "Standardization" is intended (here and now on) as a phenomenon that seek to converge constitutional law among different countries, see Tushnet, M, op. Ult. Cit.; Law, D.S., Globalization and the future of constitutional rights. Nw. UL Rev., 102, 2008, 277; Shapiro, M., The globalization of law in *Indiana Journal of Global Legal Studies*, 1993, 37-64.

# 5. THE ATYPICAL RELATIONSHIP BETWEEN THE DUTCH CONSTITUTIONAL SYSTEM AND THE ECHR: DOES THE CONVENTIONALITY REVIEW SUPPLEMENT THE LACK OF CONSTITUTIONAL REVIEW?

In the past chapters it was of main interest to understand first the status of constitutional justice in Europe, then the peculiar case of the Dutch Constitutional adjudication and constitutionalism. Having compared this approach with the one of other countries that adopted other pattern of control and review, we now focus on the role of European human rights in the Dutch constitutional system, admitting the possibility to review the conventionality of the provisions.

The chapter will be organized in the following way: first, the degree of openness of the Dutch legal system towards international legislation and the peculiar monist system valid in Netherlands; from this point of beginning the impact of the ECHR legislation and its court on the Dutch judiciary branch is consequently questioned. In the matter of international relationships and treaties, granted by Article 94 of the Grondwet, there have been efforts to modify this legislation, without any successful result at current date. If the pattern used does not change, it should mean that the mechanism contained in Article 94 is legally solid and works smoothly. To ascertain that, in the last part of the chapter we will analyze in the overall the mechanism of protection and understand its efficacity.

## 5.1 DUTCH DEGREE OF OPENNESS TOWARDS INTERNATIONAL LAW

Already during this research, it has been stressed that the Dutch openness towards international law is a peculiar feature of the country, considering its rigidity towards other sources of law such as the *Grondwet*. Starting from the core notion enshrined in the Constitution, at article 90 of the *Grondwet*, the Netherlands have multiple factors that prove this proactive tendency towards the international legal system. For instance, the country is the host of international organizations and institutions, such as the International

Criminal Court, the International Criminal Tribunal for the former Yugoslavia and the Organization for the Prohibition of Chemical Weapons. This approach not only demonstrates the openness towards international legislation but the willingness to stand a major promoter of the international legislative order. Other than the explicit statement contained in Article 90, proofs can be found if we think about the meaning of hosting the International Criminal Court: as the Court is still seeking an universal acceptance for the sake of its legitimacy, the hosting countries empowered itself as an ambassador of the Statute in order to convince non signatory countries to join. In this context Netherlands is promoting an international judiciary framework that inserts among the subjects that form the international legislative order mentioned in Article 90:

« The Government shall promote the development of the international legal order.[319] ».

The provision is quite unique in the context of the Dutch Constitution, which is short, simple and contain the sufficient provisions necessary for the enforcement of the law and the respect of the fundamental rights. Nevertheless, this kind of provision is pretty much rare even when compared with other constitutional texts. From this comparison, it might be possible to infer that many countries enshrine the aim of international peace and cooperation, but not with the specific meaning contained in the *Grondwet*. The Dutch provision conglomerates aims such as the one mentioned above, being much more inclusive with respect to other countries. For instance, the Italian constitution expresses the willingness to support international organizations, or the German one that stand for the enhancement of the European integration, or again, the Portuguese one that foresees disarmament, the dismissal of colonialism and its practices and the allowance to revolt against any form of dictatorship. These aims can easily be regrouped in the macro-concept contained in Article 90, which is broader but still detailed. Moreover, these provisions were retained necessary in the constitutional text by the mentioned countries given the particular historical background they had, especially if we consider that most of the modern constitutions have been written and ratified after the experience of the two World Wars. Therefore, here it is questioned the nature of the Dutch provision and its justiciability, which will be understood only by starting from analyzing the origins and the reasonings of this law.

[319] Art.90, Grondwet

As a matter of fact, Article 90 did not come with the Constitution of 1983, but it has already been conceptualized in the version of 1922 and changed in parallel with the changes of the *Grondwet.* Specifically, Article 57 implied this assumption while referring to foreign relationships. The reform empowered the parliament with major prominence in the decision-making process related to the relation with other countries, having the right for the approval on international agreements and wartime decisions:

« The King seeks to resolve disputes with foreign Powers through jurisdiction and other peaceful means. He declares war only after prior permission from the States General.[320]»

In the process of democratization enacted by the Netherlands in these years, the removal of the exclusive authority of the King and the inclusion of the States General in the decision on the declaration of war, definitively rends better the management of the foreign relations.

But this represents only the very beginning of the mission undertaken by the Dutch culture and governments. With the constitutional revision of 1953, a new and more focused approach towards foreign relations came in Netherlands, probably as a response to the aftermath of the Second World War. The C*ommissie - Van Eysinga* had been established with the task of reconceptualizing in a more comprehensive way the Dutch goals in international relations[321]. The Commission proposed a more detailed and specific provision, where the exclusive power on the decision making is still conferred to the King, but now it is stressed his aim in striving for the development of the international legal system; but also, the recurrence to the use of force is now deemed necessary only in urgent situations and after the agreement of the States General. That might seem natural nowadays, but the use of armed force was still an idea shared by a large domain after the end of the two World Wars. The text proposed by the Commissie stated that:

« The King shall have supreme authority over foreign affairs. He shall promote as far as possible the development of the international legal community. Except in urgent cases,

[320] Art.57, Grondwet, 1922

[321] *Besselink, L., The constitutional duty to promote the development of the international legal order: The significance and meaning of Article 90 of the Netherlands constitution in Netherlands Yearbook of International Law, 34, 2003, 89-138, 97*

the armed forces shall not be put at the disposition for the collective maintenance of law until after consultation of the States General[322] ».

This proposal had been later reconfigured by the *ad-hoc* appointed *Staatscommissie* concerning the constitutional revision and after undergoing to a process of skimming, the provision, which will later receive the Parliamentary approval, stated the following:

« The King shall have supreme authority over foreign affairs. He shall promote the development of the international legal order.[323] »

Here, for the very first time, it is possible to see the position undertaken by the Netherlands in the management of international relations, putting themselves as a character for the establishment and improvement of the international legislative system.

We now reach the last step, with the last meaningful constitutional revision happened in 1983. Article 58 became Article 90, but it risked being completely dismissed from the constitutional text, as it was deemed superfluous on the basis that without the written provision, the King would still strive for the development of the international legal order. Instead, the textual change that really happened in the end has been the substitution of the word "King" with the word "Government", therefore:

« The Government shall promote the development of the international legal order[324] »

The deletion of the referral to the King does not mean to shift the conferral of power, it gives a clearer point of view as from the perspective of the foreign countries, the first referral for a country should be its government rather than its king[325]. Apart from that, textually speaking, the provision did not go through other substantial changes.

Having reconstructed the origins of this provision, it still remains unclear the nature and scope of the legislation, which remains obscure and encrypted in the short sentence of Article 90. The aim of the Article became less clear through the years, indeed we had occasion to see the degree of details in the textual versions of the different constitutions.

[322] Eindrapport van de Commissie nopens de samenwerking tussen regering en StatenGeneraal inzake het buitenlands beleid, 9 juli 1951, The Hague, 1951, 13-14
[323] Art.58, Grondwet
[324] *Art.90, Grondwet*
[325] *Besselink, L., Op. ult.Cit., 118*

In the first version, of 1922, it was clear the constitutional provision aimed at constraining the powers of the King on declaring war, opting for a more democratic decision-making process and striving towards the use of peaceful meaning to resolve disputes between and among countries[326]. The aim of solving conflicts by means of peaceful dispute settlement lasted in the version of 1953. With the Constitution of 1983 the meaning of the whole article went well beyond the concept of recurring to mechanism of peaceful dispute settlement. The cryptic statement of Article 90 compasses a very broad category, the one of the international legal order. Giving the vagueness of this sentence it is of our interest to understand the effects of this provision nowadays and its justiciability.

First of all, it should be stressed that the nature of the provision has been challenged many times by representants of the government, such as the Liberals, which rooted for the removal of the provision as it mirrored a desire rather than conferring and regulating obligations and duties, as a constitutional text should do in its main scope[327]. According to Besselink, the law in its different versions through the years always maintained a regulative nature. Therefore, it seeks to determine the manner with which the government should manage its powers in the branch of foreign policy. According to this vision, the powers of action in the matter are conferred by other provisions contained in the constitutional text and are the so-called "attributive norms"[328]. There is a current, always explained by Besselink, that would tend to reinterpret the nature of Article 90 with the conferral of the attributive nature. This understanding seems honestly to stretch the nature of the legislation, as the attributive norm usually convey an open and not constrained power which is assigned, generally in an exclusive manner, to a domestic organ, and so would block any other domestic institution from any kind of involvement. That is not the current effect of Article 90, nor the ones of the previous provisions, and consequently this understanding is not worth of consideration in our research. Nevertheless, the provision does not only contain a desire, a willingness, or broadly speaking sentiments, as said by the Liberals, but effectively influence the approach in foreign policy in real life. Firstly, its justiciability is considered in administrative and civil courts. The provision is enforced in the following courts, but it has a stronger character in the former body as it is

[326] *Huart, F.J.A., Grondwetsherziening 1917 en 1922, Arnhem, 1925*
[327] *Besselink, L., Op. ult .Cit., 99*
[328] *Besselink, L., Op. ult. Cit, 119*

understood as a proper guideline that helps in the interpretation of the events, while in the latter courts it is almost deemed as not justiceable[329].

Article 90 also determines other behaviors conducted by the state, always linked to the fostering of foreign relationships and of the consequent international legal order. Starting from the more controversial, it is possible to infer that the legislation confers powers to the country to send troops in foreign countries for peacekeeping activities and non-bellicose aim. It is quite controversial if we think at the first version of the provision, contained in the *Grondwet* of 1922, that set an obligation on the pursue of peaceful means for dispute settlement. Of course, peacekeeping operations are among the solutions listed for a peaceful dispute settlement, but on the other hand it can imply the use of armed force. It is not just that, other behaviors derive from Article 90 such as the regulatory terms on an extradition, the competence on concluding treaties and the conferral of the power on the authorization and verification of documents[330]. On extradition, the Grondwet confers the powers for the negotiation and the regulation of the terms of extradition mostly to the government rather than the judiciary. The judicial branch will intervene if the government solve the requested extradition in a wrongful manner, the individual can appeal to the civil court of the country in which he is at the moment, the court may apply an injunction on the governmental branch, in order to grant that the behavior followed will comply with provisions deriving from international agreements such as Article 3 of the ECHR[331].

These are the effects and scopes foreseen by Article 90 at the current date. Therefore, its nature is the one of a law that has the scope of the promotion of the international legal system, but also has its enactment in the legislative field. Despite that, it can be said that in the overall, Article 90 sets a goal for the recent future, but also a concern on the goal that has to be reached. The same legislation textually determines the approach to be followed by the Dutch government, but it cannot be said to be determining on the matter. Without the written provision, the Dutch government will much probably strive for the fostering of the international legal system, because the legal tradition of a country cannot

[329] *Besselink, L., Op. ult. Cit*, 127-130

[330] Besselink, L., Op. ult. Cit, 124

[331] *This assumption derives from the statements contained in the following judgement:* 9 November 1990, District Court, The Hague, para. 6.3.8, quoted in NJ 1991, 696

be erased from one day to another and the same tradition cannot depend only on a legislation written on the constitutional text.

During the years, the provision developed and constituted a legal tradition in its three main steps: in 1922 the legislation concerned the use of peaceful dispute settlement mechanisms, in 1953 the provision added the intention to promote the international legislative system, also a consequence to the facts occurred in the recent past with the World Wars, in 1983 the provision maintained the goal set in 1953 but included also the human rights given the prominence they were acquiring in those years.

Finally, we can infer that this approach can be understood as a policy for the self-benefit of Netherlands. Forcing the rest of the countries to join in a path, in which the Netherlands are already well grounded, in order to have the grant that the same safeguards that people may receive in the Netherlands, will be mutually received abroad when it comes to Dutch citizens in need.

### 5.1.1 QUALIFIED MONIST SYSTEM

Already in chapter 2 we saw that the Netherlands is among those countries that have a monist system. This approach is adopted by those countries that receive international law in the same legislative system of the domestic one, but also gives prominence and primacy to the international legislation when in conflict with the national order. Conversely, the dualist system foresees the distinction and the separation between the two legislations, with different sphere of competence that does not meet between each other. Pragmatically speaking, the monist system consists in the direct incorporation of the international legislation: it can be straight forward applied without being redirected to the domestic legislative system, and so without any need of change in order to conform to the national standards.

These are the two theories in their purest form, from an orthodox point of view. As we have seen with the comparative framework of chapter 4, dichotomies based on theories does not always translate as such in reality. Forms of hybridization can happen, but also countries may adopt a model and mold it to their necessities, usually that means that they

avoid the adoption of the purest form of a model, but rather use it at their discretion. In the case of the monist and dualist system, not only the two may influence one with the other, but according to some scholars their relationship is more symbiotic than poles apart[332].It is quite rare to find a country that enshrine the principle in an orthodox way, despite enshrining the principle: in case of monism, the form adopted may not be the purest, but the pattern still implies that the country believes in the unity of the law.

This can be said to be the case of Netherlands, that does not adopt the purest form of the model, but still stand towards the unification of different legislative orders. The country, despite having a monist approach, still need the agreement and opinion of the Parliament on an international legislation, as normal nowadays according to the pattern of modern constitutionalism[333]. This obligation derives from the constitutional text, in this context the Grondwet foresees, in Article 90, a compulsory parliamentary approval before the direct implementation of the international legislation. International agreements and treaties for example, specifically need to be passed by the States General. The Dutch Constitution influence the monistic approach by not only determining the need for parliamentary approval, but also by requiring the official publication of the law. Moreover, the Grondwet cannot be said to treat all the international legislations and their sources in an equal manner[334]. Nevertheless, this approach does not result in the transferal of prominent powers and competences to the legislature, but it rather follows the pattern of democratization with the involvement of the Parliament, that should represent the will of the citizens. The Dutch adoption is known as "qualified monism", and the specific term derives from a denomination given by the Dutch government in the first ever Universal Periodic Report. At section 18 of the same document, it is possible to find the government's definition and explanation to the pattern of adoption:

« A distinction should be made between the direct effect of provisions of international law and the binding nature of provisions of international treaties. The latter is beyond dispute. However, the Netherlands has a qualified monistic legal system. In a monistic

[332] Charlesworth, H, The Fluid State: International Law and National Legal Systems, Federation Press, 2005, 16

[333] Haljan, D., Separating powers: International law before national courts, Springer Science & Business Media, 2012 October 30, 93

334 Doorwerking internationaal recht in de Nederlandse rechtsorde, Parliamentary documents 2007-2008, 29861 No. 19, p. 3

system the courts must, in principle, apply not only national rules but also the provisions of treaties and resolutions of international institutions, with the latter two categories of law prevailing if the domestic legislation is incompatible with them. The Dutch system is characterized as a 'qualified' monistic system because the provisions of treaties and resolutions of international institutions can only be applied if they (a) are binding on all persons and (b) have been published.[335] »

This definition is quite clear on the approach that the government is willing to follow, but for the sake of clarity, it worth to contextualize it briefly. Article 93 and 94 of the Grondwet have already been a subject of examination during this research: the former regulates the adoption of the international treaties; the latter determines the primacy of international treaties and the consequent prominence of the fundamental and human rights deriving from it. Article 93 particularly, is a provision that influence the "qualified" character of the system by imposing that international treaties will become binding only after their publication[336], and so after the approval of the Parliament.

As we can see the Dutch model is far from being a pure form of monist system. Limits and constraints do not only derive from the binding nature of the legislation and the direct effectivity of it, which tends to be a matter of difficult management in monist systems; the first and very limitation, that bring a moderate form of monism, derive from the same Dutch Government that selectively chose in the Universal Periodic Report the contexts in which this pattern is admitted and not conflictual.

### 5.1.2 THE DUTCH MIRROR PRINCIPLE

The qualified monist system is not the only particular Dutch feature regarding international agreements and the consequent rights deriving from them. The Dutch government has been enshrining this practice since a particular judgement released by the Supreme Court in 2001. The mirror principle does not originate from the Dutch legal tradition, but from the one of the United Kingdom. The U.K. Law Lord Bingham coined

335 A/HRC/WG.6/1/NLD/1, 7 March 2008, The Netherlands, Universal Periodic Report, Section 18
336 Art.93 Grondwet

this term while issuing an opinion in which he sustained that it was a duty of the domestic courts and judges to reflect the standards of protection, hence the rights, asked by the European Court of Human Rights. In other words, it is up to the national judges to check that the domestic standards of protection are in line with the requests of the Court of Strasbourg, in order to do not provide a weaker method of protection. This approach derives from the provision contained in Article 53, which enables the domestic courts to set higher standards of protection of the rights contained in the Convention than the ones provided by the European Court of Human Rights:

« Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party[337]. »

On the other hand, Bingham added that domestic courts do not have to adjoin to the standards of protection granted by the European Court of Human Rights[338].

Starting from this assumption, the Dutch courts derived their personal approach towards the mirror principle. In a *Hoge Raad* judgement issued in 2001[339], the judicial body noted that Article 53 permits to the national courts to rise the standards of protection of human and fundamental rights with respect to the levels established by the Court of Strasbourg, as noted by Bingham. Differently form the context given in the United Kingdom, the Dutch Constitution does not permit to alter and add the standards of protection foreseen by the Court if that is not a provision that follows a judgement issued by the European Court of Human Rights. As a matter of fact, Article 94 of the *Grondwet* foresees that any statutory legislation cannot be enacted if in conflict with a provision deriving from international agreements and supranational entities.

Given these conditions, according to the *Hoge Raad* it is up to the legislative branch to determine whether higher standards of protection are needed, with respect of those

[337] Article 53 ECHR

[338] In Ullah v. Special Adjudicator (2004), UK HL. 26, (2004) 2 A.C., Lord Bingham affirmed: « It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less. »

[339] HR 10 August 2001, NJ 2002, no. 278

provided by the Court of Strasbourg and consequently by the Convention. This approach follows the judicial restraint that is in force in the Netherlands, in line with the great empowerment that the Dutch Parliament enjoys.

## 5.2 THE IMPACT OF ECHR ON DUTCH COURTS

At this point of the research, we have well acknowledged and comprehended the Dutch approach towards international treaties, and so towards the fundamental and human rights deriving from their ratification. Mainly, the *Grondwet* regulates this kind of behavior. As we have seen in the previous section, in several occasions it is widely expressed the monist approach of the Dutch legal culture, that permits a direct enforcement of international agreements to ordinary judges, for the self-executing provisions and with a binding *erga omnes* effect. Considering now the specific case of the European Convention on Human Rights, it is a treaty that has prominent value in the Dutch courts, and it is usually enforced. As Article 94 foresees the dismissal of an Act of Parliament in favor of the provision contained by an international agreement, it is possible to infer that the ECHR functioned as a constitutional text, replacing in full effect the role of the *Grondwet*[340]. Moreover, as suggested by Van der Schyff, the Convention enjoys a high status of relevance in the Dutch legal system as the text of the treaty is much more easy to comprehend, with respect to the Grondwet that has a minimalist structure and leave comprehensive gaps, shaded areas of understanding giving the cryptic nature[341]. These are aiming the most reasonable justification for the Dutch approach towards the ECHR, and so it is of our interest to understand the impact of such Convention on the Dutch legal system and on the bodies that enforce these provisions by judiciary means.

[340] Claes, M. and, Gerards, J., 'National report- The Netherlands', in J. LAFFRANQUE, ed., The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention, Human Rights and National Constitutions, Reports of tile XXV FIDE Congress Tallinn, Vol. 1, Tartu, University Press 2012, 629-632

[341] Van Der Schyff, G., The system for limitations of Dutch fundamental rights: critical comments to the report of the Government Commission for Reform of the Constitution, Constitutional Law Review ,2011, 190-194.

First, it is worth to mention that the Dutch judiciary system is often in line with the judgements delivered by the Court, having the *res interpretata* approach. Specifically, this means that the courts of Netherland agree on the interpretative flexibility determining that the interpretation of a peculiar case can be enshrined and enforced in analogous cases. Before focusing on the enforcement of the levels of protection by the Dutch courts, we will briefly see the effect of a judgement of the European Court of Human Rights on Netherlands. If the Court desires to investigate and reopen a domestic case, it is possible in criminal proceeding but not in those matters of civil and administrative legislation[342]. As enshrined by the Code of Criminal Procedure, at Article 457, it is possible for the Court to reopen a proceeding in which it has been found an infringement of the ECHR. The procedure is admitted only if the request is submitted to the Court by the applicant[343]. Another path to be followed is to contest the conduct of the State before the ECtHR appealing for a tortious act, according to Dutch Civil Code at Article 6:162. In this eventuality, the responsibility of the state must be evident, and the unlawful conduct of the State must be absolute. If that happen, the Court will fulfill its duty and oblige the State to remunerate the individual for the tortious act committed[344]. Sticking to the field of domestic legislation, it has to be noted that the Dutch judiciary branch usually mold the national provisions to the standards enshrined in the judgements issued by the Strasbourg Court, in continuous progression. This behavior, resulting from mirror principle, does not imply that Netherlands blindly follows the ECHR directives: as we will see later, Dutch courts remarkably change their behavior when it comes to the interpretative process.

Focusing now on the Dutch application of the levels of protection imposed by the ECHR and its Court, it has immediately to be noted that despite the Grondwet foresees this possibility, it is quite rare to see an Act of Parliament to be dismissed in favor of a provision contained in the Convention. That happens because, generally, there is no need to replace the provision of the Grondwet as the Convention does not compass and conflict with the Dutch constitutional text[345]. This is quite telling on the positive structure of the

[342] Gerards J, Fleuren J., Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law. A comparative analysis, 2014, 255.
[343] Barkhuysen, T., and Van Emmerik, M.L., Rechtsherstel bij schending van het EVRM in Nederland en Straatsburg', 31 NJCM-Bulletin, 2006, 59.
[344] Gerards J, Fleuren J., op. Ult. Cit., 238
[345] Gerards J, Fleuren J., op. Ult. Cit., 239

ECHR and the thoughtful manner with which it has been written, as a matter of fact, the Convention is usually considered in the process of building the standards of protection at the domestic level. The Dutch judiciary branch can be said to use the ECHR as a proper benchmark when checking domestic provisions that conflict with the Convention, by controlling the effectiveness, necessity and proportionality according to the necessity check of the European Court of Human Rights[346]. The parallelism between the Dutch case-law and the ECtHR ones is quite strong: the aforementioned check of necessity or the control on concrete factors are similar and it is a formalized practice among Dutch courts. As we stressed in the previous section, the parallel Dutch approach with respect to the Convention and its court almost disappear when it comes to the duty of interpretation.

This is a peculiar behavior of the Netherlands: the country will follow the guidelines provided by the Court and eventually update their behavior according to the new verdicts proposed by the ECtHR, but they will know little about the principles that the new interpretation contain and consequently it is quite rare to see any reference to the ECHR in the judgements. Despite the fact that the judiciary branch in Netherland is quite proactive in comparing and confronting with foreign judicial systems and jurisdiction, they do not take in consideration concretely foreign cases to justify a new interpretation of the ECHR. Novelty will usually be introduced by the same Strasbourg court, given the parallel approach between the two entities[347].

### 5.2.1 THE HORIZONTAL EFFECT PRINCIPLE

Before focusing on the Dutch interpretative method of the European Convention of Human Rights, it is worth to see briefly the horizontal effect principle as a factor of the impact that the Court has on the Dutch system. We recall that the horizontal principle permits the use of the communitarian law against individuals, privates. The principle's effect is definitely notable in the branch of private law, giving also the cooperative

[346] Gerards J, Fleuren J., op. Ult. Cit., 240
[347] Gerards J, Fleuren J., op. Ult. Cit., 241

approach of Netherlands in complying with the positive obligations that arise from the case-law offered by the Strasbourg Court. These obligations contained in the ECHR are valid in domestic courts when regulating conflicts between private entities. Indeed, the obligation that follows the provision established by the Court becomes a duty for the States Parties to be complied. The compliance is necessary as the obligation contains rights that must be exercisable by the individuals in their relationship with each other. Given the direct effect, and so self-executing nature, of the ECtHR legislation, the rights enshrined in it are applied by domestic judges within national offices[348].

From this clarification, it is understandable that the factors of impact on national jurisdiction through the horizontal principle is two folded as we have both the ECHR and the ECtHR. In saying this we can refer to two different Dutch cases.

The first concerns the role of Court: in case n.6758 of the *Hoge Raad* it has been recognized, in the case concerning the right to access by an individual to child that is not recognized and not his legal child, that a parent is rightful in pretending the respect for the life of the own family and exercise it against the other parent and appellant before the domestic judges. This decision follows the case-law provided by the Court in relation to the provisions contained in Article 8 of the Convention concerning the right to access to the children of another individual[349].

In the other case, it is possible to see the impact of the European Convention of Human Rights as we refer to the case *"Rechtbank-Hertogenbosch"* of 2001*:* here, the removal of a satellite structure was not authorized because it did not follow the provision contained in Article 10 of the Convention, this according to the vision upheld by the Dutch District Court[350].

Given this situation it is possible to state that the impact is present in the direct horizontal principle, when it come to the ECHR, and in the indirect horizontal principle, following the interpretation of the case-laws of the ECtHR. As we can see from the vast effect described, the ECHR and the Court are mainly influent in the Dutch private law. Despite a high degree of penetration by the treaty, it is not always enforced according to the

[348] Gerards J, Fleuren J., op. Ult. Cit., 242
[349] HR 22 February 1985, NJ 1986, no. 3.
[350] Rechtbank's-Hertogenbosch, 26 October 2011, ECLI:NL: RBSHE:201l: BU2938

discretion of the Dutch judges. If these entities deem that the case contains judgement upon certain sphere of competences, usually delicate, it is possible for the individual to appeal to the judiciary, instead it will be a matter left to the judgement of the legislative branch.

### 5.2.2 THE DUTCH MINIMALIST READING OF STRASBOURG'S JUDGEMENTS

The judiciary branch of Netherlands traditionally follows the approaches enshrined in the case-law of the Court of Strasbourg, but at the same time desires to keep a narrow level of interpretation of the judgements issued by the ECtHR, benefitting of more independent discretion in the issuing of the judgement of the domestic case. This particular behavior is notable in the so called "*Post-Salduz*" case and in *Vidgen v. the Netherlands*, two cases concerning the right to a fair trial and profoundly influenced by a minimalist behavior in the reading of the ECtHR judgement by the Dutch courts. The judgement concerned derives from the ECtHR case law of *Salduz v. Turkey* of 2008, where the Court enshrined the right to have legal assistance while being taken under police custody. This obligation had to be fulfilled unless peculiar conditions or events do not permit so[351]. This exemption has not been clearly demarked and prompted doubts in the interpretation, implicitly giving more space to independent interpretations.

The "*Post-Salduz*" judgement concerned a person that in order to solve a debt was obliged to perform 20 hours of voluntary social services. The individual appealed to the Supreme Court by evidencing that the judgement depended on statements made by the charged while being without any legal assistance at the moment of the confession. The Hoge Raad neglected the right to the appellant as stated that:

« The Supreme Court deduces from the case law of the ECtHR that a suspect who has been arrested by the police complies with art. 6 ECHR can derive a claim for legal aid that means that he is given the opportunity to consult a lawyer prior to the interrogation by the police regarding his involvement in a criminal offense . However, it cannot be

[351] Salduz v. Turkey, ECtHR (GC) 27 November 2008, no. 36391/02

inferred from the case law of the ECtHR that the suspect is entitled to the presence of a lawyer at the police interrogation. [...][352] »

According to this verdict, the *Hoge Raad* sees the legal assistance as an opportunity rather than a compulsory right, therefore, following this narrow interpretation of the *Salduz* case-law, there should not be any ground for the claiming of infringement of Article 6 concerning the right to fair trial.

In the judgement of 2012, a British man called *Nicholas Vidgen* has been found guilty of transporting illegal substances. The appellant appealed to Article 6 of the Convention, at comma 1 concerning the right to a fair trial, and at comma 3 on the right to obtain attendance and examination of witnesses. According to *Vidgen*, his charge was held upon evidences coming from the declarations of an unexamined witness, but the Court dismissed his request. The European Court of Human Rights in this case noted that, following the narrow interpretation of the Article 6 and the annexed case law, the *Hoge Raad* acted in violation of Article 6.

The following year, in 2013, the Dutch judiciary branch committed another violation, this time of Article 5 of the Convention, by maintaining an obscure and minimalist interpretation of the ECtHR case-law. In *Van der Velden v. the Netherlands* the court decided to set aside the interpretation of the domestic legislation given by the Court, concerning the right to decide on the extension of a psychiatric confinement measure. In its judgement, the *Hoge Raad* delivered unclear justifications on the setting aside of the ECtHR, without deliberately stating that it was wrongful nor saying that the reading provided was about to be dismissed. The Dutch Supreme Court declared that the *Van der Velden v. the Netherlands* case had to be solved through a different and independent interpretation from the ones suggested[353]. The Court did not remain silent in front of the behavior upheld by the Dutch judiciary and judged Netherlands as guilty in his behavior by infringing Article 5 of the Convention, the right to *habeas* corpus and so against unlawful detention[354].

[352] HR 30 June 2009, NJ 2009, (2.5)
[353] HR 12 February 2013, ECLI:NL:HR:2013:BY8434
[354] ECtHR 31 July 2012, appl. no. 21203/10.

In both cases where the infringement had been found by the Court, the Supreme Court later accustomed to the interpretation given in whole by the Strasbourg body. Nevertheless, these cases demonstrate that the Dutch Courts are not always willingly in following the interpretation of the Court, preferring to have a margin of discretion in deciding on national jurisdiction.

## 5.3 THE DUTCH JUDICIAL REVIEW IN THE PROTECTION OF RIGHTS

After the considerations upheld in the previous two sections, we briefly resume the Dutch approach in reviewing legislations conflictual with the protection of rights. The judicial system in Netherlands is quite constrained, as article 120 prohibit the review of an act of Parliament by the judges. Conversely, the same entities are entitled to review primary legislation to avoid any conflict with the provisions foreseen in the international treaties. Specifically, the practice of review that is allowed to the Dutch judges is a control of conformity, or conventionality, in which the judicial entities analyze the inapplicability of a statutory legislation, when threatening the protection of human rights. Even in this context, judges are not allowed to decide on the constitutionality of a statutory provision. The ability to perform the control on conventionality is granted by Article 94 of the Grondwet.

Even if lacking a practice of constitutional review, the Dutch legislative system seems to be able to fill the legal gap left by the ban on constitutional review of Article 120 with the procedure of control of conventionality. The practice relies on two main preconditions that dictate the dismissal on the national provision: the direct effect and binding for all principles.

Despite the balanced and well-functioning path followed by Netherlands, in the recent years the system has been doubted and new patterns has been proposed, as in the case of the Staatscommissie 2010 and of the one advanced by the People's Party for Freedom and Democracy. Critics are not only concerning the Dutch system, but also touches the offices exercised by the Court of Strasbourg. The criticism against the ECtHR is not of Dutch matrix, even though it has been well absorbed, as the first to voice these complaints

has been Lord Hoffmann, justice of the British Supreme Court. Targets of doubts are: the extensive range of operations undertaken by the Court, that should only intervene in deciding only upon main issues and not act as a court of cassation; consequently, a wider margin of appreciation should be left to national legislations when relating to the Court; finally, the Court is deemed to act in a way that does not respect the democratic principles[355].

Given the recent unpopularity that the Dutch system and the ECtHR was living, the aforementioned two proposal tried to seek a new beginning in the protection of rights.

### 5.3.1 MODIFYING ARTICLE 94: THE STAATSCOMMISSIE REPORT OF 2010 AND THE PEOPLE'S PARTY PROPOSAL

The State Commission report of 2010, also known as Thomassen-Staatscommissie, has been already analyzed in Chapter at section 3.3, and so we already know that this aim at clarifying, enhancing the relationship between treaty provisions and fundamental rights. The proposal consistent in the addition of a second paragraph to Article 94 of the Grondwet, that foreseen the inapplicability of treaties and international agreements if in conflict with fundamental legislations concerning the democratic rule of law, its fundamental principles, human and fundamental rights[356]. In this way, certain provision contained in international agreements would no more be enforceable at the national level, as they violate the fundamental constitutional values. The proposal, which would still permit the Netherlands to fulfill its obligations according to the treaties established, has been rejected by the Dutch Government in its reaction to the report issued by the Commission[357].

Two years later, a new modification to Article 94 was proposed, but this time it came from a political party: the *Volkspartij voor Vrijheid en Democratie*. The political entity

[355] Lord Hoffmann, 'The Universality of Human Rights. Judicial Studies Board Annual Lecture', 19 March 2009, 22-3
[356] Efthymiou, N.S., and De Wit,J.C., The role of Dutch courts in the protection of fundamental rights, Utrecht L. Rev 9,2013 , 84
[357] Kamerbrief 24 October 2011, pp. 12-13,

wished to amend Article 94 in order to give to the Parliament the right of reservation in a legislation when addressing the direct effect of the fundamental provisions contained in international agreements. This new approach would remarkably limit, in the domestic legislative system, the direct effect of *erga omnes* provisions. This proposal sounds more revolutionary in terms of real changes but has not been well received among scholars and members of the judiciary. Moreover, as a reason of doubt on the rightfulness of the proposal, it has to be noted that in this latter case it is not granted that Netherlands will continue to fulfill adequately the obligations deriving from international agreements, as it would enjoy unlimited authority in weakening the direct effect principle of a treaty provision when applied to domestic legislation[358].

### 5.3.2 REDEFINING THE ECtHR'S COMPETENCES: THE GERARDS PROPOSAL

As highlighted by Justice Lord Hoffmann, in the recent years the approach of the ECtHR has been criticized according to their enlargement of the range of competences and its conduct similar to the one of a court of cassation, losing the democratic character that should firstly enshrine. At Dutch level, the complaints have been upheld by Gerards in the inaugural lecture of 2011 spoken in Nijmegen. According to her vision, the ECtHR should determine in a clearer way the provisions of the Convention, in order to define the cases in which fundamental rights are at stake and so the intervention of the Court is necessary. Having well defined the spheres of competences of the ECHR judicial body, Gerards propose to limit the power of review of the Court. The body should, by standard, conduct a procedural review in all those cases, concerning national proceedings and decision makings procedures, in which the domestic conduct has been rightful and sufficient according to the standards imposed by the Convention. If this rightful conduct is recognized by the ECtHR, then the same body will have to agree on the outcome of the domestic practice. Conversely, if the Court of Strasbourg believes that the national system lacked a rightful conduct during the decision-making process, then it will be intervening

[358] Efthymiou, N.S., and De Wit, J.C, Op. ult. Cit., 84

in the matter by proceeding in the evaluation of the complaint against the domestic conduct[359].

The proposal of Gerards clearly aims at restraining the competences and powers of the Court of Strasbourg when relating with national jurisdictions and their manner of protecting rights. From this, it is possible to understand that Gerards implicitly push for a great empowerment of national courts in the protection of the fundamental rights at the domestic level, contained in the Convention. Consequently, the national judiciary branch will be the only focused on the controversy and will have to interpret the Convention more often, progressively constructing a more detached interpretative doctrine from the one embraced by the ECtHR; even if this will result in a long term period, as the case-law offered by the Court are still valid and will perdure in the short term[360].

The changes advised by Gerards would affect particularly the idea that the Convention is a "living tool". By requiring a more specified determination of rights of the ECHR, to the concept of the "living instrument "it is juxtaposed the idea of the core meaning of a provision of the ECHR. Therefore, the ECHR would not be any more a living tool to be interpreted conformingly to context dictated by the living times, and so it would change radically the nature of the provisions of the Convention, not only for Netherlands but for all the countries that ratified the treaty.

The consequent empowerment of national courts has not to be understood as a smooth shift. Given the fact that the Dutch courts always and much relied on the guidelines issued by the Court of Strasbourg, resulting in a national court that is made lazy by the conduct of the ECtHR, it is questionable whether the domestic bodies will be able to be auto sufficient in the decision-making of procedure for the protection of fundamentals and human rights. If the national bodies will be able to be rightful and auto sufficient in the short - term, it is presumable then an awakening of these entities in the protection of rights at the national level, but there are not sufficient evidences to make a solid hypothesis on this eventuality.

[359] J.H. Gerards, Het prisma van de grondrechten, 2011, 14-23,
[360] Efthymiou, N.S., and De Wit, J.C, Op. ult. Cit., 86

## 5. 4 IS IT A WORKING MECHANISM?

The lack of judicial review within the Dutch system can be said to have a marginal impact in the protection of the human rights as prescribed by the Convention. As we have described above, the permission granted by Article 94 to perform a control on the conventionality of legislations when in conflict with the provision of the ECHR, seems to be generally sufficient. Moreover, the Dutch constitution already granted a vast protection of rights, which has been eventually enriched with the addition of the European tool, the ECHR.

Nevertheless, the system sometimes provides elements of overlapping practice between the two jurisdictions, the supranational and the domestic. As pointed out by Gerards, it might be the right time to modify the procedure of review and preliminary ruling in order to make the protection of rights smoother and faster.

In Netherlands, the protection of fundamental and human rights is matter of first importance but not always the Dutch Court are exempted from infringements and violations. There are two main reasons for that: the first is, again, the minimalist reading given by the Dutch courts to the ECtHR interpretations; while the second is the continuous evolution of the human rights and therefore, new interpretations and tools must be used in order to conform to these protections. On this, it is a factor also the change conveyed by time, as we can see in the change of approach of the Dutch courts towards citizenship, migrants and security.

On the former issue, it is up to the Dutch government to decide which position it wants to take, and this again links up to the proposal formulated by Gerards, remarkably the most reasonable one. On the latter, it is possible to say that it is probably a matter of time in the assessment of interpretations and judgements on relatively new subjects of rights.

Overall, the control of conventionality underlying in Article 94 of the *Grondwet* fill the judicial gap caused by the lacking practice of judicial review within the national jurisdiction. The Court of Strasbourg has assumed a very prominent role in the Dutch judicial affairs given also the fact that Netherlands has not a Constitutional Court. Therefore, assuming that that the Court will leave more floor to national courts and reduce its margin of appreciation is quite difficult to realize given the recent tradition that has

been built. Moreover, there is not any particular ground to request the contrary solution: The Convention filled the gaps in matter of human rights in the already quite rich *Grondwet*.

This pattern would ease the national courts on the duty of the protection of rights, but that to be done with more fast and precise procedures, where competences are well defined and the appeal to the Court can be quicker where there is no sign of violation. In a context in which the jurisdiction on human rights is almost completely left to the conscience a supranational court, every member of the treaty should feel empowered in promoting and pushing towards new and more inclusive reaching in the standards of protection of those rights. This presumption completely falls in line with the Dutch spirit contained in Article 90 of the Grondwet and also explains the high standards that Netherlands has in the protection of rights by domestic means.

# 6. IS THE DUTCH SYSTEM A MODEL ON ITS OWN?

In the past chapters we focused on the analysis of the mechanisms and origins of the practice of judicial review, the Dutch legal system, its version of constitutionalism; later we provided a comparative framework including three countries that embrace three different approaches towards constitutionalism and judicial review. Both in describing the Dutch pattern and those valid in other countries, we definitely give preeminence to the pragmatical effects and results of these approaches, its mechanisms and the structural habitat in which governments act according to the judicial, or non, path chosen. Having exhausted the description of the practical side, it is now of our interest, at last, to analyze the theories on judicial review and consequently the constitutionalist approach that derives from it. Having in mind the concrete cases in which issues and problems from one approach or the other, which in my opinion are helpful in understanding what the legal and political theories underlines, with opportunities to recall cases, countries, that enshrine a particular approach. Indeed, the range of selectable behaviors that a country can choose in the practice, or not, of judicial review and of protection of rights, is vaster than the classical dichotomy offered by most of scholars and legal traditions. Despite this, we will start from the polarized view on judicial review and by evaluating the purest forms of the theories. Later we will see the theoretical shift that started to imply the existence of a hybrid form, or third way; even if the shift at the theoretical is caused by the shift that first happened in the pragmatical context. In doing so, we will start to individuate if the Netherlands approach can fit among these theories, or if the Dutch model is a pattern of its own; an opinion that can be traced only in the conclusions. Mainly, the debate that will be proposed aims at evidencing the benefits and flaws of each model, which fits better between the two and what, especially if, the new model conveys novelties that seek to solve traditional problems in the establishment, or not, of the judicial review in legal and political constitutionalism, such as the counter-majoritarian difficulty.

## 6.1 THE POLARIZATION OF JUDICIAL REVIEW

Traditionally, on judicial review, the positions considered and conceptualized in order to be taken can be only two, in favor or against. This, for a relative long time, has been the only framework in which the debate on judicial review, and the consequential type of constitutionalism deriving from it, could have place. Therefore, we use the term polarization: not only because it is possible to choose between two only poles, but those debated are idealized, not always realized, in their purest from, one being the antipode of the other pole. This classification, that we will briefly analyze, on one hand result useful in clarifying and classifying the approaches; on the other hand, it has to be noted that exiting from this framework is not that easy. Consequently, if it is difficult to quit from a pattern, it will be harder for scholars and thinkers to develop anything that stems from the traditional view, the only proposed worth of consideration. In this sense, the polarization is considerable as one of the obstacles that have to be faced in order to break the traditional barrier and, subsequently, to propose new patterns of adoption and pluralism in constitutionalism.

Despite these premises, we will start from enucleating the two models that constitute the theoretical dichotomy and that trace the reasoning behind the support of the legal or political constitutionalism. With the term "constitutionalism" we intend the doctrine in which, accordingly, the authority of a government is defined by a constitutional text or by a set of laws[361]. According to Louis Henkin, one of the most important scholars in the matter of international law, constitutionalism realizes with nine characteristics, that are: a government that acts according to the constitution, separation of powers, practice of constitutional review, democratic government, an independent judiciary, constrained government subject to a legislation of individual rights, control on the police, control operated by civilians or military forces and finally no state power, or very restricted, when intends to dismiss part or the whole constitutional text[362]. To the idea of constitutionalism, it is often linked the idea of government containment, but this definition is way too general and does not coincide with the various form that constitutionalism can take, consequentially with various and different aims that are sought to be reached. The two main theories considered here in the research are legal and political constitutionalism.

[361] Bellamy, R., *Constitutionalism* in Encyclopædia Britannica, Encyclopædia Britannica, inc.
[362] Henkin, L., 'Elements of Constitutionalism', Occasional Paper Series, Center for the Study of Human Rights, 1994

The former entails a governmental system in which the conditions prescribed by Henkin realizes, having the separation of powers and the practice of judicial review. In this model, the governmental doctrine sticks to the judiciary supremacy, meaning that the judicial branch has the duty to check on the acts of the executive branch. In the latter, the legislature is a tool of checks and balances with respect to the actions and decisions made by the executive. Differently from the legal doctrine, the political one does not foresee the separation of powers but a mixed government that finds a justification to the parliamentary involvement through the notion of representative democracy; this means that the legislative acts and speaks by mirroring the willingness of the citizens, their voters. The topic of representative democracy is always upheld when it comes to the comparison between the two doctrines and is usually opposed as a critic to the elitist approach that the legal constitutionalism can bring. The latter doctrine is usually criticized because of its arbitrariness that can harm the population, which is not represented in the decision making by the judiciary, as the components are not appointed by means of elections. The practice of judicial review is intrinsic to this debate and is usually criticized or upheld depending on the doctrine embraced. The dilemma on the political doctrine and the use of judicial review has been vastly disputed during the last thirty years. Mark Tushnet, one of the major scholars of constitutional law, has been very skeptical on the practice of review, because of its problematic nature. Tushnet evidences that legal constitutionalism has to deal with the counter-majoritarian difficulty, an issue first raised by Alexander Bickel in his work «The Least Dangerous Branch: The Supreme Court at the Bar of Politics». The term counter majoritarian difficulty mirrors the fear and popular perception in which the actions of the judiciary, such as the invalidation of a legislation, can result in the overriding of the desire of the citizenry or of the governmental majority[363]. A first attempt to fix the undemocratic outcome that a judiciary decision can bring was brought by Thayer. According to him, the practice of judicial review should be admitted only in case of a "clear error": when the legislature, the body having the duty of law-making, makes an evident mistake that cannot be ignored and calls for a straightforward resolution, brought by the judiciary[364]. This approach ,that seeks to minimize the practice of judicial review and defined "minimalist judicial review" by

[363] Bickel, A.M., The Least Dangerous Branch: the supreme court at the bar of Politics, 1962
[364] Thayer, J.B., The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harvard Law Review 129, 1893, 144

Perry[365], has found its realization: if we think about the Finnish approach[366], Section 106 of the constitutional text admits the intervention of the Court only when a provision is in evident case of conflict with a constitutional provision.

The Thayer proposal consist in a different interpretation of the rigid interpretation of judicial review, but the polarization resides in the conception of the purest form of judicial review. This form is usually taken by Tushnet, notably against the practice of judicial review[367]. On one hand, the justification for judicial review resides on the assumption of the separation of powers, while other reasonings are not completely convincing because cannot meet with democratic standards[368]. Tushnet pointed out that, recalling Bickel's counter-majoritarian difficulty, judicial review causes policy distortion and democratic debilitation[369]. These two issues have to be added to the deracination of the will of the majority and of the citizenry. The displacement of a governmental policy is a duty that has to be recognized to the people, not to judges, that can express their will by means of direct actions like referenda, or more indirect such as the replacement of the lawmakers of the parliament, appointed by the citizens. The proposal of Thayer, in his minimalist view, would aim to avoid this democratic issue, but, as pointed out by Tushnet, this would not be sufficient to contain the powers of judiciary[370], that over time may progressively expand its operative range. This eventuality is defined by Tushnet as judicial "overreach[371]", in which the judicial branch, empowered by a more specific knowledge in order to dismiss legislations, will try to intervene on any matter and not only on policies which aligns with the judiciary spheres of competences.

This logic of empowerment of the judiciary is proposed by thinkers in favor of judicial review that recognizes it as a tool that ensure the safeguard of the constitutional text and

[365] Perry, M.J, The Constitution, the Courts, and the Question of Minimalism, 88 Nw. U. L. REV. 84, 1993
[366] Since the constitutional reform of 1999, that included Section 106. Before that, judicial review was not foreseen in the country; see Scheinin, M, The welfare state and constitutionalism in the Nordic countries, Nordic Council of Ministers, 2001
[367] Waldron shares this aversion with Tushnet, see Waldron, J, The core of the case against judicial review, Yale lj, 2005.
[368] Troper, M., The logic of justification of judicial review in International *Journal of Constitutional Law*, 2003 January 1;1(1), 1
[369] *Tushnet, M., Policy distortion and democratic debilitation: Comparative illumination of the counter majoritarian difficulty. Mich. L. Rev., 1995 ;247;*
[370] Tushnet, M, Against Judicial Review, Harvard Public Law Working Paper No. 09-20, 2009, 5
[371] Tushnet, M, op. Ult. Cit, 7. On the matter see also: Lenta, P., Judicial restraint and overreach, South African Journal on Human Rights, 20(4), 2004, 544-576.

of its fundamental rights. If hypothetically, the parliament enacts a provision that is wrongful with respect to the constitutional text, it is up to the judicial branch to correct the situation and ensure, through the practice of judicial review, the respect of the constitution[372]. The role of guardians of the constitution, that the judiciary would recite by acting in this way, still find criticism. As a matter of fact, it can be inferred that the vision of the judiciary is not uniform: judges may have different points of view on a certain case and a provision that is deemed wrongful according to some, may be said to be constitutional according to the opinion of others. Still, the promoters of judicial review insist that the intervention of the judges, in a regime of separated power, is very important: legislators provides the community with laws of general sense, while the judiciary is able to determine the specific casuistry with their judgement; and eventually cooperate in the lawmaking activities or the interpretation of the constitutional text with their case-law. Therefore, if a provision that conveys general sense finds a specific case in which its application is wrongful or unconstitutional, the decision on the status of the law should be left to the judiciary[373]. Linked to this function of the judiciary, another last justification in the use of judicial review can be found in the redundancy. Within the practice of judicial review, redundancy would function as an additional tool of safeguard. Indeed, during the practice of review it may happen that the judicial branch may repeat the mistake of the lawmakers and enact an unconstitutional legislation. According to this function, it is deemed necessary an additional panel of safeguard and control of the legislature, of judiciary nature[374]. It is important to stress that the body should come from the judiciary, as this function in the legislative branch already exist and take the form of parliamentary committees. A real example of this legislative mechanism can be found again in Finland with the Constitutional Law Committee, described in chapter 4. Finally, with judicial redundancy justifications it would be able to fill the lack of the judiciary which can happen when judges may accept unconstitutional provisions or when they dismiss those that are conform to the constitutional text. Otherwise, unconstitutional laws may take effect in the domestic legislation after having bypassed the legislative mechanisms of control, even if it is not supposed to happen[375].

[372] Tushnet, M, op. Ult. Cit, 8
[373] Tushnet, M, op. Ult. Cit, 10
[374] Tushnet, M, op. Ult. Cit, 15
[375] Tushnet, M, op. Ult. Cit, 15

Beyond the reasonings offered by both sides, promotors and skeptics of the practice of judicial review, there has not been much mobility and detachment from the purest form treated by these two parts. Some scholars wanted to go beyond the minimalist approach towards judicial review, extending its operative range within a democratic framework; while others maintained their skeptical view towards the practice. Given the problems evidenced by scholars when it comes to the practice of judicial review, two main positions have been built on judicial review, pro or against, causing an effect of polarization that for many years did not admit any other approach or consideration on the subject. Before focusing on the formulation of new ways of judicial review, it is worth to analyze the two problems highlighted by Tushnet, but also supported by Waldron[376], in order to better understand the skepticism towards the practice of review.

## 6.2 POLICY DISTORTION

On policy distortion, Tushnet evidenced that judicial review can alter governmental plans if the constitutional provisions are understood in a rigid and strict manner by the legislature, overthrowing other legislative factors worth of consideration in the lawmaking process. Pragmatically speaking, this issue might lead the legislative branch to opt for a policy that may result less effective with respect to other proposed but is the most harmonic to the principles contained in the constitutional text. Despite being felt as an issue by Tushnet, this process is also seen as a natural effect of judicial review when it comes to the normative implications of the use of this practice. For instance, this idea is upheld by Stone, which defines the mechanism as "juridicization[377]". Nevertheless, Tushnet stresses that judicial review, while distorting a policy, obscures the lawmaking of the legislature. In the case of practice of the review, it is consequential that the lawmakers will follow the guidelines on constitutional interpretation provided by the judges in their judgement[378]. Under this light, it is better understandable the aim of the "minimalist judicial review" proposed by Thayer: a mechanism in which the judiciary is

[376]Waldron, J, The core of the case against judicial review, Yale lj, 2005.
[377] Special Issue, The Judicialization of Politics, 15 INTL. PoL. Sci. REv. 91, 1994.
[378] Tushnet M. Policy distortion and democratic debilitation: Comparative illumination of the counter majoritarian difficulty. Mich. L. Rev, 1995; 265.

constrained and that can operate only in case of an evident mistake, would prevent the overshadowing towards the legislature and the dominance of the legislature in the law making, a duty not of their concern.

If the lawmakers decide to do not consider the norms articulated by the judiciary, the problem of policy distortion can be solved, but the legislature is not always permitted to ignore such provisions. The legislative branch would then opt for the best policy, according to their view, and then let the judiciary decide upon its enforcement or not. In the case in which the legislature does not take this position and do not forge its constitutional view in relation with governmental policies, then it would be possible to speak of democratic debilitation[379]. The legislature would be entitled to overcome the judiciary point of view if the same branch delivers norms of constitutional nature that are not clear; further, from this approach there would be no distortion caused by judicial review as impossible when it comes to unclear judicial constitutional rules[380].

Policy distortion may arise also in the case of bargaining breakdowns following judicial review. According to Schelling, the breakdown can happen when the two branches, legislative and judiciary, need to coordinate but are not able to communicate with each other; given the context, the two bodies will try to cooperate by individuating a key element that gathers both branches[381]. In attempting to coordinate, the two branches may reach a provision which is not the most effective but that respects the limits established by the judges. This process results from the practice of judicial review, the one that imposes limits to the lawmaking and causes the breakdown[382].

## 6.3 DEMOCRATIC DEBILITATION

If with the issue of policy distortion there is an overestimation of the constitutional norms that alters the choice of the best policy possible, conversely the problem of democratic

[379] Tushnet, M, op. Ult. Cit., 261.
[380] Tushnet, M, op. Ult. Cit., 265.
[381] The explanation given by Schelling derives from an example offered by the author in Schelling, T.C., The Strategy of conflict, 57,1960.
[382] Thayer, J.B., The origin and scope of the American doctrine of constitutional law. Little, Brown, 1893.

debilitation concerns the disregard of the constitutional provisions in the enactment of law by the legislature. The legislative branch may act in this way be trusting the efficacy of the judiciary in blocking and dismiss those legislations that are not conform to the constitutional text[383]. Unfortunately, this particular behavior of the legislature leads to democratic debilitation, that is the underestimation of the constitutional norms by the legislature.

Policy distortion does not exclude democratic debilitation and vice versa, they can happen at the same time given that the issues can be caused, through the practice of judicial review, by a behavior of the legislature and another of the judiciary, which theoretically have different powers but also different views on constitutional matters[384].

Democratic debilitation happens when the legislature stops the disputes, reasonings and conceptions on the constitutional text. Sticking to this behavior, the parliament decides to confer the competences for the lawmaking of constitutional provisions to the judges[385]. In doing so, democratic standards weaken as the duty for the articulation of constitutional provisions is left to a body which is not elected by the citizens and so do not convey any representative meaning. Given the detachment that domestic courts typically have from their citizenry, there might be the risk that, without means of communication between the two parts, judges tend to do not pay attention to the will of the citizens or they do not have access to important information about the opinion of the people. This eventuality not only causes democratic debilitation but also may lead to the public's distrust of the judiciary.

As Tushnet targets this issue as an outcome of the practice of judicial review[386], Thayer tries again to affirm his point of view, proposing to solve once again the problem with the establishment of the minimalist judicial review activity[387]. According to him, the practice would have first solved the issue of displacement, that could no longer cause the phenomenon of policy distortion as there would not be any space left for judicial norms within the legislative lawmaking activity, and finally this kind of approach would reinforce the popular view on the importance of being represented by elected members[388].

[383] Tushnet, M, op. Ult. Cit., 247
[384] Tushnet, M, op. Ult. Cit., 247
[385] Thayer, JB, Op. Ult. Cit, 1893, 155-156.
[386] Tushnet, M, op. Ult. Cit., 248-275
[387] Thayer, JB, Op. Ult. Cit, 1893
[388] Tushnet, M, op. Ult. Cit., 248

This sort of solution again foresees a very little operative range for the judiciary. If we look for resolutions that admit practices that goes beyond the Thayer's minimalist judicial review, we might want to consider the Canadian notwithstanding clause, as suggested by Tushnet.

The notwithstanding clause enshrined in the Canadian Charter of Rights and Freedoms represents the federalism envisaged in in the constitutional text, a pillar for Canada[389]. Section 33 of the Charter authorize federal and provincial governments to disregard certain constitutional rights during their lawmaking process. The rights overridden are the «Fundamental Freedoms» contained in section 2 and «Legal and Equality Rights» included in section 7 and 15[390]. These particular provisions, which have to explicitly recur to the notwithstanding clause, have efficacy up to 5 years, the same duration of a governmental mandate. Despite this limitation, the section foresees the possibility of restoring the legislation for an undetermined amount of time:

« […] Parliament or the legislature of a province may re-enact a declaration made under subsection […][391]»

The aim of the notwithstanding clause is to avoid the effect of a controversial judicial judgement and it is conceived as a tool that permits to detach from a regulation without creating democratic destabilizations[392]. This solution can permit to the legislative branch, to choose better and more carefully the interest in competition and the ones that have to be safeguarded. On the other hand, the notwithstanding clause is a fragile procedure that is not always successful, as in the case in which the judiciary is willing to turn down a legislation but is precluded from doing so by the legislative override[393], which actually does not always result in a positive and decisive consideration of the interests at stake[394]. Despite being rarely used, the notwithstanding clause is proposed as a solution that empowers the will of the citizens, for example the will of a particular province in contrast with the rest of the country, that would admit judicial review not in his minimal form.

[389] Oliver, P., Macklem, P., Des Rosiers, N. eds., The Oxford Handbook of the Canadian Constitution. Oxford University Press, 2017, 695
[390] The Canadian Encyclopedia, 2nd edition, Hurtig Publishers, Edmonton Canada, 1988. See "Constitution Act", 499, and "Opting-Out," 1580.
[391] Section 33 (3), The Canadian Charter of Rights and Freedoms
[392] Oliver, P., Macklem, P., Des Rosiers, N., op. Ult. Cit., 695
[393] Oliver, P., Macklem, P., Des Rosiers, N., op. Ult. Cit., 698
[394] Tushnet, M, op. Ult. Cit., 281

Moreover, the counter majoritarian difficulty seems avoided by the resulting means of communication that this clause offers to the citizenry and the parliamentary representatives, who can discuss on the constitutional rights and provision during the normal enforcement of the legislation[395].

Despite being a good compromise, the notwithstanding clause is still criticized and not accepted by thinkers like Tushnet and Whyte, who deem it as not sufficient in taking care of constitutional problems such as democratic displacement, policy distortion and democratic debilitation[396]. This does not mean that Thayer's proposal of minimalist judicial review performs better, also this solution is not able to solve the problematic inclusion of the practice of judicial review within democratic standards. It has to be noted that Thayer's pattern cannot be said to be realistic: the thinker affirms that a practice that goes beyond the minimalist form of judicial review causes democratic debilitation. The example of Netherlands debunks the theory offered by Thayer given that the country does not have a proper constitutional court and poses a ban on the practice of judicial review[397], but still it is possible to talk about debilitation as the constitutional debate is already weak and the Dutch constitutional culture is low or insignificant. Minimalist judicial review may be helpful in case of democratic displacement, but still lacks resolution against policy distortion and democratic debilitation. With the dismissal of the proposal, once again, it is not possible to move from the dichotomy that admit the existence of judicial review under its purest form or that does not foresee this practice.

## 6.4 RESHAPING THE CONSTITUTIONAL DESIGN

The threat evoked by democratic debilitation, displacement and policy distortion convinced thinkers and scholars to go again beyond the purest form of judicial review, trying to formulize a new pattern that would solve these problems and admit judicial review within democratic standards. A shift from the traditional dichotomy can be said to

[395] Tushnet, M, op. Ult. Cit., 284
[396] Tushnet, M, op. Ult. Cit., 284; Whyte, J, On Not Standing for Notwithstanding, 28 Alberta L. Rev. 347, 355, 1990.
[397] Art. 120, Grondwet

be started with the progressive acceptance of the weak form of judicial review, enshrined by the Canadian Charter of Rights and Freedoms, and the shift of focus on non-judicial remedies.

The Charter drafted in 1981 contains Section 33, the one that permits to federal and provincial governments to recur to a notwithstanding clause in order to legislate differently from the provisions contained in the Charter. Tushnet individuate in the drafters of the Charter of 1981 the pioneers of the weak form of judicial review[398]. As we analyzed in the previous paragraph, the section permits to override certain constitutional norms and rights in the lawmaking procedure, for a limited time. This solution is deemed quite creative in trying to circumvent the typical issues of judicial review and empower the legislature in respecting the will of their voters. The British Human Rights Act of 1998 is believed to have took inspiration from the idea of the drafters of the Charter, without replicating the same exact model: the HRA relies on regulations coming from the interpretation and on the ability of the judiciary to proclaim the incompatibility of a legislation, in order to change the provision as quick as possible and make it fit with the rights granted in the country[399].

The weak form of judicial review distinguish itself by the fact that the legislative branch can overturn or dismiss the decision of the judiciary on constitutional matters, considerably in a quick time. As a matter of fact, in the weak form of review the judiciary is called to interpret and judge on the conformity of the proposed legislation with respect to the existent constitutional norms[400]. Differently from the pure form of judicial review, also called strong form by Tushnet and Sinnott-Armstrong[401], the weak form seems to successfully deal with the problem of democratic displacement, given the possibility to override the judicial interpretation and the constitutional provision. But the pattern proposed is not exempted from critics, flaws in the form can be found in the fact that the mechanism can devaluate the hierarchical status of the constitutional text. The issue concerns the fact that the constitution is posed on the same level of ordinary legislation,

[398] Tushnet, M., Alternative Forms of Judicial Review Georgetown Law Faculty Publications and Other Works, 2003, 2785
[399] Tushnet, M, op. Ult. Cit., 2786
[400] Sinnott-Armstrong, W., Weak and Strong Judicial Review. Law and Philosophy, 22(3/4), 2003, 381-392
[401] Tushnet, M, op. Ult. Cit., 2782; Sinnott-Armstrong, W., op. Ult. Cit., 2003

as the legislature can intervene on the constitutional provision at their desire. Still, it might be a cost to pay in order to permit a more democratic form of judicial review that safeguards the same constitutional text from the invasive intervention of the judiciary, keeping in mind that in the weak form the courts are not allowed to apply a strong form of review if not requested by the legislature[402].

With the gradual acceptance of the practice of judicial review, the weak form of judicial review started to gain more ground in the international community, paving the way towards the dismemberment of the polarized view of judicial review. Thinkers and scholars started to admit the possibility of addressing features of one model to the other, in an embryonal stage of the hybridization process[403].

Before analyzing the non-judicial remedies for the safeguard of the constitutional rights, it is important to make clear the relation between the so called "Commonwealth model" and the weak form of judicial review. Despite being similar from the normative point of view, the two patterns differ: scholars like Tushnet or Hiebert, which produced the concept of "Parliamentary Bills of Rights" a theory very similar to Tushnet's one, theorize the model as a singular model that replicates in the same manner; on the contrary Gardbaum's model do not imply a pure form of the pattern, but admit pluralism in assessing the practice of judicial review deriving from the "New Commonwealth model". Moreover, Gardbaum promote the pattern as a standalone third way[404], while the others accept it as variation of the pure and polarized form of judicial review, and so not independent. Nevertheless, we will analyze further the Gardbaum's proposal in the next section, given its different nature.

The practice of non-judicial review of legislation is another remedy contemplated by Tushnet but cannot be intended as a new way of understanding the practice of review, given the lack of judicial activity. It is a formulation that arises from the necessity to cope with the protection of human rights, which skeptical of judicial review entrust. A clear example can be the human rights commissions of parliamentary nature. According to the vision of Tushnet, these legislative bodies are able to perform the activity of review

[402] Tushnet, M, op. Ult. Cit., 2787
[403] Tushnet, M, op. Ult. Cit., 2802
[404] Gardbaum, S., The New Commonwealth Model of Constitutionalism in The American Journal of Comparative Law 49, no. 4, 2001

without falling in the counter-majoritarian difficulty nor weakening the democratic standards[405]. It has to be noted that not all bodies appertaining to this category has the power to strike down a legislation, some can just deliver a non-binding opinion on the matter and then remit the decision to higher legislative bodies. Despite the evident parliamentary nature of this typology of bodies, Tushnet recognizes them as "quasi-judicial bureaucracies" given their structure, which strongly resembles the one of judiciary courts[406]. Non judicial bodies should differ from those entities also in the motivations and aims: starting from the assumption that the judiciary is not able to issue a disinterested interpretation of the constitutional text, non-judicial characters, or politicians, may push towards the achievement of policies that ameliorate the performance of the country and the condition of its citizenry[407]. In order to explain briefly the mechanism, we take into consideration the Human Right Act of 1998, more specifically the duty of the ministry to express on the conformity of a legislation with respect to the HRA.

According to Section 19 of the HRA, the minister responsible for the proposition of a law must express through a statement whether he is able to guarantee the conformity of the provision with respect to the legislations contained in the HRA or not, despite still striving for the acceptance of the bill:

« A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill: (a)make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b)make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill […][408] ».

The positive answer of the minister corresponds to a statement of compatibility, while a negative one consists in a statement of inability[409]. Both expressions may be issued with some difficulties by the minister and this may work as a deterrent against wrongful

[405] Tushnet, Non-Judicial Review, Georgetown Law Faculty Publications and Other Works, 2003, 454
[406] Tushnet, M., op. Ult. Cit, 454
[407] Tushnet, M., op. Ult. Cit, 455
[408] Section 19(1), Human Rights Act 1998
[409] Tushnet, M., op. Ult. Cit, 479

proposed legislations. That is the case when a minister has to face the issuing of a statement of inability, who may take a more prudential attitude and not deliver the bill rather than have to face up the critics of proposing an unconstitutional provision. Even in the case of a statement of ability, the minister is not exempted from parliamentary challenges and may be asked to explain the reasons according to which the bill is deemed as conform. In this case, other non-judicial actors come to the rescue of the minister: public employees and other citizens may be asked by the minister to formulate reasonings and justifications and gather their work during the office of the so-called "Human Rights Act Compliance Unit[410]". The use of this tool provides the government with a mechanism of control that ensures the public agreement or disagreement, that is highly representative and according to the canons of democratic standards. Consequently, democratic debilitation and displacement would be dismissed by recurring to this mechanism. Also, policy distortion is an issue that might be eliminated, if we assume that the civilians employed with the task of control and reasoning strive for the most desirable policy. The operate of civilians can be eased by the margin of appreciation doctrine. As a matter of fact, this doctrine has been formulated by the European Court of Human rights and foresees flexibility in the judgement of the Court when the sanctioning of a country is put at stake. According to the doctrine, the ECtHR admits a wider range of allowance in analyzing the reasons for the lack or different enforcement of a provision contained in the Convention. By relying on this assumption, the duty of the civilians seems of an easier nature, given the cooperative approach of the Court in declaring as conform to the Convention those legislations that are questioned. The ECtHR recognizes the multiethnicity and multiculturality of the continent to which it is addressed the ECHR. Therefore, it has been deemed logic to maintain a case to case approach rather than conduct investigations under a more theoretic and strict perspective[411].

Under these lights, a non-judicial remedy seems to fit best the protection of the constitutional text under democratic standards; even better than the weak form of judicial review. Nevertheless, non-judicial review may be obstructed by the same Convention, which lack of clarity in the statement of the rights contained in it may cause confusion in

[410] Tushnet, M., op. Ult. Cit, 480
[411] Tushnet, M., op. Ult. Cit, 483

the civilian assessment of the legislation; a problem which has also been raised by Gerard's proposal in Netherlands.

But again, keeping in consideration non-judicial review of legislation represents a partial answer to the problem given that bodies are of legislative nature and not judiciary; and for the scope of our research it feels like circumventing the dilemma rather than solving it. Therefore, in the next section we will take in consideration the third judicial way foreseen by Gardbaum, right after having analyzed the cause for the shift of judicial review from its purest forms.

### 6.4.1 THE ROLE OF HUMAN RIGHTS

At this stage of the research we have already acknowledged that the culture on the importance and protection of fundamental rights started to grow in a remarkable way at the beginning of the 90s. As this knowledge spread, it had to relate with mechanisms and institutions ensuring the standards of protection. In this section, we will see the incidence of human rights in the progressive shift in constitutional design and detachment from the polarized view. Various remedies can be admitted for the protection of those rights, but only certain proven to be effective, striving for a better entrenchment of fundamental and human rights. The international culture for the protection of these rights clearly rooted for those remedies that act quickly and without mistakes, molding new institutions that could reach the target. New institution can be intended as legislative committees, judicial panels or specialized courts that take on human rights issues, such as the one of United States. New bodies can enshrine old doctrines or experimenting new remedies in order to ensure the entrenchment of human rights, cooperating in the progressive detachment from the polarized view if the institution is of a judicial nature. The reinforcement of the levels of protection can be mined by the presence of wrongful statutes that due to legislative inertia[412], or disinterest, are still present in constitutional and fundamental texts[413]. The

[412] Tushnet, M, Skepticism About Judicial Review - A Perspective from the United States, 2000, SSRN Electronic Journal. 10.2139/ssrn.240588., 3

[413] Kenney, S., Reisinger, W. and Reitz, J., Constitutional dialogues in comparative perspective, Springer, 30; Stone AS, Goldsworthy JD, Campbell T. Protecting human rights: instruments and institutions. Oxford University Press on Demand; 2003, 273

scope of these new institutions is to clean these texts with judgements and remedies that have to be different from the ones used in the past, ineffective when they to deal with issues such as legislative inertia.

Among new bodies and institution that favored a better entrenchment, not only those of governmental nature has to be considered. Non state actors such as NGOs actually cooperate in the entrenchment of human rights, by means of actions that are not binding but can only influence the political agenda, as most of the civil society organization does. Nevertheless, these institutions may serve as an additional mechanism of control on the efficacy of the remedy undertaken, and eventually insist on the need for new institutions, or on the same bodies adopting new doctrines.

Given the novelty of the institutions or the remedies undertaken, the solution must be well calibrated before there establishment, rather than progressively correct their office, in order to offer better continuity. Nevertheless, it would be non-sense to pretend that the treatments for the protection of the rights would maintain fixed and exempted from changes, given that the branch of fundamental and human rights is a subject in continuous evolution. It is worth to consider here the example of the U.S. judicial enforcement of fundamental and human rights. Courts composed by judges appointed on a long term mandate may experience some asymmetries in assessing the entrenchment of rights, as the interpretation of certain violations that are upheld now does not align with the interpretation undertook by long term judges, who may be used to a different understanding of a certain violation that changed during the time. Eventually, if there is a certain resistance in judges to change their point of view, these actors may result as an obstacle to the progressive amelioration of the levels of protection. This eventuality also prompted the renewal of institutions, which have undertaken new measures such as the method of appointment, that in general majorly foreseen the political scrutiny of the selectable judges and fixed short-term mandates of their office.

In overall, the creation of new institutions that seek to purge all those issues that block the innovation in the protection of fundamental and human rights, also by means of judicial enforcement, bring to the table new arguments for the renovation of judicial review as part of the necessary institutional recalibration that has to be done when dealing with rights subject to continuous change. This process of creation and renovation can be

labeled as constitutional activity, given that most constitutional text contain generous portions on the protection of fundamental rights. A priori from the remedy chosen, these procedures can rely on a mechanism of check and control undertaken by civil society organizations, such as NGOs, that make appear the procedure more reliable. The problem in this is that giving their non-binding nature, their activity of control can be totally ignored by governmental actor and institutions. Also, this issue can be counted up as a justification for the search of new method or institutions that ensure compliance with treaties on the protection of fundamental and human rights. If this research wants to take into account judicial enforcement as a remedy, it necessarily needs to refuse the polarized understanding of judicial review, which, at this is point is safe to say, represents an obstacle in the fostering of the standards of protection.

## 6.5 THE REFUSAL OF THE POLARIZATION VIEW

As seen in the previous paragraphs, in recent years there has been vitality on the subject of judicial review. Despite the effort professed by scholars and thinkers, the debate never actually left the original dichotomy on judicial review, offering only variations that do not detach from the purest form of the theory. As noted by Gardbaum, being in favor of judicial review means supporting judicial supremacy, while going against judicial review underlines the preference for a system characterized by legislative supremacy[414]. The growth of the culture on rights definitely have speeded up the process and shook the rigid framework provided. The debate engaged in recent years permitted to highlight two main questions on the model provided, which concern the individuation of the best model for rights protection and on the democratic valency of the practice of review[415]. Eventually, a debate that have to focus to few, two, models, can also be helpful in evidencing new flaws of the models, or conversely, the strongest features of each pattern, which can be useful in the process towards the proposition of a new theory, possibly hybridized. It has been understood that, in order to permit the entrenchment and enforcement of

[414] Gardbaum, S., The New Commonwealth Model of Constitutionalism in *The American Journal of Comparative Law 49, no. 4,* 2001, 2231
[415] Gardbaum, S., op. Ult. Cit, 2234

fundamental and human rights, it is necessary to dismiss the polarization view and accept the coexistence between parliamentary sovereignty and judicial supremacy. This presumption implies a clear reversal of the theory offered by Marshall, which has been entrusted for a very long time without admitting modifications.

The theorization of the model starts from the old dichotomy and aims to recalibrate it, taking the best from both approaches. The result is the formation of a third way which foresees the combination of the compulsory pre-enactment political rights review, the ex-ante procedure, with the procedure of weak form of judicial review[416], so called in the previous section. Definitely, there is ground to affirm that the third way, or New Commonwealth model as defined by Gardbaum in his works[417], derives from a process of hybridization between the preexistent forms. This presumption can be confirmed by the view of Kumm, that evidences the fact that legislative say, and application cannot be enough, even taking into account political liability, in ensuring the accomplishment of the obligations charged on the targeted individual[418]. In Kumm's words it is possible to find the reasoning for striving towards a hybridized third form of judicial review, that would better reallocate the powers between legislature and judiciary, from which cooperation should result a better mechanism of compliance and democratically acceptable judicial review[419].

Given these premises, it is of our interest now understand the beneficial features that the third way took from both original standpoints. Moreover, it will be analyzed how the third hybrid way aims to contrast those issues unresolved by the previous models, dissolve the counter-majoritarian difficulty, but also how it seeks to calibrate and adjust those issues rising from the adoption of the two polarized models.

### 6.5.1 THE THIRD WAY

[416] Gardbaum, S., op. Ult. Cit, 2231
[417] Gardbaum, S., op. Ult. Cit
[418] Kumm, M., Democracy is not enough: Rights, proportionality and the point of judicial review. The Legal Philosophy of Robert Alexy, M. Klatt ed., OUP, 2009, 09-10
[419] Kumm, M., op. Ult. Cit., 2009.

The new independent configuration of the practice of judicial review of legislation propose a remedy between the existent pure theories, conveying a situation of greater balance of powers between the legislative and judiciary. Before describing the central mechanisms of the so-called New Commonwealth model, we identify the pros of the two doctrine of constitutionalism that determine the dichotomy of judicial review. Having analyzed these features, it will be easier to understand the reason for their revival in the third way. In taking from both models, the new pattern and its enforcers must refrain from falling in the typical issues that characterized the past solution.

Starting from political constitutionalism, propeller of legislative supremacy without judicial review, it has to be recognized that this doctrine proposes a solution to excessive governmental authority and enshrines democratic standards in representing the citizens and their will. On the former, the legislature has to be intended as a tool of check and balance on the operations of the executive. On the latter, the legislature has to maintain a conduct that is in line with the will of the electors, for which the legislative branch is responsible. That also poses a mechanism of control: if the legislature does not respect the will of the voters, at the following elections the voter will reallocate their preference in a different representant that might substitute the existent parliamentary representants. Governmental characters depend on the preference of the people's vote convey also different points of view in legislative matters, gathering multiple sources and conditions differently from the judiciary[420].

On the other hand, legal constitutionalism, the doctrine entrusting judiciary supremacy and the practice of judicial review, proposes elements of strength with respect to the political doctrine. The first factor can be found in the transparency and in the recognition of rights. This can be achieved by means of a defined and written bill of rights that gives a transparent access to the knowledge of laws and avoid circumstances in which fundamental and human are left behind because of legislative inertia. This also provides the citizens with a better acknowledgement of the statutory rights legitimized by their country. Another element of strength of legal constitutionalism, to be taken in the new model, is linked to the first factor. The risk of the underenforcement of rights can be avoided by recurring to case laws which can be useful in those case where the legislature

[420] Gardbaum, S., op. Ult. Cit., 2234

and its lawmakers can be helpful in solving specific cases that go beyond the general textual provision[421]. Finally, a point of strength can be found in the essence of the doctrine of legal of constitutionalism: the separation of powers and the independence of the judiciary. A governmental branch that has no responsibility with respect to the people and it is not influenceable by the will of the voters, presumably seeks to reach the best decision according to the constitutional text, and so rightful from the legal point of view. Therefore, the practice of judicial review has to be seen as another tool of checks and balances, not only on the executive but also the legislature[422].

Having outlined the benefits of the preexistent doctrines, it is now our task to focus on the essence of the third model of judicial review, in respect of democratic standards and of the entrenchment of fundamental rights. The so-called New Commonwealth model makes possible the coexistence of the *ex-poste* judicial review with the ex-ante review performed by the legislative and executive branch. In doing so, the mechanism permits the internalization and a better acknowledgement of the rights combined to the activities of policy making, diminishing the chances of infringements or legislative inertia[423]. Balance is provided by the activity of judicial review, that is constrained by the legislative power, as the judicial branch has to justify the decision to the legislature, that has the final say. This procedure falls in line with what has been stated by Kumm and Fallon, or rather that democratic legitimacy and representation is not the only kind of legitimacy that has to be sought, combined with the judicial one[424]. The judiciary provides a defined written bill of rights, increasing the consciousness of the rights culture, the legislature provides justifications for the ex-ante and ex poste stages, and can take into account the responsibility towards the electors in the decision making[425].

The judiciary have a role of check and control but differs from the position of strong form of judicial review where the branch is able to exercise full veto powers with respect to a legislation. The judiciary has a function of control that is transmitted to the legislative branch. For example, we can refer to the judicial statement of incompatibility entrusted

[421] Gardbaum, S., op. Ult. Cit, 2235
[422] Gardbaum, S., op. Ult. Cit, 2236
[423] Gardbaum, S., op. Ult. Cit, 2248
[424] Fallon Jr, R.H., Legitimacy and the Constitution. Harv. L. Rev., 2004; Kumm, op. Ult. Cit., 2009
[425] Gardbaum, S., op. Ult. Cit, 2246

in the Human Right Act of 1998[426]. The lack of the veto power concentrated in the judiciary is a consequential result of the involvement of all three governmental branches in the new model. The decentralized pattern that involves also the executive, not only the legislature and the judiciary, can be seen in the compulsory pre-enactment political review exercised by the executive and the legislature; but also is notable in the post enactment judicial review and in the post-prosecution political review by the legislature. This system enhances all three branches, that are forced to cooperate in the smoothest way possible, bringing a better knowledge of rights protection within all the three branches. The consultation and involvement of all three branches in right protection offer multiple points of view, carried by different governmental sections, and so a better comprehension of the factors that can be taken into account when evaluating the legislation. As all three branches are involved, there are little chances of experiencing rights under-enforcement as the procedure is not conveyed in one department, but other governmental sections can evidence the under-enforcement when happening[427].

For the reasons mentioned in this paragraph, the so-called New Commonwealth model proposes itself as the new model to be entrusted in the practice of judicial review. The avoidance of centralization and the involvement of every governmental branch, with the political and legal control of rights, seems the best solution when it comes to the exercise of review of legislation according to democratic standards.

## 6.6 THE ROLE OF GLOBALIZATION

The so-called New Commonwealth model admits pluralism in the practice of judicial review and in the protection of fundamental and human rights. The plurality and the consciousness of constitutional texts and their rights is not only influenced by the new third way, that opened up to new possibilities, but it is also influenced by a much bigger phenomenon: globalization. With globalization we intend the process of formation of transnational networks thanks to the ICT revolution that permits faster interconnection and it is characterized by free trade and free flow of capital. This process involves not

[426] Gardbaum, S., op. Ult. Cit, 2247
[427] Gardbaum, S., op. Ult. Cit, 2248

only people, but also governments and institutions. Proofs of political globalization are international treaties and the creation of supranational institutions, like the WTO or the UN, that comes with new obligations towards the member states. From the legal point of view the process of globalization result in a mechanism where influences perpetrated by international treaties, supranational entities and non-governmental groups, such as NGOs, create a network among national governments other than common legislations.

Starting once again from the origins of the paradigms of constitutional law, it is possible to find a dichotomy constituted by the post-war centralized system and by constitutional exceptionalism, enshrined by Australia and the United States[428]. This conception becomes weaker with the process of globalization, that sought to unify the systems within one single framework. As evidenced by Tushnet, the mechanism is constituted by a top-down process and a bottom-up one[429]. Staring from the former process, we start from taking into account Slaughter's theory on judicial cross-national networks[430]. In her work the scholar suggests that the personal contact and communication among domestic judges of constitutional law, fostered by international meetings, push domestic judges to look at the remedies undertaken by their colleagues in another country, that hopefully have a similar system[431]. This exchange of knowledge ameliorates the domestic systems by providing new remedies for wrongful legislations or constitutional matters and by expanding the possibilities of resolutions, and so increasing pluralism. This mechanism will work efficiently when constitutional legislation among countries are similar and converges, reducing so the difficulties in implementing a remedy coming from another legal order. Convergence can be brought by international treaties and their institutions that impose obligation that have direct or indirect effect on domestic systems. Here it is possible to recall the European Convention of Human Rights and its court, specifically to the case of Netherlands, where the international treaties changed the understanding of judicial review in the Dutch culture. The review imposed by the Convention with respect to national judges' activities influences domestic system to the point that the latter will follow and reflect the judicial guidelines provided by the transnational treaty. This mechanism is a

[428] Tushnet, M, The Inevitable Globalization of Constitutional Law, Hague Institute for the Internationalization of Law; Harvard Public Law Working Paper No. 09-06, December 2018, 2
[429] Tushnet, M, op. Ult. Cit., 3
[430] Slaughter, A.M., A New World Order, Princeton; Oxford: Princeton University Press, chapter 2, 2004
[431] Slaughter, A.M., op. Ult. Cit., 2004

key factor in the progressive growth of the convergence among domestic constitutional legislations. Transnational obligations will forcibly modify the legal order of its member states, that will start to coincide on several matters of constitutional law. In doing so, the separation of power of domestic governments is put under threat, or at least under modification. This possible change can result in the change of approach of a country towards international legislation, from monist to dualist and vice versa. Again, we can recall the ad-hoc monist system exercised by Netherlands when facing obligations deriving from international treaties.

Finally, another element of convergence in the top-down process can be found in NGOs. Transnational non-governmental entities as such, take care of constitutional law mostly because of the fundamental, human rights and their standards of protection that can be found in the constitutional text. NGOs' statements and opinions are non-binding, as they are civil society organizations, but still they act as lobbyists in striving for the entrenchment of these rights and ensuring that this priority is put as preeminent in the public governmental agenda. NGOs can suggest to domestic constitutional courts, new solution or remedies that derives from other constitutional orders[432]. In doing so, NGOs activities resemble the one of judges in transnational network, but the former results less effective lacking a legally binding nature. When relating to domestic orders, transnational NGOs offer a convergent and homogenous comprehension of fundamental and human rights. Therefore, also NGOs cooperate in the standardization[433] of the entrenchment of these rights, being another positive factor in the process of globalization within constitutional legislations.

Focusing now on the bottom up process, we consider now the point of view offered by Law in **«** Globalization and the Future of Constitutional Rights **»**. In his work he poses human rights and their protection in relation with international economy. According to Law, companies' consideration on capital investment will be influenced by the conditions of the country where they want to invest. Venture capitalists will be more likely to invest in countries that ensure political stability and where human rights, like personal liberty,

[432] Tushnet, M, op. Ult. Cit., 5

[433] "Standardization" is intended (here and now on) as a phenomenon that seek to converge constitutional law among different countries, see Tushnet, M, op. Ult. Cit.; Law, D.S., Globalization and the future of constitutional rights. Nw. UL Rev., 102, 2008, 277; Shapiro, M., The globalization of law in *Indiana Journal of Global Legal Studies*, 1993, 37-64.

are respected. On the same page, this argument can be proposed talking about of human capital and its mobility. Workers will be more likely to work in a country that ensure high standards of protection of human rights, and basically where the person can feel safe[434]. From this point of view, it can be said that these conditions push countries to compete for the best surrounding habitat for workers, trying to grant and enforce in the most effective way the respect of fundamental and human rights. This constitute a positive point of leverage that finds its flaws only with respect to countries that are richly naturally endowed and possess natural resources. As a matter of fact, this typology of country can find elements of resistance, or it is better to say, their government will find elements of resistance to the process of globalization and standardization of fundamental and human rights. Countries that economically relies on natural endowment will have little interest to respect standards to ease human capital mobility. From a more general point of view, authoritarian or non-democratic form of governments will be ready to sacrifice part of their economical profit in order to avoid the influence of other systems in the entrenchment of fundamental and human rights.

Despite the possibilities of resistance by authoritarian regimes, the mechanism of standardization has grown remarkably in the past decades and induced national governments to uniform under the same pattern with respect to the entrenchment of human rights, and so tending to uniform the remedies for constitutional matters. Given the process of molding of national legislations, there is one final question left to our comprehension, that is whether the Dutch system is unique or falls within the category of countries that opted for a particular preexistent doctrine, or even if it has been affected by the process of standardization described above.

## 6.7 THE DUTCH IDENTITY

After having analyzed wide and large the practice of judicial review and the inherent doctrines of constitutionalism from which it derives, it is possible to state that the Dutch system is not a model of its own, but still presents elements of uniqueness that at least

[434] Tushnet, M, op. Ult. Cit., 8

distinguish the country in the process of standardization. The Dutch system is not a unique model, it conforms to the standardization protracted by international treaties and supranational entities. This tendency to the standardization can be found in the same Dutch constitutional text, the *Grondwet*, at Article 90. The fact that the provision commits the country towards the promotion of international law is a symptom of the legal contamination under which Netherlands has posed itself. Starting from Slaughter's theory, a country that set itself as a promotor of international legislation is committed to the communication among different legal and judicial orders and therefore is willing to exchange knowledge and remedies on, for example, constitutional legislation. Therefore, there is ground to admit pluralist remedies for the resolution of the matter, while there is little chance to maintain a proper scheme. The standardization affects also the monist Dutch model, that forces the country to adopt the monist system, given also their commitment towards international law. But at the same time, the Netherlands reveals to be quite unique in the implementation of some patterns, in this case the country embraced monist system but adopted a variant from the purest form, that is qualified monism.

Another proof of this behavior can be found when in relationship between Netherland and the ECtHR. Netherlands loyally mirrors the jurisprudence and the standards issued by the Convention, but at the same time the country remains quite detach, or minimalist, with respect to the interpretation of the judgements released by the court of Strasbourg. It is a quite particular behavior, but it is not unique; moreover, Netherlands lead the way in the entrenchment of rights, so there is no ground for calling for a unique behavior towards those.

Shifting on one of the main characteristics of Netherlands, even the ban on the judicial review is something that has changed with the standardization process. Moreover, the Dutch pattern seems to have taken a form that suggest a form of hybridization rather than a unique form. For example, in chapter 3 we found a parallelism in the British model with the coming of the Human Rights Act of 1998. The position taken by Netherlands, in its purest form, has been weakened by the time by international obligations and supranational courts. Nevertheless, it can be said that the Dutch approach towards constitutional law is peculiar in the way that seeks to adapt in different ways to the standards enshrined in the international community.

When we consider the ban on judicial review on Acts of Parliament, we can still find a peculiar characteristic, that is the petrified nature of its constitution. The Constitution is not amendable, but there is a path that can be followed in order to change it, with its new writing. It can be said that the Dutch system poses requirements that are quite unique, in modifying the constitution. As most of the democratic countries are providing a more flexible constitution, adopting over and over decentralized system, the Netherlands goes against tendency, but it is unsure if its trend will last. The Halsema proposal first, and Gerard's later, are just two among the different new solutions that have been proposed and that would rend less unique Netherlands. Maybe it is necessary for Netherlands to be more conform, because its uniqueness on the ban of judicial review is getting quite oxymoronic. If Article 120 bans the judicial review on the Acts of Parliament, Article 94 permits the review of the same legislations in order to check their conformity with international obligations. This is also another view of the process of standardization. Therefore, what can be said is that the Dutch system used to be more unique in the past rather than now, for example with the *Van de Bergh v Staat der Nederlanden* judgement of 196, the ban on judicial review had been at time strengthen once again. At the same time, in the international arena, countries where striving towards the institution of constitutional courts. The pattern that we have presented in this research is that the Dutch system used to be a unique system, but it cannot be considered as such anymore. The processes that are influencing the countries and their domestic legislations cannot be reversed at this point, as suggested by Tushnet, but this has not to be taken as a cost, as the time goes by it might be worth to loosen up the constrictions on the constitutional text, but this is an argument that will be better analyzed in the conclusions.

## 7. CONCLUSIONS

In chapter 6 we evinced that Netherlands is not a model of its own, but still presents elements of uniqueness that at least distinguish the country in the process of standardization[435]. Nevertheless, the *Grondwet* has been unique until the revision of 1983, that better conformed the constitutional text to the European constitutional landscape[436].

[435] "Standardization" is intended (here and now on) as a phenomenon that seek to converge constitutional law among different countries, see Tushnet, M, op. Ult. Cit.; Law, D.S., Globalization and the future of constitutional rights. Nw. UL Rev., 102, 2008, 277; Shapiro, M., The globalization of law in Indiana Journal of Global Legal Studies, 1993, 37-64

[436] See Chapter 3, Section 2.3

Netherlands is being affected by the process of globalization in constitutional law, that is equalizing constitutional aspects among different nations, such as the entrenchment of rights. The Dutch resistance on judicial review, enshrined in Article 120, is getting looser: Netherlands already had to change its approach by admitting judicial review of acts of Parliament when vis-à-vis with international treaties provisions. This phenomenon is not only induced by exogenous factors, such as bottom-up pressures[437] and international institutions, but also by internal factors that now are intrinsic to the nature of the country and result difficult to change[438]. The best example for this condition is Article 90, the article that foresees the development and promotion of international law by Netherlands. This provision influenced Netherlands towards an opening on the concept of judicial review, that have effect only when domestic legislation is related to the international one. The result at the moment is pretty much asymmetrical and oxymoronic: judicial review is admitted only when involving international treaties, while acts of Parliament cannot be reviewed on their own. This can be said to be the result of another provision intrinsic to the Dutch nature: Article 120, which developed a culture on judicial review that is difficult to eradicate. Nevertheless, if we take in consideration the Finnish example, the exogenous pressures permitted to change Finnish approach towards judicial review. On the other hand, when considering the Finnish case, it has to be said that the longevity of the constitutional text is fairly different from the Dutch one. The gap between the lifespan of the constitutional text of the two countries is remarkable: the *Grondwet* is the oldest written constitution in force in Europe and is second most ancient constitutional text in the world, right after the U.S. Constitution of 1787[439]. Given that the Finnish constitution does not have the same longevity of the Dutch constitutional text, it results more difficult to change provision that determine the intrinsic nature of the Dutch system. Nevertheless, constitutions may need revisions, updates, due to the evolving of time, even if that touches the pillar provisions. Evidences on this need can be found in the work of Elkins, Ginsburg and Melton, where the three states that: «given the existence of exogenous shocks that

[437] See Chapter 6, Section 6; Tushnet, M, The Inevitable Globalization of Constitutional Law, Hague Institute for the Internationalization of Law; Harvard Public Law Working Paper No. 09-06, December 2018, 2

[438] We refer here to Article 90 and 94

[439] Passchier, R., The Constitution of the Netherlands at 200: Adaptive Capacity and Constitutional Rigidity, 2015

change the costs and benefits to the parties to a constitutional bargain, constitutions require mechanisms for adjustment over time»[440].

The reality confirms the theory, as in the case of the admittance of judicial review when related to international treaties provisions. This might represent only the first step of a broader process of change, whose direction results uncertain. That is, at the moment the path to be taken by Netherlands is unsure, among the foreseeable options, the most likely to be realized are: a shift towards a centralized model of judicial review, or the adoption of the hybrid model, Gardbaum's third way[441]. The practice of judicial review would benefit Netherlands, even in the case of restricted judicial review as foreseen by Gerards, as it would grant the emancipation of the constitutional text[442], in desperate need for a better recognition[443]. The decentralized model of review in concrete cases seems not to be the best option for Netherlands: as the constitutional review entails a mechanism of control that not only involves constitutional rights, but also constitutional procedures and institutions, a mechanism that confer the authority to review to one unique body would confer better legal unity. Therefore, the binding power to decide upon the constitutionality of provisions would be left to an only court, if the body receives the approval of both Chambers[444].

In the first case scenario, the adoption of a centralized model would result in the creation of an ad-hoc body charged with the duty of control of constitutionality, that is a constitutional court. The main advantage of this pattern stands in the homogeneity of the judgement, a duty conveyed to a single body. As suggested by Poorter, constitutional review should be conveyed to a body that is focused only on this duty, excluding the broader activity of judicial review of legislation. An example of this approach can be found in the nature of the Italian Corte Costituzionale, that is an independent organ[445]. Further, Van Dijk suggests that «that judicial institution will receive, after all, a special position in the constitutional system or, if you will, cooperation, between legislature and

[440] Elkins Z, Ginsburg T, Melton J. The endurance of national constitutions, Cambridge University Press; 2009 Oct 19, 81
[441] Gardbaum, S., The New Commonwealth Model of Constitutionalism in The American Journal of Comparative Law 49, no. 4, 2001
[442] W.J. Witteveen, Evenwicht der machten, 1991, 85-86
[443] See chapter 3, Section 4.1
[444] De Poorter, J.C., Constitutional review in the Netherlands: a joint responsibility. Utrecht L. Rev., 9, 2013, 104
[445] See Chapter 4, Section 1

judiciary […][446]». The independent position of the court can be established, for instance, on the basis of the method of appointment, using a different criterion for the constitutional body with respect to ordinary courts. Balance and cooperation are two goals that have to be reached through the institution of constitutional review. On the matter, Van Roosmalen affirmed that: «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[…][447]». This solution has already been suggested by Halsema in her proposal[448], as the politician foresaw the possibility of introducing to a legislation that permits constitutional review on circumscribed spheres, constitutional rights. To do so, Netherlands would have to modify its nature, in legislative and institutional terms. From the legal point of view, it is necessary to amend Article 120 or introduce a new legislation that predicts a particular behavior with respect to constitutional legislation. Among the countries analyzed, we can take into account the legislative work made by Canada and Finland. Canada issued Section 33, on the notwithstanding clause, with the aim of define the regulations on constitutional provisions and their review. Finland operated with more depth: with the constitutional reform of 1999, introduced Section 106, a legislative reform that has been institutionally supported by the existence of the Constitutional Law Committee. Therefore, the procedure to be taken by Netherlands is complex and concerns both the legislative and institutional area. If the institution of a new body arises difficulties, or is not exercisable in a short term, the country might take a shortcut and reevaluate the status of the Council of State. A deeper empowerment and strengthening of the role of the Council of State might be an ad interim solution, while waiting for the institution of a constitutional court, or even transferring the duty of constitutional control to the Council of State[449].

[446] Van Dijk, P., "Constitutionele toetsing in toekomstig perspectief" in Verslag van het symposium van de Raad van State, 25 May 2010, Rol en betekenis van de Grondwet, The Hague: Council of State 2010, 51.
[447] de Poorter, J.C. A, & van Roosmalen, H.J.Th.M, Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State, The Hague: Council of State 2010, 140
[448] Kamerstukken II, 2001/02, 28 331, no. 2
[449] De Poorter, J.C., op.Ult. Cit., 2013, 105

The achievements to be set for Netherlands, balance and cooperation, can be reached not only by means of the centralized model, but also through the adoption of the hybrid model. Balance and cooperation can be sought by combining the *ex-ante* and *ex-poste* review. Eventually, the model foreseen by Gardbaum might convey more balance with respect to the centralized pattern. The combination of legislature and judiciary, where the final say is left to the former, obligatorily requires cooperation and dialogue between the two. In the centralized model, most of the pressure is exercised on the judicial branch and, consequently, the judicial offices will gain major prominence, that might result asymmetrical with respect to the relationship with the legislature. Therefore, in order to alleviate the position of the judicial branch and to rebalance the position with respect to the legislature, the adoption of a hybrid pattern of constitutional review seems very suitable for the Dutch case.

Pragmatically speaking, it is more likely that Netherlands will adopt a Kelsenian approach towards constitutional review. This assumption can be inferred by taking in consideration the most recent Dutch attempts to modify the approach towards judicial review. The already mentioned Halsema proposal constitutes the most concrete effort for the establishment of the practice of review, despite predicting the practice for a limited amount of constitutional rights. The idea has been proposed once again during the *Staatscommissie* of 2018: in the report «Low thresholds, high dikes», it is proposed the establishment of a constitutional court that would operate by exercising ex-poste review on determined constitutional rights, and so the practice would be restricted as in the earlier Halsema's proposal. This further step towards the admittance of judicial review represents the gradual growth of Dutch consideration concerning the creation of a constitutional ad-hoc body. Nevertheless, the proposal of 2018 is cautious as the Halsema's one, hinting the difficulty in eradicating the culture on judicial review in Netherlands, given its longevity. On the other hand, the proposal of 2018 can be seen with optimism as it can be read as a step on the matter. It can be inferred that if governmental actors push for change, it is more likely to happen rather than with pressures coming only from the citizens. That is, if the desire of change to the system comes from those actors that work inside it, the system is likely to change to permit to the governmental actors to work properly, according to their standards.

In both cases, either with adoption of the centralized or hybrid model of review, Netherlands would have the same needs. That is, independently from the model chosen, Netherlands will have to intervene on the legislative and institutional sphere. As in the case of the Kelsenian pattern of review, the adoption of the hybrid model would require a substantive change in the Dutch legislation, possibly with an amendment of Article 120, but also a change from the institutional point of view with the establishment of a constitutional court, or an existing body conferred with the authority to review the constitutionality of provisions.

At the moment, the centralized model is the most foreseeable option, given the recent Dutch history of attempting to change the culture on judicial review rooted in Article 120. Still, there is one last consideration worth of importance and is linked to the Gerards proposal. Gerards' proposition aimed to curtail the spheres of competences of the Court of Strasbourg, by redefining the capacities of the ECtHR and circumscribing the fields in which the Court can review national legislation. This proposal goes in countertendency with the Dutch approach towards international law, as prescribed by Article 90. This proposal, conversely, to the Halsema's and of the Staatscommissie of 2018, targets the relationship with the ECHR and not the institution of a constitutional court, but at the same time concerns also the practice of judicial review. In Gerards proposal, focus is given to limit the power of the Court rather than building an approach towards judicial review in the domestic field. From this proposition, it is worth to highlight that the Dutch approach towards international law goes in the opposite direction with respect to the other European members. The Gerards proposal is the exception that confirms the rule. Gerards proposes a major focus on judicial nationalism and strive to limit of competences of the international actors on domestic affairs. Netherlands, as we widely noted in this research, has peculiar features in its constitutionalism. At current date, the element of uniqueness of Netherlands stands in the approach towards international legislation and the internationalization of domestic legislation. As witnessed by Lustig and Weiler[450], the response of most countries to the wave of internationalism, also definable as standardization[451], goes in the opposite way of Netherlands. The wave of internationalism

[450]Lustig, D., & Weiler, J.H., Judicial review in the contemporary world—Retrospective and prospective, International Journal of Constitutional Law, 16(2), 2018, 366-371

[451] According to the meaning given in Chapter 6, Section 6

is now being opposed by a return to nationalism and the desire to decide on national legislation autonomously, without taking into account supranational bodies as well as international treaties[452]. The old-fashioned inclination towards national sovereignty does not match the Dutch approach, that greatly complies with international legislation, and so it is a unique feature that Netherlands maintains, at least with respect to the other European members. Nevertheless, the new global resistance to internationalism can benefit the whole international arena: a gradual rejection of the approach can push for a better pattern of international integration. It is possible to infer this assumption by looking at the major prominence that recently has been given to national identity, with the amendment of the TEU in the Lisbon treaty, at Article 4(2). National identity will be preserved by taking a milder approach with regard to the possible alteration of national values, more specifically on the matter of human rights. This solution promptly responded to the recent desire of many European members to assert and strengthen their exclusive sovereignty over their national territory. Eventually, there is ground to believe that, as European institutions reconsider their approach towards member states, Netherlands might take the chance to reconsider its approach towards international legislation and align with other EU members in their call for national sovereignty, even though the Dutch tradition has always strived for the opposite path.

[452] Lustig, D., & Weiler, J.H., op. Ult. Cit., 370

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## Executive Summary

## Is the Dutch Constitution Unique? From Its "Petrifaction" to its Transformation

The relevance of the topic today concerns the European legal landscape, more specifically whether it is still possible to affirm that Netherlands lacks of a mechanism of control of constitutionality on legislations or the accession to the EU and ECHR, with their subsequent evolutions, has changed the Dutch legal tradition on constitutional adjudication. The object of my research entails the Dutch Constitution, a peculiar constitutional text that is defined as petrified. The procedure finds its description in Article 137,138 and 139 of the constitutional text. Peculiarity can be found also in Article 120, where the constitution foresees the ban on the judicial review of Acts of Parliament. In my research it will be discussed the nature of the Dutch constitutional text, in order to understand whether it is unique, a model of its own, or it can be regrouped in a shared constitutional model. Determining the uniqueness of the Grondwet will represent the last step of the research question, that will be anticipated by other sub questions that are necessary for our research. These early queries concern respectively: the origin of judicial review, the Dutch constitution and constitutional adjudication, the position that Netherlands has with respect to other countries with regard to judicial review and finally the relationship between the Dutch constitutional text and the ECHR. Having answered these questions, it should be easier to cast an opinion on Dutch constitutionalism.

### The Practice of Judicial review

Starting from the origins of judicial review, we analyze the first form of precautionary principles of constitutionalism in Ancient Greece. The procedure of set the basis for a mechanism of constitutional review of legislation, that will determine a shift towards constitutional justice in the European landscape. On the phenomenon of judicial change, most of the contribution in Europe is brought by France and more specifically by the Constitutional jury predicted by Sieyès. As Europe starts to frame a mechanism of judicial review, that strive for the adoption of a centralized system of control headed by an ad-hoc body, that is a constitutional court; the United States build their own approach towards constitutional justice, in the historic case law of Madison v. Marbury. In this

latter case, the US opens to a mechanism of judicial review, thoroughly debated among A. Hamilton, J. Madison and J. Jay in "The Federalist", that foresees a decentralized model of review, where any ordinary court is entitled to review the conformity of a legislation to the constitution. It is than understandable that two approaches have developed on judicial review of legislation, creating a dichotomy constituted by the centralized and decentralized model. The centralized pattern of judicial review finds its proper establishment in the first half of the twentieth century, with the works of Kelsen applied to the Austrian Constitution. The model set by the jurist will rapidly spread across Europe, even though the existence and development of the EU and its principles, like the Simmenthal doctrine, forces the member states to reconsider their approach in judicial review and introduce elements of decentralization. The establishment of the primacy of EU law and of the direct effect principle weakens the authority of the constitutional court, that has not the authority to decide on supranational law, instead national legislation has to bend to the supranational one. The adaptation to these principles has not been homogenous nor smooth. If we take into consideration the French and Belgian path with respect to the method of adaptation of Germany and Poland. In the former case, we analyze the horizontal and vertical allocation, while in the latter case we consider two countries that both come from an authoritarian regime, having opposite conditions.

**The Dutch constitutional framework**

As in Chapter 2 we have briefly analyzed the habitat in which the culture on judicial review developed, it is time to focus on the relationship between Netherlands and constitutional adjudication. Netherlands proves to be an authentic country when it comes to the legal branch. As the constitutional knowledge progressed by the time an in incremental way, the legal culture followed the same path but maintaining its core approach. The Dutch Legal culture can be reassumed in pragmatism, soft approach and Poldermodel .The Dutch constitution is a subject of study in constitutional and international law, given its features, such as the openness to international legislation , the ban on judicial review of acts of Parliament and the rigid procedure predicted to amend a constitutional provision .Rigidity is given by Article 137,138 and 139 of the Grondwet. These articles are the main reason for the rigidity of the Dutch constitution. It is worth to recall that, according to Ryan and Foster, a constitutional text can be defined as rigid when there is particular path to be followed, that are legislative or constitutional

impediments, in order to amend the constitution. The process of amendment can be hindered by recurring to national referenda or to special voting majority in Parliaments. The first one requires the following: a bill, under the form of act of parliament, containing the proposal for a constitutional amendment must be passed, the Lower House may divide the long bill in single issue bills and shorter ones; once the amendment is approved by the States Generals, the Lowest Chamber, Tweede Kamer is dissolved after the publication of the act of parliament containing the proposal for the constitutional amendment is published ; at this point a new Lower House has to be elected and the two chambers of the States General will proceed with the second reading of the initiative bill, after having passed the first one, and vote for its acceptation if a two-thirds majority is reached. Again, the Tweede Kamer will proceed to the division of bill into multiple ones if the document receives the two-thirds majority vote needed or if there is a bill proposed directly by the sovereign or someone on his behalf. After this last provision, the procedure continues in Article 138, where it is stated that bills for constitutional amendment that passed the second reading, will see the introduction of further provisions by means of an act of parliament whereby: locate the adopted bill and the unamended provision one consequential to the other as requested by the procedure, divide the chapters, sections, articles and the heading according to the substantial changes made in the previous stage; then finally the adjusted bill will be presented before the State General and will be passed if reaches a majority of two-thirds of the members .This procedure is still loyal to Thorbecke's vision that sought continuity and stability in 1848, proving that the mechanism for the constitutional amendment in Netherlands is still complex and rarely successful and so maintaining its status of rigid constitutional text according to Ryan's and Foster's vision.

To understand the roots of these features, it is worth to compass the different version of the Grondwet, in order to denote its incremental nature, and its development through the 200 years of existence. Despite the incredible lifespan of the Dutch constitutional text, there have been attempts to modify the nature of the constitution and the Dutch approach towards constitutional adjudication. Among different proposals, the Halsema's and the Gerards'one are those that seems the most pragmatical and possible to be realized. Even though the Grondwet is among the oldest constitutional text in force, the Dutch understanding of the constitution does not permit an active dialogue on the matter,

provoking a constitutional stall. Citizens acknowledge the rigidity of the constitution, eventually some would like to see a change in their structure but only a few of them question the Dutch culture on judicial review. This judicial approach is contained in Chapter 4, where it is analyzed Article 120. As seen in the previous section, the ban on judicial review is a provision that exists since a long time in the Grondwet. Nevertheless, the Dutch judicial culture has experienced changes brought about by the Communitarian legislative framework. The result is oxymoronic: acts of Parliament can be reviewed only when vis-à-vis to international legislation, while at the domestic level, the ban persists. This condition of asymmetry might give major prominence to the proposal of Halsema, foreseeing a control of constitutionality that is circumscribed to certain rights contained in the constitution. Nevertheless, the Dutch approach towards judicial review finds its reasoning in the Van de Bergh v Staat der Nederlanden case law of 1961, which strengthen the prohibition of constitutional review, the unassailability of the legislation and of its review whether it is a formal or a substantive act. The prohibition to perform the practice of review is extended to the Charter for the Kingdom of the Netherlands, that established the impossibility of testing formal legislations against the Charter.

Given the oxymoronic condition in which Article 120 is currently expressed, we take into consideration the British context. The United Kingdom is often compared and regrouped with the Dutch constitution, the and judicial system, in so far as they bock lack a system of constitutional adjudication. The UK implemented the Human Rights Act that permits the enforcement of the ECHR in the British country and that gives execution to the judgements of the Court. This integral tool for the protection of human rights stand on three main pillars: first, every UK legislation must try to be adopted in compliance with the HRA ; in case of a breach of the HRA by an act of Parliament the courts can judge the bill incompatible, and finally that no public authority can infringe the rights while conducing his behavior, and so the violated can challenge the offices for the unlawful actions perpetrated .

**Estonia, France and Italy: a comparative framework on judicial review**

This first parallelism leads to Chapter 4, where a more comprehensive framework on different approaches towards judicial review is posed. Two are traditionally recognized: the centralized, Kelsenian, model and the decentralized one, of American inspiration. The

third one is a hybrid model: its existence, in the Finnish model, debunks the polarized view on judicial review admitting the possibility of pluralism. The Finnish model exercise a compromise between the abstract ex ante review and the concrete ex poste one. The framework analyzes Italy, Estonia and Finland by considering the different constitutional approach by each country, that is analyzed by taking into account the institutions that regulates the control of constitutionality and the permitting domestic legislations. The analysis of each country will be conducted in order to give a contrastive description with respect to the Dutch model, presented in Chapter 3. From the framework, it is possible to evince the constitutional shift in force at the moment. Italy, for instance, embraced the centralized practice of review, but it is progressively including elements of decentralization in the judicial review, due to the adoption of European legislation and principles.

**The Influence of European legislation on the Dutch legal culture**

As we frame the context of judicial review at national level, in Chapter 5 we take on the elements of influence in current constitutionalism by analyzing the pressures exercised by international treaties, specifically the ECHR, and the European courts, the ECtHR. The influence of international treaties, and their deriving courts, seems to be amplified by Article 90, that set Netherlands as a pioneer in international law. Nevertheless, to acknowledge the Dutch relationship with the ECHR and the entrenchment of fundamental rights, it has to be taken into account the Dutch minimalist reading of the ECtHR's judgements, that goes in the opposite way with respect to the approach enshrined by Netherlands towards international law. The influences brought by international treaties are progressively attacking the long lasting Dutch judicial model. The prohibition on the judicial review of acts of Parliament is not exercised when the acts are vis-à-vis with international legislation, but further progresses can be done in order to permit a mechanism of judicial review at national level, as suggested for instance by the Gerards proposal. The lack of judicial review within the Dutch system can be said to have a marginal impact in the protection of the human rights as prescribed by the Convention. When in conflict with the provision of the ECHR, the permission granted by Article 94 to perform a control on the conventionality of legislations that seems to be generally sufficient. Moreover, the Dutch constitution already granted a vast protection of rights, which has been eventually enriched with the addition of the European tool, the ECHR.

Nevertheless, the system sometimes provides elements of overlapping practice between the two jurisdictions, the supranational and the domestic ones. As pointed out by Gerards, it might be the right time to modify the procedure of review and preliminary ruling in order to make the protection of rights smoother and faster. Overall, the control of conventionality underlined in Article 94 of the Grondwet fills the judicial gap caused by the lacking practice of judicial review within the national jurisdiction, given also the fact that Netherlands has not a Constitutional Court. Therefore, to assume that the Court will leave more room to national courts and reduce its margin of appreciation is quite difficult, given the recent tradition that has been built. Moreover, there is not any particular ground to request the opposite solution: The Convention filled the gaps in matter of human rights in the already quite rich Grondwet. In a context in which the jurisdiction on human rights is almost completely left to the conscience of a supranational court, every member of the treaty should feel empowered in promoting and pushing towards new and more inclusive reaching in the standards of protection of those rights. This presumption completely falls in line with the Dutch spirit contained in Article 90 of the Grondwet and it also explains the high standards that Netherlands has in the protection of rights by domestic means.

**Is the Dutch system a model on its own?**

Given the outlines provided in chapter 2 to 5, it is finally possible to determine the answer to our research question, that is whether the Dutch system is a model of its own or not. In assessing my thesis on the subject, in chapter 6 we will start from the theories on judicial review. Starting from the polarization of judicial review, we will shift to Gardbaum's third model. Proposed as an alternative path to judicial review, the hybrid model has gained prominence since a global better recognition of fundamental and human rights, with their consequent entrenchment. This acknowledgement is very important as debunks the polarized view on judicial review, sustained for instance by Tushnet, and admits pluralism. Still, it has to be assessed the identity of Netherlands on the matter, that is, whether the Dutch model is unique, or only has peculiar features in a model that is not distinguishable from others. The answer to this question will have to take into account the process of globalization in constitutional law, that is conveying different nations under the same process of standardization of constitutional law, where systems are more similar, or even equalized, given the pressures coming from international entities, but also from civil society organizations and NGOs. The Dutch system is not a unique model, it

conforms to the standardization protracted by international treaties and supranational entities. This tendency to the standardization can be found in the same Dutch constitutional text, the Grondwet, at Article 90. The fact that the provision commits the country towards the promotion of international law is a symptom of the legal contamination under which Netherlands has posed itself. Starting from Slaughter's theory, a country that set itself as a promotor of international legislation is committed to the communication among different legal and judicial orders and therefore is willing to exchange knowledge and remedies on, for example, constitutional legislation. Therefore, there is ground to admit pluralist remedies for the resolution of the matter, while there is little chance to maintain a proper scheme. Shifting on one of the main characteristics of Netherlands, even the ban on the judicial review is something that has changed with the standardization process. Moreover, the Dutch pattern seems to have taken a form that suggest hybridization rather than uniqueness. In its purest form, the position taken by Netherlands has been weakened through time by international obligations and supranational courts. It can be said that the Dutch system poses requirements that are quite unique, in modifying the constitution. As most of the democratic countries are providing a more flexible constitution, adopting over and over decentralized system, the Netherlands goes against tendency, but it is unsure if its trend will last. The Halsema proposal first, and Gerard's later, are just two among the different new solutions that have been proposed and that would rend less unique Netherlands. The pattern that we have presented in this research is that the Dutch system used to be a unique system, but it cannot be considered as such anymore. The processes that are influencing the countries and their domestic legislations cannot be reversed at this point, as suggested by Tushnet, but this has not to be taken as a cost, as the time goes by it might be worth to loosen up the constrictions on the constitutional text.

**The possible Dutch change of approach towards judicial review of legislation**

This might represent only the first step of a broader process of change, whose direction results uncertain, that is, at the moment the path to be taken by Netherlands is unsure. Among the foreseeable options, the most likely to be realized are a shift towards a centralized model of judicial review, or the adoption of the hybrid model, Gardbaum's third way. The practice of judicial review would benefit Netherlands, even in the case of restricted judicial review as foreseen by Gerards, as it would grant the emancipation of

the constitutional text, in desperate need for a better recognition. In the first case scenario, the adoption of a centralized model would result in the creation of an ad-hoc body charged with the duty of control of constitutionality, that is a constitutional court. The main advantage of this pattern stands in the homogeneity of the judgement, a duty conveyed to a single body. To do so, Netherlands would have to modify its nature, in legislative and institutional terms. From the legal point of view, it is necessary to amend Article 120 or introduce a new legislation that predicts a particular behavior with respect to constitutional legislation. Eventually, the model foreseen by Gardbaum might convey more balance with respect to the centralized pattern. The combination of legislature and judiciary, where the final say is left to the former, obligatorily requires cooperation and dialogue between the two. In the centralized model, most of the pressure is exercised on the judicial branch and, consequently, the judicial offices will gain major prominence, that might result asymmetrical with respect to the relationship with the legislature. Therefore, in order to alleviate the position of the judicial branch and to rebalance the position with respect to the legislature, the adoption of a hybrid pattern of constitutional review seems very suitable for the Dutch case. Pragmatically speaking, it is more likely that Netherlands will adopt a Kelsenian approach towards constitutional review. This assumption can be inferred by taking in consideration the most recent Dutch attempts to modify the approach towards judicial review. The already mentioned Halsema proposal, proposed again in the Staatscommissie of 2018, constitutes the most concrete effort for the establishment of the practice of review, despite predicting the practice for a limited amount of constitutional rights. In both cases, either with adoption of the centralized or hybrid model of review, Netherlands would have the same needs. That is, independently from the model chosen, Netherlands will have to intervene on the legislative and institutional sphere. At the moment, the centralized model is the most foreseeable option, given the recent Dutch history of attempting to change the culture on judicial review rooted in Article 120. Still, there is one last consideration worth of importance and is linked to the Gerards proposal. Gerards' proposition aimed to curtail the spheres of competences of the Court of Strasbourg, by redefining the capacities of the ECtHR and circumscribing the fields in which the Court can review national legislation. This proposal goes in countertendency with the Dutch approach towards international law, as prescribed by Article 90. In Gerards proposal, focus is given to limit the power of the Court rather

than building an approach towards judicial review in the domestic field. From this proposition, it is worth to highlight that the Dutch approach towards international law goes in the opposite direction with respect to the other European members. The Gerards proposal is the exception that confirms the rule. Gerards proposes a major focus on judicial nationalism and strive to limit of competences of the international actors on domestic affairs. Netherlands, as we widely noted in this research, has peculiar features in its constitutionalism. At current date, the element of uniqueness of Netherlands stands in the approach towards international legislation and the internationalization of domestic legislation. As witnessed by Lustig and Weiler, the response of most countries to the wave of internationalism, also definable as standardization, goes in the opposite way of Netherlands. The wave of internationalism is now being opposed by a return to nationalism and the desire to decide on national legislation autonomously, without taking into account supranational bodies as well as international treaties. The old-fashioned inclination towards national sovereignty does not match the Dutch approach, that greatly complies with international legislation, and so it is a unique feature that Netherlands maintains, at least with respect to the other European members. Nevertheless, the new global resistance to internationalism can benefit the whole international arena: a gradual rejection of the approach can push for a better pattern of international integration. It is possible to infer this assumption by looking at the major prominence that recently has been given to national identity, with the amendment of the TEU in the Lisbon treaty, at Article 4(2). National identity will be preserved by taking a milder approach with regard to the possible alteration of national values, more specifically on the matter of human rights. This solution promptly responded to the recent desire of many European members to assert and strengthen their exclusive sovereignty over their national territory. Eventually, there is ground to believe that, as European institutions reconsider their approach towards member states, Netherlands might take the chance to reconsider its approach towards international legislation and align with other EU members in their call for national sovereignty, even though the Dutch tradition has always strived for the opposite path.