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Judicial Review and the Role of the Judiciary in Dutch Constitutional Law

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Abstract

This article discusses the concept of judicial review and the role of the judiciary within the Dutch constitutional law system, which constitutionally prohibits courts from reviewing the constitutionality of statutes through Article 120 of the Grondwet (Dutch Constitution). However, in practice, various indirect mechanisms allow for the continued exercise of judicial oversight over legislation. This article aims to examine how judicial institutions in the Netherlands contribute to constitutional oversight despite the formal prohibition of judicial review. The main research question explored is: How do judicial institutions in the Netherlands fill the void left by the absence of constitutional judicial review?. The article employs a normative and comparative approach. The comparative element involves both an internal comparison—between legal norms and judicial practices within the Netherlands—and an external comparison with selected foreign constitutional systems that permit judicial review. The approach is not limited to doctrinal analysis; it also incorporates secondary data drawn from court practices and legal developments in case law. The role of the Raad van State as a legislative advisor and administrative court, as well as the Hoge Raad as the Supreme Court that develops progressive legal interpretations, serves as a key instrument in controlling the quality of regulations. In addition, Dutch national courts also invoke international law—particularly the European Convention on Human Rights (ECHR)—as a basis for refusing to apply national laws that conflict with human rights, pursuant to Article 94 of the Grondwet.

Keywords: Judicial Review, Judiciary, Dutch, Constitutional Law

INTRODUCTION

In a modern constitutional democracy grounded in the rule of law, judicial review serves as a fundamental mechanism to enforce constitutional supremacy, uphold the separation of powers, and protect fundamental rights. It allows the judiciary to evaluate whether legislation or executive actions conform to the constitution, thereby maintaining a system of checks and balances. From a theoretical standpoint, judicial review is linked to broader concepts such as constitutionalism, legal accountability, and the protection of individual liberties in the face of majoritarian politics. These principles are central to contemporary debates on the proper functioning of democratic governance.

However, the constitutional structure of the Netherlands presents a distinctive anomaly within this theoretical framework. Article 120 of the Dutch Constitution (Grondwet) explicitly prohibits the judiciary from assessing the constitutionality of Acts of Parliament or international treaties. This reflects a positivist-democratic tradition, in which elected branches of government are seen as the primary bearers of legal legitimacy. Courts, as unelected bodies, are intentionally excluded from constitutional adjudication to prevent judicial interference in the political domain (Andriotis, 2023). .

Yet, this rigid doctrine has come under increasing pressure. Growing legal complexity, globalization, and the expanding role of international human rights law have raised critical questions about the adequacy of the Dutch system in upholding constitutional guarantees in practice. Furthermore, significant legal developments—such as cases involving refugees, data protection, and freedom of expression—have revealed gaps in domestic constitutional protection, prompting both academic and public calls for constitutional reform, including the possible revision of Article 120. These demands are often framed in terms of enhancing democratic legitimacy, human rights protection, and judicial accountability.

At the core of this article lies a key research problem: How do judicial institutions

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in the Netherlands contribute to constitutional oversight and the protection of fundamental rights in the absence of formal judicial review?

This problem implicates deeper theoretical tensions between legal certainty and adaptability, judicial restraint and activism, and national sovereignty and international legal obligations. It also raises the issue of whether the Dutch model can be sustained in an era when most constitutional democracies have embraced judicial review as a core component of constitutional governance (Van, 2020). .

To analyze this issue, the article adopts a normative and comparative constitutional law framework. Theoretically, the discussion is grounded in concepts of judicial review in rule-of-law states, checks and balances, and multi-level constitutionalism, particularly the interaction between domestic legal orders and supranational norms such as the European Convention on Human Rights (ECHR). This framework allows for a critical assessment of the Dutch model, not just in doctrinal terms, but also in terms of its functional capacity to deliver constitutional justice.

Comparative analysis will be systematically employed, with selected comparisons to other European jurisdictions—such as Germany, Austria, France, Italy, and Scandinavian countries—to examine alternative institutional models. These comparisons are based on specific analytical criteria: Institutional design (existence and scope of constitutional courts); Type of judicial review (centralized vs. decentralized); Legal basis for rights protection (national constitutions vs. international treaties) (Zoethout, 2022).

These comparisons aim to evaluate whether the absence of formal judicial review in the Netherlands can be effectively compensated by international treaty-based mechanisms, particularly under Article 94 of the Grondwet, and to assess whether current proposals for reform align with broader constitutional trends.

(Finally, this study also holds comparative value for countries like Indonesia, where debates over the institutional role of the judiciary in safeguarding constitutionalism remain active. While Indonesia has a Constitutional Court with full judicial review powers, it faces challenges of a different kind—related to judicial consistency, political influence, and public trust. The Dutch experience, which operates on a different normative assumption, offers a contrasting model that may enrich comparative legal debates.

Thus, this article argues that despite the formal ban on constitutional judicial review, the Dutch judiciary—particularly the Hoge Raad and Raad van State—plays an increasingly significant role in shaping constitutional practice. Through doctrinal innovation, treaty interpretation, and procedural oversight, Dutch courts contribute to a functional form of constitutional review. Whether this indirect approach can meet the demands of contemporary constitutionalism remains an open question that this article seeks to address.

METHOD

This research employs a normative legal approach, a method that focuses on the analysis of applicable written legal norms, including constitutional provisions, statutory laws, international treaties, and judicial decisions. This approach was chosen because the main object of the study is the body of positive legal rules governing the judicial review system and the role of the judiciary within Dutch constitutional law. In this context, law is understood as a normative system that regulates the behavior of the state and society, and the analysis is therefore directed at interpreting and evaluating these norms systematically.

In its implementation, this research combines several legal approaches. First, the statutory approach is used to examine legal provisions directly related to judicial review, particularly Article 120 and Article 94 of the Dutch Constitution (Grondwet), as well as international instruments such as the European Convention on Human Rights (ECHR). Second, a conceptual approach is applied to

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understand the theoretical foundations of judicial review, including scholarly opinions on the function and role of constitutional review in democratic states. Third, a comparative legal approach is employed to compare the Dutch legal system with other countries—such as Germany, France, and Indonesia—that have adopted judicial review in their constitutional frameworks. Finally, a historical approach is used to trace the background of the formation of Article 120 of the Grondwet and to examine how the principle of judicial non-intervention in constitutional review developed in Dutch legal history.

The data used in this research are secondary in nature and consist of three types of legal materials: primary, secondary, and tertiary legal sources. Primary legal materials include the Dutch Constitution, international treaties ratified by the Netherlands, and relevant court decisions, both from the Hoge Raad (Supreme Court of the Netherlands) and the European Court of Human Rights. Secondary legal materials include academic literature such as books, legal journals, previous research, and analyses by both Dutch and international legal scholars discussing the topic of judicial review and constitutional reform. Tertiary legal materials consist of legal encyclopedias, law dictionaries, and other supporting documents that help define and explain legal concepts used in the study (Kamerstukken, 2023).

Data collection was carried out through library research, involving the review and compilation of legal documents from official and academic sources. The data were obtained from international legal databases such as HeinOnline, JSTOR, and SpringerLink, as well as official websites of Dutch government institutions such as Rechtspraak.nl and Raadvanstate.nl. In addition, judgments of the European Court of Human Rights were accessed through its official portal, HUDOC (hudoc.echr.coe.int). All legal materials were systematically collected and organized to ensure relevance and accuracy in addressing the core issues examined in this study (Voermans, 2021). .

Once the data were collected, the analysis was conducted qualitatively using a juridical approach. This method emphasizes legal interpretation of normative provisions and judicial practice by classifying legal materials according to their hierarchy and binding authority. The author then performed a critical legal interpretation of constitutional norms and jurisprudence, identifying patterns of legal reasoning within the context of judicial review in the Netherlands. Comparative analysis with other countries' systems also formed an essential part of the study in order to uncover the unique characteristics, strengths, and limitations of the Dutch legal system. Through this method, the research aims to provide a comprehensive understanding of the absence of judicial review in the Dutch legal system and its relevance to the rule of law and the protection of constitutional rights of citizens.

RESULTS AND DISCUSSION

The Netherlands holds a highly distinctive position in the landscape of modern constitutional law, particularly due to its firm stance in rejecting the practice of judicial review—or constitutional review by the judiciary—of statutes enacted by parliament. Article 120 of the Dutch Constitution (Grondwet) explicitly states that judges are not permitted to assess the constitutionality of acts passed by parliament, including international treaties. This provision reflects the spirit of classical parliamentarism, in which parliamentary supremacy is regarded as the highest expression of democratic authority, and control over legislation is deemed the exclusive responsibility of elected representatives, not the judiciary. Since the constitutional reform of 1848, initiated by Johan Rudolph Thorbecke, this principle has been reinforced. The underlying philosophy is to preserve a clear separation between legislative and judicial powers, thereby preventing judicial intervention in political decision-making. This principle was reaffirmed and even expanded in the 1983 constitutional amendment, which

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extended the prohibition to include judicial review of international treaties by national courts.

Nonetheless, in practice, the Dutch legal system is not entirely devoid of oversight mechanisms concerning the constitutionality of legal norms. Behind the formal prohibition of judicial review, there exist indirect mechanisms and practices that allow for similar functions to be exercised, albeit in different forms. One such mechanism is the role of the Raad van State (Council of State), which acts as both a legislative advisory body and the highest administrative court in the Netherlands. Every government bill must first be submitted to the Council of State for legal advice regarding its compatibility with general legal principles, international law, and sound constitutional governance. Although this advice is not binding, it is highly respected in practice and often determines the fate of a legislative proposal. In this way, the Raad van State functions as a form of preventive control over the quality of legislation before it is formally enacted.

In addition, oversight is carried out by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). While it lacks the authority to conduct constitutional review, the Hoge Raad plays a crucial role in interpreting the law through binding cassation decisions. In certain cases, the Court has applied the doctrine of contra legem, refusing to apply a statute literally when doing so would contradict general principles of law or result in manifest injustice. Although this does not render the law invalid, such legal interpretations can effectively weaken the enforcement of the relevant legal norm. In other words, the Hoge Raad does not explicitly engage in judicial review, but it can "modify" the impact of a law in the concrete context of a case.

Furthermore, the Dutch legal system is strongly influenced by international law, particularly the European Convention on Human Rights (ECHR). According to Article 94 of the Grondwet, international treaties that are directly applicable and binding upon citizens (self-executing) take precedence over national law, including statutory law. As a result, when there is a conflict between a national law and a provision of an international treaty such as the ECHR, Dutch courts may refuse to apply the national law. This enables courts to conduct a substantive review of national legal norms based on international standards, even without directly invoking the constitution. In this way, the Netherlands has, in practice, adopted a limited form of judicial review through the channel of international law (Raad van State, 2023).

A striking example of the influence of international law on the Dutch legal system is the case of Benthem v. The Netherlands (1985). In this case, the European Court of Human Rights (ECtHR) ruled that Dutch administrative procedures—which allowed the government (through the King) to make final decisions without judicial oversight—violated Article 6 of the ECHR on the right to a fair trial. The judgment prompted the Dutch government to implement structural changes to its administrative law system, including the abolition of the Kroonberoep (appeal to the Crown) mechanism. This case demonstrates that even in the absence of domestic constitutional review, oversight is still exercised by international courts, with potentially significant consequences for the national legal system **(**De Lange, 2022).

However, the Dutch system is not immune to criticism. Many academics and civil society actors argue that the lack of a domestic judicial review mechanism creates a deficit in the protection of constitutional rights. When a law clearly harms certain groups or violates principles of justice, citizens have no national legal avenue to challenge it directly. They must first be affected by the law in a specific case and, if still unsatisfied, file a complaint with the European Court of Human Rights. This process is not only lengthy and exhausting but also ineffective as a preventive mechanism to avoid rights violations. One of the clearest examples of the weakness of domestic oversight is the child benefits scandal (*Toeslagenaffaire*), in which thousands of parents were unfairly

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accused of fraud and forced to repay benefits by the tax authority, based on overly harsh legislation. The absence of constitutional review meant that this systemic failure went uncorrected until political and media pressure became too great to ignore (Gerards, 2021).

Such incidents have been a major catalyst for the emergence of constitutional reform discourse in the Netherlands. Several political parties, academics, and public figures have proposed that Article 120 be repealed or revised to allow for a limited form of constitutional review. These proposals generally do not aim to establish a separate constitutional court, as in Germany or Indonesia, but rather to empower ordinary courts to assess whether laws conflict with the fundamental principles of the constitution, particularly human rights (European Court of Human Rights, 2021). This model would maintain parliamentary supremacy while granting the judiciary a corrective constitutional oversight function and ensuring protection for minority groups. Some legal scholars have also proposed a "constitutional dialogue" model, similar to that in the United Kingdom, where courts do not strike down laws but instead issue declarations of incompatibility that serve as strong signals for parliament to reconsider its legislation **(**Komárek, 2020). .

Support for such reform has grown, especially following the 2023 general election, which brought several new parties into parliament, including the New Social Contract party led by Pieter Omtzigt. In his manifesto, Omtzigt explicitly called for strengthened constitutional protections and the introduction of a mechanism to review legislation that is disproportionate or discriminatory. This discourse has become part of the national agenda for rebuilding public trust in the rule of law and government accountability.

Nevertheless, constitutional reform in the Netherlands is not easily achieved. Amendments to the Grondwet require a two-step process: first, the proposed change must be approved by a simple majority in parliament; then, following a general election, the newly elected parliament must approve the amendment by a two-thirds majority. This process is designed to ensure that constitutional change is not rushed and only occurs when there is broad political and social consensus. Therefore, even though many academics and political actors ideologically support limited judicial review, its realization still requires significant political struggle and a lengthy deliberative process.

From a comparative perspective, the Dutch legal system stands out sharply from those of other European countries. In Germany, judicial review is conducted by the *Bundesverfassungsgerich*t (Federal Constitutional Court), which has broad authority, including the power to annul unconstitutional laws. In France, although the system is more parliamentary in nature, the Conseil Constitutionnel may be asked to review draft legislation before enactment. Italy and Spain also have constitutional courts with judicial review powers. As such, the Netherlands remains one of the few democratic countries to maintain this unique legal position**.**

CONCLUSION

The Dutch constitutional legal system presents a unique and distinctive configuration compared to most democratic countries around the world. Article 120 of the Grondwet (Dutch Constitution) explicitly prohibits the judiciary from conducting constitutional review of laws enacted by parliament. This reflects a strong parliamentary philosophy in which legislative supremacy is placed above judicial intervention, as a manifestation of representative democracy. Nevertheless, this prohibition does not entirely eliminate the possibility of judicial oversight over legislation, particularly through indirect pathways available within the Dutch legal framework.

In practice, oversight of legal norms is carried out through several alternative mechanisms. First, through the role of the Raad van State (Council of State), which serves as a legislative advisory body and the highest administrative court. It provides assessments of draft laws before their enactment, thus

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functioning as a form of preventive control over problematic legislation. Second, the Hoge Raad (Supreme Court) plays a vital role in developing progressive and equitable legal interpretations, albeit within the constraints of the formal absence of judicial review. Third—and most significantly—is the use of international law, particularly the European Convention on Human Rights (ECHR), as a basis for courts to refuse the application of national laws deemed to violate human rights. Article 94 of the Grondwet serves as the legal foundation for this practice, allowing Dutch courts to carry out a form of "substantive review" of national legislation through self-executing international norms.

Nonetheless, the absence of a domestic judicial review mechanism remains a significant weakness in the protection of citizens' constitutional rights. Events such as the child benefits scandal (Toeslagenaffaire) demonstrate that a system lacking judicial correction of legislation can result in widespread and systemic rights violations. This has led to a growing discourse on constitutional reform in recent years, driven by academics, civil society, and various political parties advocating for the repeal or revision of Article 120 to allow limited judicial review at the national level.

Reform proposals vary, ranging from a decentralized model allowing all courts to review constitutionality in the context of concrete cases, to the establishment of a dedicated institution such as a Constitutional Court. While political and procedural challenges to amending the constitution are considerable, the post-election political momentum and growing public awareness of the importance of human rights protection have made this agenda increasingly relevant. A limited and dialogic model of judicial review, as practiced in the United Kingdom, could serve as a moderate option that maintains parliamentary supremacy while providing corrective mechanisms for flawed legislation.

In conclusion, the Dutch constitutional legal system has demonstrated flexibility in reconciling the principle of non-judicial review with demands for rights protection and justice. Although the formal prohibition of judicial review remains in place, developments in legal practice and pressures from social realities have paved the way for more adaptive and responsive reform possibilities. Considering the balance between democracy and the rule of law, constitutional reform that introduces limited judicial review could be a strategic step toward a more just, transparent, and accountable constitutional system in the future.

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