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ROBERT SCHUMAN CENTRE

The European Court and National Courts  
Doctrine and Jurisprudence:  
Legal Change in its Social Context  
Report on the Netherlands

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Doctrine and Jurisprudence: Legal Change in its Social Context*  
Directed by Anne-Marie Slaughter, Martin Shapiro, Alec Stone, and Joseph H.H. Weiler

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The Netherlands do not seem to fit well within this research project. All commentators, both inside and outside the Netherlands, agree that the reception of the European Court's direct effect/supremacy doctrine has gone very smoothly in the Netherlands, without major doctrinal controversies or judicial hesitations. Comparative studies of the domestic reaction to the supremacy and direct effect doctrines do not dwell on this country, and quickly move to other, more interesting cases such as those of France, Italy, Germany or the UK. We will not challenge that view here; the constitutional setting of the Netherlands is indeed optimal if compared to those other countries. Yet, the reaction to the direct effect/supremacy doctrine has not been without some ambiguities. In the second part of the report, we will look into them, and hope to show that even in the Netherlands the reception of the European Court's doctrine has not gone without some distortions of the message from Luxembourg.

The first part will deal with something else. Before looking at the reception of the direct effect/supremacy doctrines, we will look at their conception. Those doctrines did not appear out of the blue. The European Court had its own intellectual sources from which it derived the formulation of those doctrines, and those sources, apart from sparse references in the case-law of international courts, were to be found in national law. The link between the direct effect doctrine and the American doctrine of self-executing treaties is well-known, but the 'European' sources of the Court's doctrine are less completely explored. The constitutional law of the Netherlands is, arguably, one of its major sources of inspiration. The first part of the report will therefore deal with the contribution of the Dutch legal order to the emergence of the European Court's doctrine.

## I. THE DUTCH SOURCES OF THE EUROPEAN COURT'S DOCTRINE

### 1. Direct Effect and Supremacy of International Treaties in the Netherlands Prior to *Van Gend en Loos*

For a long time, the Dutch Constitution did not contain any provisions on the relationship between international law and national law. In the absence of express constitutional provisions, this question (which started to appear of practical relevance towards the end of last century) was left to legal writing and to the courts for discussion and decision. In this respect, the Netherlands does not stand apart from the other European countries. Yet, the discussion gradually took a distinctive turn in the Netherlands. In the beginning of this century, a large-scale doctrinal controversy, involving the leading professors of constitu-

tional and international law, took place about the contending theories of monism and dualism: were international treaties directly applicable (i.e., were they a direct source of rights and duties upon their entry into force or their publication) or did they first require transformation into Dutch law?<sup>1</sup> In 1906, the *Hoge Raad* -the Dutch Supreme Court- made a statement which was not entirely clear, but was generally interpreted as a rejection of the transformation doctrine.<sup>2</sup> It is worth noting that the Supreme Court used the argument that all treaties affecting the rights of Dutch subjects needed prior approval by Parliament, so that a subsequent act of transformation would not serve a discernable purpose.<sup>3</sup> From that time onwards, monism became the leading doctrine among Dutch authors; as for the courts, their attitude was summarised as follows by Erades: "despite the employment of vague, confusing or ambiguous terms in some judgments, Netherlands case law as it was when the 1953 Constitution became operative, treated international agreements as rules of international law binding internally, and not as rules of municipal law."<sup>4</sup>

A second controversy had developed by then, which was predicated upon the first. It dealt with the rank of international treaties, and more specifically with the primacy of international law over later statutes in the case of a conflict. There were no clear judicial statements about this; rather, like in other countries, Dutch courts tried to avoid the issue by adopting rules of construction aiming at interpreting national law in accordance with international treaties, and vice-versa.

At a conference of the Dutch Association of Jurists in 1937, two conflicting views were proposed by the rapporteurs, both professors of international law.<sup>5</sup> Telders acted as a late defender of the dualist approach, arguing that a treaty, after its publication, produced internal effect as a national norm with the same rank as a formal statute. His opponent Verzijl defended the monist doctrine, combined with full recognition of supremacy. He considered international and internal law to be part of one system, in which treaty law had

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<sup>1</sup> For a summary of the debate, see L. Erades, 'International Law and the Netherlands Legal Order', in *International Law in the Netherlands* (1980) Vol.III, 375, at p.394 and ff.

<sup>2</sup> H.R., 25 May 1906, W., 8383.

<sup>3</sup> See the translation of the relevant part of the Supreme Court judgment in Erades, op.cit., at p.397.

<sup>4</sup> Erades, op.cit., p.402.

<sup>5</sup> *Handelingen van de Nederlandse Juristen Vereeniging* (1937).

a higher rank, and the judge had to disapply any conflicting national rules. At a vote concluding the 1937 conference, the majority of lawyers present preferred Verzijl's theory. Yet, Verzijl had to admit that the most likely attitude of Dutch courts (if a conflict could not be interpreted away) would be to make the later statute prevail over the earlier treaty. One of the reasons that made him think so was the attitude of courts in all other countries which made it unlikely that Dutch courts would take the bold step of affirming the supremacy of international law in the absence of any constitutional authorization to that effect.

Such an authorization came in 1953 when, in the slightly euphoric post-war period, a series of new external relations clauses were inserted in the Dutch Constitution, all of them inspired by an internationalist spirit.<sup>6</sup> The important novelties for present purposes were the following:

\* Article 66 now held : "Agreements shall be binding on anyone insofar as they will have been published".<sup>7</sup> Although those words do not say so explicitly, they were meant to confirm the dominant view that treaties could be directly applied by domestic courts. The article also resolved a doctrinal controversy among monists about the moment from which a treaty displays its domestic effect, by settling upon the date of publication rather than the date of entry into force. Though publication could still theoretically be seen as operating transformation of the international treaty into Dutch law, this view was never defended either by a court or by legal writers, so that from 1953 monism reigns without dispute in the Netherlands.

\* More importantly, article 65 resolved the controversy about the rank of international treaties by stating unambiguously: "Legal provisions in force within the Kingdom shall not apply if the application should be incompatible with agreements which have been published in accordance with Article 66 either before or after the enactment of the provisions."

The essence of this provision lay in the word 'before' which confirmed that a treaty could not even be set aside by subsequent national laws. This bold assertion had not been proposed by the government but was inserted in the Constitution on the basis of an amendment voted by the Second Chamber with

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<sup>6</sup> For a complete analysis of those changes, see H.F. van Panhuys, 'The Netherlands Constitution and International Law', 47 *American Journal of International Law* (1953), 537.

<sup>7</sup> Translations of the 1953 Constitution are taken from van Panhuys, op.cit.

a narrow majority of 46 votes to 40.<sup>8</sup> Thus, it was Parliament itself that took the initiative of submitting its future statutes to judicial review of their compatibility with treaties. This step is all the more striking if one considers that, in 1953 as today, there is no judicial review of the *constitutionality* of legislation in the Netherlands. Since 1953 therefore, treaties are more effectively enforceable than the Constitution.

\* The relationship between the Constitution and treaty provisions was dealt with in two articles. The notion "legal provisions in force in the Kingdom" in article 65 was deemed to include the Constitution, that must therefore give way to treaty provisions.<sup>9</sup> This was confirmed in article 60(3): "the judge shall not review the constitutionality of Agreements".

\* The rules formulated in articles 65 and 66 with regard to *treaties* were made applicable, by virtue of the new article 67, also to *decisions of international organizations*. This provision was inspired, among other things, by the recently signed Treaty on the European Coal and Steel Community.

The Dutch constitutional reform was greeted by professor De Visscher, in his course at the Hague Academy, as providing the most audacious solution to the question of the relation between international and domestic law.<sup>10</sup> In the Netherlands itself, a lonely voice rejected the new regime,<sup>11</sup> but its fundamental principles were never to be called into question by a significant part of either politicians, courts or legal authors.

Immediately after the 1953 revision, the Government set up a new advisory committee with the task of preparing some 'technical' revisions of parts of the 1953 text that were considered infelicitous. Acting upon the recommen-

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<sup>8</sup> The amendment is known as the *Serrarens amendment*, from the name of its author. Serrarens became, shortly afterwards, the first Dutch judge at the European Court of Justice.

<sup>9</sup> Handelingen EK, 1952-1953, 2700, no 63a (Memorie van Antwoord), p.3

<sup>10</sup> P. de Visscher, 'Les tendances internationales des constitutions modernes', in *Recueil des Cours* 80 (1952-II), 511, at pp.569-570. Yet, the author added a warning: "L'expérience seule établira si un système aussi progressiste n'est pas de nature à provoquer entre le pouvoir législatif et le pouvoir judiciaire des conflits politiques dont ce dernier pourrait être la victime." The experience of the next 40 years showed that major conflicts did not arise, but that must be partly due to the fact that, as will be indicated below, the courts smoothened the sharp angles of the new regime.

<sup>11</sup> Duynstee, *Grondwetsherziening 1953* (1953)



dations of the committee, the Government introduced a new constitutional amendment bill which was adopted by Parliament in 1956.<sup>12</sup> One modification was the reversion of the sequence of the above mentioned provisions, as it appeared more logical to deal with domestic effect first (new article 65), and with supremacy after that (new article 66). A second change was not merely 'technical': it introduced the condition of "binding on anyone" in both articles 65 and 66. The 1953 text, by its sweeping terms, might have given the impression that *all* agreements were to be enforceable by Dutch courts.<sup>13</sup> The intention was to restrict it to what were called, in the American doctrine, 'self-executing treaties'. In order to remove any doubt about this, article 65 was henceforth formulated as follows: "Provisions of agreements *which, according to their terms, can be binding on anyone* shall have such binding force after having been published."<sup>14</sup> The same qualification was added to the supremacy clause (now article 66): "Legislation in force within the Kingdom shall not apply if this application would be incompatible with *provisions of agreements which are binding on anyone* and which have been entered into either before or after the enactment of such legislation."

The words 'binding on anyone' stem from the text of 1953; its article 66 expressly said that such general (and horizontal) obligation could only arise once a treaty was published. The clause was meant to protect citizens; they could only be bound by a rule if they could know it.<sup>15</sup> In the 1956 version, however, the same words are used to insert a supplementary condition for treaties to become binding in the domestic legal order, and for the judge to have the competence to disapply conflicting national legislation. This condition, rather than protect the individuals, makes it more difficult for them to assert the benefits provided for them by a treaty.

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<sup>12</sup> See H.J. van Panhuys, 'The Netherlands Constitution and International Law', 58 *American Journal of International Law* (1964), 88.

<sup>13</sup> This was never the opinion of the Government. Already in 1953, the Government deemed both articles to be limited to "self-executing" provisions. In the Memorandum on the revision of 1953, the term "self-executing" was explained by the Government as meaning "provisions that according to their nature can be applied directly by the judge" and further as "provisions that are directly effective vis-à-vis the citizens", as opposed to norms of instruction addressed to the legislative and executive organs. The question whether a norm was directly effective or not was "in full confidence" left for the judge to decide, since this amounted to an interpretation of the provision. TK, 1952-1953, 2700, nr 63a, p.3

<sup>14</sup> The newly inserted part is emphasized.

<sup>15</sup> Handelingen TK, 1951-52, 2374, no 11 (Memorie van Toelichting)

The binding effect and the supremacy of treaty provisions is henceforth made subject to the capacity of those provisions to be "binding on anyone". As mentioned above, the American doctrine of 'self-executing' treaties inspired this. Yet, it is by no means clear when a treaty provision is capable to bind individuals. Which were to be the criteria to decide whether treaty provisions complied with that condition? Was it the wording of the provision (only those expressly conferring rights to individuals)? Was the intention of the Contracting Parties decisive? Or was it the possibility for courts to apply those provisions without the need for prior implementation by either the Legislature or the Executive?

The 1956 additions were presented by their authors as technical updates of the 1953 revision, as the self-executing criterion was, according to them, implied in the 1953 formulation. Yet, the fact of specifying this condition so openly could also be interpreted as an invitation to the courts to use that criterion as a means for restraining the disruptive effect of international treaties on the domestic legal order. That, at any rate, was what happened in the court practice of the late 1950's. The courts tended to shy away from their newly recognised power to review legislation on its compatibility with international treaties, either by relying on the rule of construction (interpreting national law in accordance with treaties, and vice-versa) or by denying the self-executing nature of international conventions.<sup>16</sup> The first device is a natural attitude for courts, and one which is practised in many countries. The second device is more typical for the Dutch courts of that period, and was probably encouraged by the insistence of the Constitution (in its post-1956 version) that treaty provisions needed to be "binding on anyone" before they could be the basis for reviewing domestic legislation.

Slightly more than one year after the 1956 revision, the EEC Treaty entered into force. In its early years of operation, several business companies sought to enforce the competition rules of that treaty, articles 85 and 86, before Dutch courts.<sup>17</sup> The general trend of those courts' judgments was that, in the absence of implementation rules to be issued by the organs of the Community under article 87 of the treaty<sup>18</sup>, the articles 85 and 86 could not be regarded as

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<sup>16</sup> See M. Waelbroeck, *Traités internationaux et juridictions internes dans les pays du Marché commun* (1969), at pp. 250-251

<sup>17</sup> This special interest for the competition rules was probably due to the fact that their enforcement was provisionally delegated, according to article 88 of the Treaty, to "the authorities in Member States", which could be seen to include the courts.

<sup>18</sup> Regulation Nr.17 of 1962 had not yet been adopted then.

'binding on anyone' and could therefore not be enforced in court.<sup>19</sup> There was also a debate on the underlying issue of whether the existence of direct effect was a matter of interpretation of Community law or of national law and related to this, which court was competent to decide on the matter. In *KIM Sieverding*<sup>20</sup>, Advocate-General Eyssen of the *Hoge Raad* held that it was a matter of domestic law.<sup>21</sup>

The Hague Court of Appeal took a different view and decided to suspend the proceedings in order to obtain a preliminary ruling of the Court of Justice on the proper interpretation of article 85 EEC Treaty<sup>22</sup>, more particularly on the question of whether a contract between a German exporter and Dutch importers was void by virtue of Article 85(2).<sup>23</sup> This reference under article 177 EEC Treaty, in the *Bosch* case, was the first to be decided by the European Court of Justice.<sup>24</sup> Although the question whether article 85 had direct effect was not formulated *expressis verbis* by the Dutch court, it could seem to be implied in the question whether the contract was "void by virtue of article 85".<sup>25</sup>

One month after the judgment of the European Court, the *Hoge Raad*

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<sup>19</sup> See the judgments mentioned in Van Panhuys (1964), op.cit., p.102, note 65.

<sup>20</sup> *Hoge Raad*, 13 January 1961, K.I.M.-Sieverding, *S.E.W.* (1961) 324

<sup>21</sup> The *Hoge Raad* quashed the judgment in question on grounds of national law and did not enter into the debate.

<sup>22</sup> Prior to this case, the Dutch courts had always assumed that article 85 could not be directly applicable. In this case however, one of the parties argued that under German law - applicable in the case - article 85 did produce direct effect. The Court of Appeal therefore decided that there were doubts as to the effect of article 85 in the national legal order. The Court held that whether or not it had direct effect was a matter of interpretation of the Treaty, and referred the question to the Court of Luxemburg.

<sup>23</sup> Preliminary Reference by the Hague Court of Appeal, 30 June 1961, in *Nederlandse Jurisprudentie* 1961, No.375.

<sup>24</sup> European Court of Justice, Case 13/61, *de Geus en Uitdenbogerd v Robert Bosch GmbH et al.*, [1962] ECR 45.

<sup>25</sup> In its ruling in the *Bosch* case, the Court of Justice gave decisive importance to the adoption of Regulation 17 implementing articles 85 and 86, and implicitly denied the full direct effect of those articles prior to the date of adoption of the Regulation.

ruled on the appeal against the reference made.<sup>26</sup> The appeal was based on the same arguments as those developed by Advocate General Eysen, that the direct effect issue had to be decided on the basis of domestic law. The *Hoge Raad* decided that: "as is clear from article 66, the question whether provisions of a Treaty bind the nationals of the Member States, is, at least for Dutch law, a question that can only be answered on the basis of interpretation of those treaty provisions". It was therefore a question which could properly be addressed by Dutch courts to the European Court of Justice. The Dutch Supreme Court thus cleared the way for a stream of preliminary questions.

But even before this acceptance of the jurisdiction of the Court of Justice by the *Hoge Raad*, the *College van Beroep voor het Bedrijfsleven*<sup>27</sup> - a specialised administrative court having jurisdiction in first and last instance in cases concerning industrial organization and social and economic legislation- put five questions to the Court of Justice, the first of which read: 'can articles 12 and 37(2) of the EEC Treaty bind anyone, or are they addressed only to the Governments of the Member States, without the possibility for individuals to derive rights directly thereof?'<sup>28</sup> The *College van Beroep* was of the opinion

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<sup>26</sup> *Hoge Raad*, 18 May 1962, *de Geus en Uittenbogerd v Robert Bosch GmbH et al.*, *Nederlandse Jurisprudentie* (1965), 115

<sup>27</sup> *College van Beroep voor het Bedrijfsleven*, 10 January 1962, *S.E.W.* (1962) 65

<sup>28</sup> According to Erades, the question was clearly inspired both by arts. 65 and 66 of the Constitution and by a 'self-executing' theory borrowed from the Opinion of the Permanent Court of International Justice of 3 March 1928. The Government explained the terminology of the Constitution in its Memorandum to the revision of 1953 (TK, 1952-1953, 2700, nr 63a, at p. 3): a provision that is binding on anyone is one that is self-executing (has direct effect vis-à-vis the citizens); it creates 'objective rights' or obligations for individual citizens and is, by its terms apt for application by the judge. Provisions that are not binding on anyone, are those addressed only to the law-making organs of the State (norms of instruction); they thus do not create rights and obligations for individuals; they are not self-executing. In the face of such provisions, the judge cannot set aside national legislation, because to do so would create a vacuum, a gap, that the judge could only fill by implementing an international obligation, thereby by-passing the government and Parliament. This is not part of the judicial function, and judicial review was thus to be restricted to self-executing provisions. A provision belongs to either one of the two categories made. The equation between distinct notions, made by the Government, did not work for the relevant articles of the EEC Treaty in the case before the *College van Beroep voor het Bedrijfsleven*: the defendant had argued that by their terms, these articles did not create rights and obligations, but since they only amounted to a prohibition, one could reasonably argue otherwise. According to the court, the question to which category a treaty provision belonged, was a question of interpretation which for the EEC Treaty had to be decided by the Court in Luxembourg.

that the determination of the self-executing nature of a provision was a question of interpretation of the Treaty which had to be made by the Court of Justice.

As the parties reached a settlement, the questions were withdrawn. But another Dutch court soon after made a reference which made the name of the applicant firm forever famous in Community law circles: *Van Gend en Loos*.

The Tariff Commission (a specialised administrative court), in the course of a dispute about an import tax, asked whether article 12 EEC had "internal effect, in other words whether individuals can directly derive rights from the article that are enforceable by the judge". The referring judge did not exactly frame his question in the terms used by the Constitution<sup>29</sup>, although it is quite clear that the question was put in order to elucidate the application of the articles 65 and 66 of that Constitution.<sup>30</sup>

Yet, what started as a request for help to the ECJ in the application of the Dutch Constitution - a request approved by the *Hoge Raad* in the *Bosch* judgment - became the occasion for the European Court to formulate its well-known doctrine on the direct effect of Community law which it addressed, beyond the obscure Dutch Tariff Commission to all courts in all member states of the Community.

## 2. The Influence of the Dutch Legal Order on the European Court's Doctrine

At the conceptual level, there is hardly any doubt that the Netherlands have been an important testing-ground in the course of the 1950's (but even before that) for the principles of direct effect and supremacy as they were formulated by the European Court in the 1960's.

Also the time and manner by which the European Court's views were

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<sup>29</sup> Erades criticised the Tariff Commission for confusing 'internal effect' and 'direct applicability', and for wrongfully identifying the former notion with a definition of 'self-executing' borrowed from the Permanent Court of International Justice (L. Erades, *De verhouding van de rechtspraak van het Hof der Europese Gemeenschappen met die van de nationale rechters in de Lid-Staten*, Praeadvies, Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (1964), at p. 22)

<sup>30</sup> See L. Erades, op. cit., at p. 5: 'The relation between the Arts. 65 and 66 of the Constitution and Art. 177 EEC has as a consequence that that Court has a specific task in the enforcement of the Dutch Constitution.' And further: 'Given the existence of the Arts. 65 and 66 of the Constitution, Art. 177 is more important for the Netherlands than for the five other Member States.' (my translation)

formulated may bear the stamp of Dutch influence.<sup>31</sup>

a) The willingness of Dutch courts to refer preliminary rulings in the early days of the EEC<sup>32</sup> (which itself was a result of existing Dutch rules about the relationship between national and international law), the acceptance of the jurisdiction of the Court of Justice by the *Hoge Raad*, and the type of questions asked by the Dutch courts allowed the European Court to formulate its direct effect doctrine in *Van Gend en Loos*.

b) The word 'effect' in the expression 'direct effect' was possibly borrowed from the preliminary question put by the Tariff Commission.<sup>33</sup> The question whether the Court of Justice wanted to indicate, by the use of those words, something different from the 'direct applicability' mentioned in article 189 EEC has puzzled commentators for many years.<sup>34</sup>

c) Dutch law, through the questions referred, may have complicated the issue of direct effect by the terminology used. The Tariff Commission put the question of direct effect in terms of the creation of individual rights, probably because that is the pattern of the Dutch Constitution.<sup>35</sup> Direct effect was equated with the creation of objective rights (or obligations) for individuals, and the applicability by the judge. The Court of Justice followed this approach in *Van Gend en Loos* and seemed to equate direct effect with the creation of individual rights ('*article 12 must be interpreted as producing direct effect and creating rights which national courts must protect*'). The Court repeated the

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<sup>31</sup> The existence of this influence is testified by Donner, who was the Dutch judge in Luxembourg at the time of *Van Gend en Loos* (and may have been instrumental in the Court's decision in that case): A.M. Donner in *Rechtsgeleerd Magazijn Themis* (1980), 354, at p.359.

<sup>32</sup> Ten out of the first thirteen references came from Dutch courts, see references in L.J. Brinkhorst, 'De Nederlandse rechter en het gemeenschapsrecht', *S.E.W.* (1966), 65, at p. 83

<sup>33</sup> The term 'direct effect' ('*rechtstreekse werking*' or '*directe werking*') was already used in the Netherlands. See e.g. the Memorandum of the Government to the constitutional revision 1953.

<sup>34</sup> A.M. Donner, *op.cit.*, at p.359; J.A. Winter, 'Direct applicability and direct effect. Two distinct and different concepts in Community law', *C.M.L.Rev.* (1972), 425

<sup>35</sup> See footnote 23

formula in numerous cases<sup>36</sup>, although the equation between direct effect and the creation of rights is deceptive, both for the national (procedural) law of many Member States and for Community law. It complicates the direct effect issue even today.<sup>37</sup>

Direct effect and the creation of rights do not always coincide, unless the term "right" is understood as comprising a procedural right to invoke the relevant provision. But this too seems artificial and needless in some cases.<sup>38</sup>

The rights issue obscures the direct effect issue, and this may, in the beginning, have been a direct consequence of the Dutch legal thinking on the subject.

d) The fact that the direct effect question was proposed and resolved in a separate case from the supremacy question (*Costa v ENEL*) may be explained by the fact that the referring court in *Van Gend en Loos* did not need guidance about supremacy: if an EEC provision was declared to have direct effect, then it automatically had supremacy according to Dutch constitutional law. It remains debatable whether this initial distinction between direct effect and supremacy in the European Court's case-law was a good or a bad thing, but it has certainly marked the later evolution in case-law and legal thinking. (There are signs in more recent judgments of the European Court that the two principles are merging into an overarching principle of 'effectiveness').

e) Article 66 of the Dutch Constitution, which made direct effect a condition for, and limit to, the supremacy of treaty provisions, was echoed by similar connections made in the European Court's case-law. This is perhaps most evident in the later cases on the domestic effect of directives, where the review power of national courts was made dependent on the prior assessment of the direct effect of the directive. If such a connection exists between the case-law

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<sup>36</sup> See for instance in Case 13/68 *Salgoil* [1968] ECR 453 : "Article 31 ... lends itself perfectly to producing direct effect ... Thus article 31 creates rights which national courts must protect"

<sup>37</sup> See for a discussion of this problem S. Prechal, *Directives in European Community law* (1995), at p.124 and ff.

<sup>38</sup> For example in a *recours objectif*, review of the objective legality of a national rule. Direct effect can also be defined in terms of the applicability of the provision by the judge. A directly effective provision is a provision that is legally perfect and that can be applied by the judge. See S. Prechal, *Directives in European Community law* (1995), at p. 266 and ff.

of the European Court and Dutch constitutional doctrine, this would arguably be one of the more unfortunate influences of the latter. The fact that supremacy is limited to provisions with direct effect has been criticized, within the context of Dutch constitutional law, with the argument that those treaty provisions that need implementation by the domestic authorities (and do not, therefore, have direct effect) are more likely to be breached by national authorities and therefore more in need of judicial affirmation of their supremacy. That argument is also true for Community law. The supremacy of EC law is often more threatened when its provisions are not directly effective.

f) Another possible Dutch echo in *Van Gend en Loos* is even more speculative. It relates to the theoretical underpinnings of the doctrines of direct effect and supremacy of Community law. Judge Donner, president of the Court in the *Van Gend en Loos* case, was a Dutch Professor of constitutional law. In a handbook on Dutch constitutional law, published before the judgment in *Van Gend en Loos*, Donner reflected upon the relation between national law and treaty law as it stood *before* the revision of the Constitution of 1953 which decided the issue as a matter of positive law. Considering the situation of a conflict between an international treaty provision and a subsequent provision of national law, he wrote:

"My opinion was that when this situation occurs, the international act must be deemed to have precedence, not because it originates from a higher community of law<sup>39</sup>, but because, as Verzijl has put it, "for the future the sovereign freedom of action of the state is limited and the legal possibility has been taken away to exercise its legislative function in full freedom, if he should try to do so".<sup>40</sup>

The author concluded from this that the judge had to review national legislation in the light of the treaty provisions and that he was obliged to give precedence to the rule of international law. In other words, the direct effect and supremacy of a treaty derive, in his view, from the fact that sovereign powers were transferred or limited by means of the treaty. The review power of national

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<sup>39</sup> This was the opinion of a school of thought, among which Krabbe, who identified international law with supranational law, under the premise that national sovereignty is only a derivative from international law. International law has a higher rank in the hierarchy of norms, since it derives from "the wider community of law". For this school the acceptance of the competence of the judge to review national law was a only a logical consequence of the character of international law.

<sup>40</sup> C.W. Van der Pot, A.M. Donner, o.c., at p. 193



judges does not need to be expressly recognised by the Constitution; this power can only be denied by an express provision in the Constitution.

In *Van Gend en Loos*, the direct effect doctrine was founded on strikingly similar arguments. Judge Donner (and through him, a traditional current of thought from the Netherlands) may well have had a decisive influence on the doctrinal foundations of the European Court's case-law on the relation between Community law and national law.<sup>41</sup>

## II. THE RECEPTION OF THE EUROPEAN COURT'S DOCTRINE IN THE NETHERLANDS

### 1. The General Picture

There is a general consensus in the literature, since the 1960's, that with regard to the domestic status of EC law, the Netherlands "presents the least difficulty".<sup>42</sup> In view of the receptivity of the constitution to international treaty law, the application of Community law did not require (as it did elsewhere) a painful reconsideration of established doctrine. The case-law of the ECJ, so far, has always fitted into the Dutch system: the principle of direct effect, supremacy, interpretation of national law à la *Marleasing*, or even *Francovich* have never required the judges to re-arrange national law in a dramatic way. It all fits into the system of the Dutch Constitution and Dutch judges have accepted the doctrine of the European Court on those matters as the governing law.

Since 1983, the Constitution has been amended, but without any consequences for the relationship with Community law. As part of the general revision of the Dutch Constitution in 1983, the provisions on external relations

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<sup>41</sup> It is worth noting that the theoretical underpinnings in *Van Gend en Loos* were not essential for the case: as will be explained below, the 'limitation of sovereignty' used by the Court as a basis for its direct effect doctrine has no bearing on the Dutch situation. In a Dutch case note on *Van Gend en Loos*, the theoretical 'lecture' by the Court was accounted for as reaction to the political crisis in European integration caused by the failure of the accession negotiations with the United Kingdom (Samkalden, *S.E.W.* (1963) 107, at p.108) Another reason for the Court to give this extensive description of the legal order of the Community was of course that in other Member States, there was a need for this approach in order to adopt the direct effect doctrine.

<sup>42</sup> C.J. Mann, *The Function of Judicial Decision in European Economic Integration* (1972), at p.28.

were also modified. Only minor changes and shifts of emphasis occurred but the main lines of the 1953/1956 regime remained unaltered.<sup>43</sup> The existing provisions were re-numbered as article 93 (on domestic effect of treaties and international decisions) and article 94 (recognising the competence of the judge to set aside national law which conflicts with provisions of treaties and decisions that are 'binding on anyone').

One may note, however, that the 1983 revision was not used for drafting a special provision relating to the European Communities. They continue to be covered by the global notions of 'treaties' and 'international organizations'.

The constituents' view was that the articles 93 and 94 were to be applied to the Community treaties and to deal with the relationship between Community law and national law. In its advisory opinion on the proposed revision, the Council of State<sup>44</sup> warned the Government against the confusion that could arise for Dutch judges if one kept the words "binding on anyone" in the Constitution. Referring to a judgment of the European Court<sup>45</sup>, the Council of State reminded the Government of the fact that in the framework of Community law, the judge could be under a duty to review national legislation in the light of a directive. A directive is a 'decision of an international organization' that needs to be implemented by the national authorities and is not 'binding on anyone' in the strict sense of the word. Therefore the wording of the Constitution might inhibit Dutch courts from enforcing EC directives to the extent required from them by the European Court. In the end the words 'binding on anyone' were maintained in the Constitution. The Government referred to the *Bosch* judgment of the *Hoge Raad*, accepting the Court's competence in the direct effect issue, and maintained that the Constitution offered sufficient leeway for the reception of the case law of the Court of Justice. Deleting the words 'binding on anyone' would, according to the Government, be even more confusing, since judges may then mistakenly think that they should change their whole attitude towards international treaties. Furthermore, outside the scope of Community law, the words were deemed necessary to refrain the judges from interfering with the competences of the other State organs, in cases where

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<sup>43</sup> E.A. Alkema, 'Foreign Relations in the Netherlands Constitution of 1983', *Netherlands International Law Review* 1984, 307 (see his conclusion at p.330).

<sup>44</sup> This institution, like its French model, has advisory and adjudicatory functions. Opinions given as part of its advisory function are not binding.

<sup>45</sup> Case 51/76, *Verbond van Nederlands Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113.

implementation was required by a treaty. But the Government indicated that provisions requiring implementation may sometimes be considered as 'binding on anyone', with all the consequences (direct effect, supremacy) deriving from that qualification.

Yet, it is not clear whether the interpretation of the articles 93 and 94 is relevant at all to the question of the domestic effect of Community law. There are, in fact, two schools of thought on the question of the ultimate ground for the domestic effect of Community law: does it rest upon the constitutional articles presented above, or does it rather rest purely and exclusively on its autonomous character as defined by the European Court?

One might have thought that the Constitution would be the obvious basis. In most European countries, the Constitution is considered to deal, in an exhaustive manner, with the conditions and mode of application of legal rules on the country's territory.<sup>46</sup> There is even more reason to hold that view in the Netherlands, because the wording of its Constitution is so well adapted to the requirements of international cooperation and European integration.

Yet, one finds that most authors hold the view that the constitutional articles about the domestic effect of international treaties do not apply to *Community* law.<sup>47</sup> They argue that questions about the direct effect of Community law and its supremacy over national law (including the Constitution) have to be decided by the European Court and that Dutch judges are under an obligation to follow the ECJ's views as part of the general obligation of article

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<sup>46</sup> See e.g. the characteristic statement by the German constitutional judge Kirchhof: 'Das Grundgesetz der Bundesrepublik Deutschland regelt Entscheidungs- und Geltungsgrund verbindlichen Rechts für seinen Anwendungsbereich abschliessend' (P. Kirchhof, 'Verfassungsrechtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?', in *Europäische Grundrechte Zeitschrift* (1994), 16, at p. 18

<sup>47</sup> F.C.L.M. Crijns, *Het Europees perspectief van het Nederlandse staatsrecht* (1989) at pp. 27-28; C.A.J.M. Kortmann, *Constitutioneel recht* (1990) at p. 155; J.G. Brouwer, *Verdragsrecht in Nederland* (1992) at p. 3; H.R.B.M. Kummeling and J.B. Mus, 'De invloed van het gemeenschapsrecht op de nationale rechtsorde', in M.C. Burkens, H.R.B.M. Kummeling, *EG en de grondrechten* (1993) at p. 3; R.H. Lauwaars and C.W.A. Timmermans, *Europees gemeenschapsrecht in kort bestek* (1989) at p. 27; L.J. Brinkhorst and R. Barents, *Grondlijnen van het Europees gemeenschapsrecht* (1990) at p. 198; H.R.B.M. Kummeling, 'De doorwerking van internationale normen, in het bijzonder EEG-richtlijnen, in de Nederlandse rechtsorde', in *Nijmeegs staatsrecht, Bundel opstellen aangeboden aan Mr H.J.M. Beekman* (1987) at p. 68; P.J.G. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het recht van de Europese gemeenschappen* (1987) at p.241

5 EC Treaty. That position has as its logical consequence (which is spelled out by some of those authors) that the Dutch constitutional system is entirely irrelevant in this matter;<sup>48</sup> *Luxembourg locuta, res finita*.

Only a few authors take a different view. They admit that, for practical purposes, it does not matter which is the ultimate ground for the review power of the judge -in the end both constructions will normally lead to the same result- but they argue that when a judge disapplies national law he does so on the basis of the authorisation granted by article 94 of the Constitution. In using this constitutional power, the courts may be guided by the European Court's doctrine, but that Court's case-law is not at the origin of their power to review national legislation. It is striking that authors who invoke the provisions of the Constitution when discussing the internal effect of Community law are often criticised by the colleagues for doing so.<sup>49</sup> They face the objection that "in the light of Community law, these references to the Constitution are not correct".

The almost unanimous approval of "la doctrine" for the doctrine of the radical autonomy of EC law is not confirmed by the views of government and parliament when they enacted the constitutional amendment of 1983. It is clear from the memoranda of the 1983 revision that the relevant articles of the Constitution do apply to Community law, even if they have to be enforced by the judge with due regard to the jurisprudence of the European Court of Justice. But this does not seem to worry "la doctrine". The theoretical question of the ultimate ground of the domestic application of EC law is quickly disposed of with the argument that the question does not have practical relevance.

Authors of both schools hardly refer to Dutch judicial statements for supporting their views. This is not surprising, as the Dutch courts generally exercise their power of reviewing national law without indicating the legal basis for their action. This is perfectly in line with the pragmatic ('un-doctrinal') attitude of Dutch courts: if application of articles 93-94 of the Constitution leads to the same result as the application of the European Court's doctrine on the autonomy of EC law, why would judges want to stir up trouble by specifying the basis for their decision? In the sixties, judges did refer to articles 65 and 66

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<sup>48</sup> See e.g. A. Kellermann, 'Supremacy of Community law in the Netherlands', *European Law Review* (1989) 175, at p.176: The "Constitution does not play a role in the question of whether there is supremacy of Community law".

<sup>49</sup> See G.H. Addink, B.P. Vermeulen on a handbook written by I.C. Van der Vlies, *RegelMaat* (1992), 2; see A. Meij, 'Synchronisatie van rechtsorden', *Publiek Domein*, 1991, at p.178 where he reacts to references to articles 92-94 made by Van Maarseveen.

(as they then were) as the origin of their competence to disapply national law conflicting with Community law.<sup>50</sup> This practice faded away without any "revolutionary" overrulings.<sup>51</sup> The reference to the articles was simply left out without being replaced by another basis: no mention was (and is) made of the European Court's judgments in *Van Gend en Loos*, *Costa ENEL* or *Simmenthal*; nor are there any theoretical considerations on the relation between national law and Community law and the corresponding competences of the judiciary.

An exception to the practice of omitting the reference to articles 93 and 94 is the *Afdeling Geschillen van Bestuur*, one of the two adjudicatory branches of the *Raad van State* (Council of State).<sup>52</sup> When disapplying a rule of national law, the *Afdeling Geschillen* bases its competence to do so on article 94 of the Constitution. Again, annotators of those judgments reject the reference to the articles of the Constitution as being incorrect.<sup>53</sup>

Now, does it matter in practice whether the competence of the judge is derived from the Constitution or not? Most -if not all- authors think that it does not really matter. That was also the view of the Government, expressed at the time of the latest revision of the Constitution; it declared that as far as Community law was concerned, the articles 93 and 94 should always be applied in accordance with the jurisprudence of the European Court. Any discrepancies between the Constitution and the European Court's doctrine could be removed

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<sup>50</sup> Tariff Commission, 12 november 1963, *U.T.C.*, 1964 n. 71; Tariff Commission, 21 december 1965, *U.T.C.*, 1966, n.58; CBB, 16 June 1970, *AB*, 1971, 50

<sup>51</sup> Advocate General Van Soest briefly discussed the issue in a tax case before the *Hoge Raad* (H.R., 5 januari 1983, BNB (1983) 104). He cited from the leading textbook on Community law (P.J.G. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen*, 3e druk, 1980, 33) that 'in the construction suggested by the Court in *Costa/ENEL* (...) a reference to arts. 65, 66 and 67 of the Constitution is superfluous. The question whether this construction can be used by the national judge is itself an issue of constitutional law'. And he went on to say: 'How ever this may be, the Dutch constitutional system accepts the said construction and it is therefore beyond any doubt that the provisions of EEC law that are, by their content, binding on anyone, prevail over national legislation.' He concluded that even though directives are not binding on anyone, they can produce direct effects in the relation between an individual against the State.

<sup>52</sup> Raad van State, *Afdeling Geschillen van Bestuur*, 6 September 1990, *AB*, 1990, nr.12; 11 November 1991, *AB*, 1992, nr.50; 17 february 1993, *Milieu en Recht*, 1993, 305, casenote G.H. Addink

<sup>53</sup> G.H. Addink, casenote under Raad van State, 17 February 1993, *Milieu en Recht* (1993) 305, at p. 307

by using this rule of construction.

This is probably true. The choice between the Constitution or the autonomous nature of Community law as the ultimate basis may not be practically relevant at present. Yet, a Constitution can be amended and the Dutch Constitution could be modified and made less internationalist than it is now. In that situation, it would become important to know whether Dutch judges base their authority to enforce EC law directly on its nature or, rather, on an authorisation given by their Constitution. Such a constitutional change is unlikely, but not unthinkable. Only a few years ago, the Minister of Justice proposed the creation of a Constitutional Court. According to this proposal, that Court would be competent, to the exclusion of ordinary courts, for reviewing the constitutionality of acts of Parliament, but also for reviewing their compatibility with international treaties.<sup>54</sup> Nothing came out of that proposal as yet, but it shows that constitutional amendments affecting the domestic status of EC law are possible even in the Netherlands.

### III. THE QUESTION OF 'COMPETENCE ABOUT COMPETENCES'

This question has never been addressed in court in the Netherlands. The legal literature does not spend much thought on it. The issue is briefly mentioned in a 1994 textbook, clearly under the influence of the 'Maastricht' judgment of the German Constitutional Court, but is dealt with in disappointingly simple terms. The authors write that the European Community does not possess 'Kompetenz-Kompetenz' because its powers are attributed by the member states.<sup>55</sup>

For a closer consideration of this issue, one needs first to distinguish between the attribution of competences, and the exercise of those competences.

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<sup>54</sup> The proposal of the Minister was fiercely criticised in legal writings and in the advice given to the Government by several Professors of Law. One of their critiques was that such system would be contrary to the principle in Simmenthal. Does this comment imply that the constitutional rules would suddenly become relevant to Community law? If the constitutional rules are irrelevant, they can say anything: they are not applicable to Community law anyway. See 'Op weg naar constitutionele toetsing in Nederland', *De adviezen aan de regering, N.C.J.M. Bulletin* (1992), at p. 235 ff.

<sup>55</sup> J.A. Hofman, J.W. Sap, I. 'Sewardono, *Beginnselen van Europees Constitutioneel Recht* (1994), at p.49.

The attribution of competences to the EC institutions at the time of the adoption of the treaties, or of any amendments to them, is subject to the approval of the Dutch Government and Parliament. They also have the duty to examine whether such attribution is compatible with the Constitution. Unlike the situation in most other countries, incompatibility does not mean that the Constitution has to be modified (or the treaty left unratified); it merely triggers a different procedure of parliamentary approval with a qualified majority voting requirement corresponding to that for constitutional revisions.<sup>56</sup> Moreover, the Constitution does not expressly refer to a 'hard core' of constitutional values to be preserved against encroachment by means of an international agreement. Once a treaty has been approved and ratified in proper constitutional fashion, it is expressly declared by the Constitution to be immune from judicial challenge.

This remarkably generous reception of international (and European) treaties does not provide an answer to the question of 'Kompetenz-Kompetenz', which arises in the course of the exercise of competences once they have been attributed to the EC in accordance with each member states' constitutional requirements. Setting the limits to the exercise of competences is a matter of interpretation. But the power of interpretation is itself one of the powers attributed to one of the EC institutions, namely the Court of Justice. Acceptance, by the member states, of article 164 EC treaty at the time of ratification implies their recognition of the Court's authority to interpret the Treaty and to decide whether or not the other EC institutions remain within the limits of their powers.

This 'orthodox' account of the Kompetenz-Kompetenz issue is, as far one can tell, unchallenged in the Netherlands. No claims are made for preserving an ultimate checking power by national courts on the exercise of Community competences. Since the *Bosch* decision of the *Hoge Raad* in 1962, the jurisdiction of the Court in interpreting Community law is generally accepted.

One may nevertheless try to imagine how a Kompetenz-Kompetenz question could be raised by an applicant (or defendant) before a Dutch court.

- First, the party would clearly not be allowed to challenge the constitutionality of the EC treaty itself or of the parliamentary act of approval. Both are immune from judicial review under article 120 of the Constitution.
- The party should show that a specific act of application of the EC treaty is (a)

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<sup>56</sup> This does not mean that the approval of an unconstitutional treaty is tantamount to a constitutional revision. The procedure for constitutional revision requires a vote by two subsequent Parliaments (and thus an intermediate general election), whereas one qualified majority vote of Parliament is enough to approve an unconstitutional treaty.

ultra vires and (b) because of this, creates a legal situation which is in clear contrast with a substantive provision of the Constitution.

- The court may then want to check the plausibility of those two propositions by referring to the European Court of Justice a preliminary question on the validity of the Community act (in answer to proposition (a)) and possibly a preliminary question on the interpretation of that act (in order to help elucidate proposition (b)).

- If the Court of Justice fails to give satisfactory answers to those preliminary questions, then, just conceivably, the Dutch court might 'rebel' and impose its own views on the validity, or the applicability, of the Community act.

Yet, at present, there is no sign whatsoever that a Dutch court might go to such lengths. But then, no really fundamental issues of compatibility of EC law and the Constitution have arisen as yet.

#### IV. BEYOND THE LAW : THE SEARCH FOR EXPLANATIONS

The prevailing attitude towards international and European law is one of striking receptivity in principle, combined with cautious pragmatism in the application.

##### 1. The traditional openness of the Dutch legal system

As is clear from this paper, the receptivity of the Dutch legal order towards Community law is part of the larger and longer story of its receptivity to international law. Explanations must therefore also look at this underlying internationalist attitude, rather than focus exclusively on European law.

Part of the explanation may be the historical tradition of the Dutch school of international law. It may be tempting to draw a straight line from Grotius' *Mare Liberum* to the radical version of *pacta sunt servanda* espoused by Dutch internationalist doctrine. Since Grotius' time, this idealist attitude was in the best national interest. The traditional receptivity to international rules, and willingness to cooperate with foreign nations is clearly in the interest of a small trading nation, that is too small to preserve its independence on its own, and needs open borders for its prosperity. This connection is appropriately made in the title of a study of the history of Dutch foreign policy, Voorhoeve's *Peace, Profits and*



*Principles.*<sup>57</sup>

The receptivity to international law may be considered as the combined result of national interest and internationalist ideology. Dutch jurists and politicians often (even today) bring a missionary spirit to international relations. They pretend to contribute to world order by setting an example. Lofty principles are combined with a rather pragmatic application of those principles, without causing any real disruptions of the domestic legal order.

There seem to be no impediments against this openness in the Constitution, nor in the constitutional values underlying it. There seems to be no clear 'Grundnorm'.

When a number of other European countries decided, in the immediate post-war period, to adapt their constitution to the new requirements of international cooperation and European integration, they typically did so by clauses allowing for 'limitations of sovereignty'.<sup>58</sup> The creation of international organisations with often far-reaching powers was declared to be compatible with the preservation of national sovereignty (albeit in an updated form). Yet, the principle of sovereignty also indicates a limit which should not be overstepped and which may become meaningful with further progress of integration (cf. the post-Maastricht decisions in France and Germany).

There is no such thing in the Netherlands. The 1953 Constitution allowed treaties to confer "certain powers with respect to legislation, administration and jurisdiction" on international organizations.<sup>59</sup> The term 'sovereignty' is not used. Indeed, that term is altogether absent from the Constitution of the Netherlands. As for legal doctrine, its view of the concept of sovereignty is ambiguous and fluctuating. In a leading textbook of constitutional law, it is said that the concept of sovereignty is of limited use; the author even adds, without further explanation, that the Dutch state is no longer sovereign with regard to the powers attributed to the EC!<sup>60</sup> In an advisory opinion of 1984, dealing with the then controversial issue of the placing of nuclear missiles on Dutch territory, the

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<sup>57</sup> J.J.C. Voorhoeve, *Peace, Profits and Principles, a Study of Dutch Foreign Policy* (1979)

<sup>58</sup> Cf. French, Italian, German Constitutions.

<sup>59</sup> Article 67 of the 1953 Constitution. Since 1983, article 92 of the Constitution.

<sup>60</sup> C.A.J.M. Kortmann, *Constitutioneel recht* (1990), pp.46-47

Council of State took a similarly cavalier view of sovereignty.<sup>61</sup> It held that the conclusion of any international agreement implied a loss of sovereignty and that, therefore, the concept of sovereignty could not provide guidance as to which international treaties were unconstitutional and therefore required approval according to a more exacting procedure than ordinary treaties. Treaties were only unconstitutional if they conflicted with specific constitutional provisions, not with some abstractly defined core that would go under the name of sovereignty or any similar term (contrast with the German Constitutional Court in the 'Maastricht' decision !). As a consequence, the idea that there is an entrenched and untouchable 'constitutional core' does not play a meaningful role in Dutch constitutional doctrine, and cannot act as a limit to the 'incoming tide' of Community law.

A negative element of explanation (which is therefore difficult to prove) is the absence, in the Netherlands, of a centralised constitutional court which could set itself the task of protecting the core values of the Dutch constitution (as such courts tend to do in other countries). Instead, there is a variety of autonomous courts (the Supreme Court being merely a sort of 'primus inter pares'), none of which thinks of itself as the supreme guardian of the constitutional order. The Dutch constitutional context thus seemed ideal for the acceptance of monism, direct effect and supremacy.

## 2. Separation of powers and the judicial function

Yet, in another respect, the absence of a constitutional court -or any other form of judicial review of statutes- had a negative impact on the acceptance of the supremacy of international law. Article 131 of the Constitution read until 1983: 'statutes are inviolable'.<sup>62</sup> Admittedly, article 131 was designed only to deny the judges the power to review the *constitutionality* of statutes. But this conception of the position of judges in relation to the other state organs did influence the debate on the constitutional reform with regard to treaty law. It was precisely the reason why the Government had left the article 65 (on the supremacy of treaty law) outside the initial proposal for the constitutional revision. In the Government's opinion it was the responsibility of Parliament, not of the judges, to ensure that no conflicts would arise between treaties and statutes, just as it was Parliament's responsibility to control the constitutionality

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<sup>61</sup> An English version of the central parts of the Opinion can be found in the *Netherlands Yearbook of International Law* (1984) 320.

<sup>62</sup> The article was amended and re-numbered in 1983. Article 120 now reads: 'The judge will not review the constitutionality of statutes and treaties'.

of statutes. The Government saw no reason to make a distinction between the two situations with regard to the respective function of the state organs. As described above, the review power of the judges with regard to treaty law was introduced on insistence of Parliament itself. This new competence was framed in a wording that could have suggested a change in the constitutional position of the judges in relation with the other state organs. But in 1956, the Government insisted on the introduction of the specification "binding on anyone" in the article on supremacy, in order to elucidate that the article did not give the judges the competence to interfere with the functions of the Government and Parliament where a treaty provision was addressed to the latter organs, and not to individuals.

Even after the introduction of articles 65 and 66, entailing an express empowerment of the judges to control the observance of international obligations -though limited to self-executing provisions- judges refrained from using this newly attributed power. The main reason probably lies in the fact that there was no experience with judicial scrutiny of statutes, due to the absence of a constitutional court and given the constitutional ban on judicial review. Articles 65 and 66 gave the judges competences which were in fact alien to a long constitutional tradition<sup>63</sup>. At the same time, article 131 remained unaltered. This brought the judges in an odd position: they could now set aside statutes thought to violate certain international obligations, but at the same time, the inviolability of these statutes against any judicial review of their constitutionality was maintained.<sup>64</sup> The judges probably felt reluctant to use their new competences and to review what were constitutionally described as 'inviolable' statutes, not because they did not want to give more weight to international treaty obligations than to a national statute, but because these new competences, although constitutionally recognised, clashed with their traditional role. Only when encouraged by another, 'supra-national' court<sup>65</sup> the Court of Justice, the Dutch judges started to assume their new constitutional task.

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<sup>63</sup> T. Koopmans, 'Receptivity and its Limits: the Dutch Case' in *In Memoriam J.D.B. Mitchell* (1983), 91 at p. 94

<sup>64</sup> *Ibid.*

<sup>65</sup> See Hoge Raad, *Bosch*, 18 May 1962, *N.J.* (1965), 115

### 3. Judicial empowerment?

When the *Hoge Raad* accepted that the direct effect issue was one of interpretation that, for Community law, could properly be addressed to the Court of Justice, it may well have felt relieved. This meant that, at least for the direct effect issue, it could share responsibility with another, 'supra-national' court; and when that other court decided that a provision of the Treaty produced direct effect, the courts may have felt less 'awkward' to set aside what in the national constitutional context were 'inviolable' statutes.

The Court of Justice in *Van Gend en Loos* and *Costa ENEL* did not empower the Dutch judges in the sense that it obliged them to assume a new function (as was the case in Belgium) nor did it convince lower courts to do what was under the Constitution the exclusive competence of the supreme court of the land (as was the case in Italy): all Dutch courts already possessed these competences under the Constitution. But the fact that the Court of Justice in *Van Gend en Loos* accepted the role of 'accomplice' may well have encouraged the Dutch courts to exercise their constitutionally recognized powers against the national Legislature.

### 4. The Comparative Dimension as a Factor in the Explanation

One of the factors traditionally inhibiting Dutch courts and legal writing from shedding all reservations towards international law were the flaws in the general enforcement mechanisms of international law. Before the Second World War, this fact was particularly obvious. When presenting, in 1937, the reasons pleading for the recognition of supremacy by national courts, professor Verzijl had to acknowledge the existence of what he called 'practical reservations' against his view. If international law displayed genuine force in the international community, he would not have any doubts in defending its absolute supremacy.<sup>66</sup> But would it be wise for the Netherlands to act as the 'Don Quichote of international law'<sup>67</sup> by enforcing international law to its fullest extent at a time (1937!) when so many other nations trampled its norms? On balance, he concluded that the Netherlands should do it: the fight for the building of a genuine international legal order was a matter which was too serious and important for humanity as to permit desertion.<sup>68</sup>

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<sup>66</sup> Verzijl, op.cit., at p.56.

<sup>67</sup> Id., p.57.

<sup>68</sup> Ibid.

Things appeared in a different light after the Second World War. The change in the legal climate, heralded by the UN Charter and the regional European agreements, as well as the examples of some other Constitutions (notably the French) convinced the Dutch Parliament to inscribe the supremacy of international treaties into the Constitution. Yet, some of the old fears about 'going it alone' had not disappeared. Van Panhuys, after presenting the radical innovations of 1953, commented: "it cannot be denied that a state accepting the new principle runs certain risks as long as its example has not been followed by all other civilized countries, but this should not be a reason for rejecting it."<sup>69</sup>

Those doubts may well account for the partial retreat effected by the 1956 amendments to the Constitution, and for the restrictive application of the new constitutional provisions by Dutch courts. Hence the importance of the European Court's case-law also for the Dutch legal order. By diffusing the 'Dutch approach' to the other countries of the EC (at least with reference to the Community treaties), the Court of Justice has ended the isolation of the Netherlands and has thereby helped the Dutch courts to take their Constitution seriously and to recognise the direct effect and supremacy of international treaties more bravely than before.

## 5. Judicial dialogue

Dutch courts seem never to allude to the jurisprudence of the national courts of the other Member States. However, rather than demonstrating an unwillingness on the side of the Dutch courts to be inspired by the judicial reasoning of their counterparts in other countries, this is probably due to the fact that the Dutch legal order offers all the necessary tools to comply with the requirements of Community law, in a dialogue with the European Court of Justice.

Ever since the Hoge Raad accepted the jurisdiction of the Court of Justice in the *Bosch* case, the Dutch courts have frequently made use of article 177.<sup>70</sup> But also in cases where no reference is made, the Dutch courts often refer to the case-law of the Court of Justice, without ever doubting its jurisdiction or openly rejecting its judgments.

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<sup>69</sup> See Van Panhuys, footnote 6

<sup>70</sup> In 1993, the Court of Justice answered 43 questions coming from Dutch courts. Only German courts referred more questions. See *Eleventh Annual Report on Monitoring the Application of Community Law* (1993), COM(94) 500, 417-418.

The Dutch courts are receptive to the message from Luxembourg, but seem not to need inspiration from their counterparts in other states. Conversely, the Dutch constitutional system appears to have exerted its influence on the case law of the Court of Justice, and through it on that of other Member States. But also more directly, the Dutch constitutional system may well have inspired the evolution of other national courts. References to the Dutch Constitution - although often very concise and sometimes presenting a too idyllic picture- can be found in many textbooks, articles and judgments.

But not only its principles, also its scheme may well have influenced other legal systems. In Belgium, for instance, Procureur-Général Hayoit de Termicourt proposed in his *Mercuriale* of 1963, to distinguish between self-executing treaty provisions, which would take precedence, and non self-executing provisions, which would have to give way to national statutes. The distinction appeared convenient, because it gave the *Cour de Cassation* the possibility to adopt a new approach without having to overrule its earlier case law. Also, he said, only in the case of self-executing provisions would conflicts arise. There is no proof that Hayoit de Termicourt intended to copy the Dutch pattern<sup>71</sup>, but in an article of 1965, Waelbroeck<sup>72</sup> commented that 'the fact that the Dutch Constitution makes the power to review national legislation in the light of treaty provisions conditional upon their being directly applicable, is no sufficient reason to adopt the same approach in Belgium.'<sup>73</sup>

Likewise, there is a striking parallel with the approach of the European Communities Act of the United Kingdom which makes primacy of Community law over municipal law conditional upon direct effect, by reference to the

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<sup>71</sup> Hayoit de Termicourt gave a short overview of the approach adopted in several other European countries.

<sup>72</sup> M. Waelbroeck, 'Le juge belge devant le droit international et le droit communautaire', *R.B.D.I.* (1965) 348 at p. 356; P. Pescatore, case note under *Franco-Suisse le Ski*, *C.D.E.* (1971) also points at the parallelism with the Dutch system.

<sup>73</sup> Ganshof van der Meersch agreed with this point of view in a footnote in his *Mercuriale* of 1968 (Ganshof van der Meersch, *Réflexions sur le droit international et le revision de la Constitution*, *Mercuriale* prononcée à l'audience solennelle de rentrée de la Cour de cassation le 2 septembre 1968, *J.T.* (1968) 485 at pp. 493-494, and note 142); however, in his *Opinion* to the *Franco-Suisse le Ski* case he proposed direct effect as a condition for supremacy, since only then there is a conflict of norms (*Opinion* of Procureur-Général W.J. Ganshof van der Meersch in the case of the *Belgian State v S.A. Franco-Suisse le Ski*)

concept of the "enforceable Community right".<sup>74</sup>

## 6. Legal pragmatism

A factor which is difficult to pin down but plays an important role, in our opinion, is the practical mind of Dutch jurists and politicians, and their aversion from theoretical constructions and disputes. In relation, more specifically, to this subject, there is a striking lack of interest for 'constitutional fundamentals'. Issues which inflame the minds of scores of constitutionalists in countries like Germany and Italy fail to attract controversy.

In this way, the doctrine of direct effect and supremacy of Community law have become so self-evident in the Netherlands that the controversies about the relation between Community law and national constitutional law, existing in other Member States, are difficult to explain to younger generations of lawyers.<sup>75</sup>

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<sup>74</sup> Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', *E.L.R.* (1983) 155 at p. 157

<sup>75</sup> A.W.H. Meij, *Prejudiciële vragen van Nederlandse rechters en hun gevolgen*, Preadvies, Vereniging voor de vergelijkende studie van het recht van België en Nederland (1993) at p. 3

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