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Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review*

Maurice Adams and Gerhard van der Schyff

Abstract

In this article we try to answer the questions of why and when judicial constitutional review comes about as a matter of fact in some countries (as in Belgium and South Africa) but does not seem able to get off the ground in others (as in the Netherlands). More generally phrased: under what conditions is judicial constitutional review actually introduced in a particular jurisdiction? These are questions with a politico-sociological dimension, and what is striking is the extent to which these have remained underexposed in the wealth of research on the theme of judicial constitutional review. Here we will attempt to address these questions, and we will do so by outlining the political genesis and development of judicial constitutional review in Belgium and South Africa and also by checking these histories against a number of explanatory models or theories derived from political science. It turns out that the introduction of judicial constitutional review cannot simply be ascribed exclusively to the covert strategies of a particular societal class that wants to protect its value systems (as R. Hirschl argues), but might just as well be the result of a concrete systemic need of a tangible political system. Our main aim is to make suggestions for a reorientation of the theories concerned, especially by putting 'grand social theorizing' against legal dynamics, and to try to bring the two perspectives together.

KEYWORDS: judicial constitutional review, law and political theory, comparative law

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1. INTRODUCTION

Judicial constitutional review is gaining ground in political systems worldwide.[1] To give but a few recent examples with which the authors of this article are familiar: Belgium introduced judicial constitutional review in the early 1980s, as did South Africa in the mid-1990s after the collapse of the apartheid regime. And in the Netherlands, a bill is pending that would partly abolish the bar on judicial constitutional review of Acts of Parliament as stipulated by Section 120 of the Dutch Constitution. The bill was first introduced in 2002 after which it was adopted by the Dutch House of Representatives in 2004. In December 2008 it was subsequently accepted by the Dutch Senate by a mere 37 to 36 majority.[2] For the bill to successfully amend the Dutch Constitution it now has to pass a second reading with a two-thirds majority in both chambers which can only happen after the next general election (which after the recent collapse of the governing coalition actually took place on 9 June 2010).

So while by the middle of the nineteenth century this power had only been available for courts in the USA (since 1803), Greece (1847) and Norway (since

[1] Recent examples include Eastern Europe, Asia, and South America. See, e.g., W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht, Springer, 2005, 377 pp.; T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge, Cambridge University Press, 2003, 310 pp. and S. Gloppen et al. (eds.), *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies,* London, Frank Cass, 2004, 210 pp. Even in long-standing parliamentary democracies things are afoot, a case in point being the UK, where in 1998 the European Convention on Human Rights became directly enforceable through (the lens of) the Human Rights Act. Even so, full judicial review of constitutionality is not provided for by this Act, as considerations of parliamentary sovereignty preclude British courts from having jurisdiction to nullify legislation (they may only make recommendations of incompatibility to the legislator). See, e.g., C. Gearty, *Principles of Human Rights Adjudication*, Oxford, Oxford University Press, 2005, 264 pp. and H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press, 2007, 455 pp. Another telling example is a similar arrangement in New Zealand (1990). See, e.g., P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, *The New Zealand Bill of Rights*, Oxford, Oxford University Press, 2003, 904 pp. These developments are in line with a general trend towards ever more intrusive interventions by the judiciary in society and politics. See C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power*, New York, New York University Press, 1995, 556 pp., and C. Guarneri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2002, 235 pp.

[2] *Parliamentary Proceedings* II, 2001-2002, 28 331, no. 2. More specifically the bill was submitted to the Dutch House of Representatives on 1 April 2002, and an amended version was adopted and then submitted to the Dutch Senate on 14 October 2004, which adopted the bill on 2 December 2008 (*Parliamentary Proceedings* I, 2008-2009, 28 331, no. 11).

1866), today more than 80 countries have some form of it.[3] Add to this the increasing tendency among international and supranational courts to act as constitutional courts[4], and the picture is complete: constitutional review by the judiciary has gathered momentum and is *en vogue*. Seen from this point of view, the Netherlands might be something of a late arrival when it comes to judicially reviewing the Constitution.

These circumstances have led us to reflect on this topic. Our aim here is however not to investigate the normative question whether judicial constitutional review is reconcilable with 'democracy'; a question already under considerable debate.[5] We believe that arguments for or against constitutional review by the judiciary cannot be put forth in the abstract; whether or not it is as a matter of democratic principle desirable is according to us, first and foremost, a matter of how political actors (including courts) in a given society act and interrelate with each other in fact. And partly as a result of this, different societies will give different answers to the question of *which* institutions should be competent – i.e. empowered – to review the constitutionality of legislation.[6] It is interesting to note that Aristotle was already aware of this when he observed that "[t]he attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not

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[3] See R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard, Harvard University Press, 2004, p. 1, and L.F. Goldstein, "From Democracy to Juristocracy", 38 *Law & Society Review* 2004, pp. 611-614.

[4] E.g., the European Court of Justice, the European Court of Human Rights, the Dispute Settlement Body of the World Trade Organisation, and the International Criminal Court.

[5] A typical and significant example of the democratic approach in this context, can be found in Jeremy Waldron's work. See J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, 332 pp. and *The Dignity of Legislation*, Cambridge, Cambridge University Press, 1999, 206 pp. Waldron recently seems to have slightly reconsidered his position. In particular, see his "The Core of the Case Against Judicial Review", 115 *The Yale Law Journal* 2006, pp. 1346-1406. See also the reaction by Richard H. Fallon, Jr., "The Core of an Uneasy Case *for* Judicial Review", 121 *Harvard Law Review* 2008, pp. 1693-1736. For another example (which, however, takes the form of an argument in favour of a more restrained interpretative approach by the judiciary), see R. Bork, *The Tempting of America: The Political Seduction of the Law*, New York, Free Press, 1990, 430 pp. A moderately supportive view of constitutional review is that of J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge (Massachusetts), Harvard University Press, 1980, 268 pp.

[6] Cfr. T. Cristiano, "Waldron on Law and Disagreement", 19 *Law and Philosophy* 2000, p.542. On this, in the context of the current Dutch debate, see M. Adams and G. van der Schyff, "Constitutional Review by the Judiciary in the Netherlands. A Matter of Politics, Democracy or Compensating Strategy?", 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2006, pp. 399-414.

only to what is the absolute best, but also to what is the best in relation to actual conditions."[7]

In this article we however try to answer the question why and when judicial constitutional review comes *as a matter of fact* about in some countries (as in Belgium and South Africa) but does or might not seem able to get off the ground in others (as in the Netherlands). More generally phrased: under what conditions is judicial constitutional review *actually introduced* in a particular jurisdiction? Under what conditions are politicians and other politically significant elites prepared to implement judicial constitutional review? These are questions with a politico-sociological dimension, and what is striking is the extent to which these have remained underexposed in the wealth of research on the theme of judicial constitutional review. Here we will attempt to address these questions, and we will do so by outlining the political genesis and development of judicial constitutional review in Belgium and South Africa and also by checking these histories against a number of explanatory models or theories derived from political science. Our main aim is to make suggestions for a reorientation of the theories concerned, especially by putting 'grand social theorizing' against legal dynamics, and to try to bring the two perspectives together. While doing so, we will also try to explain the current situation in the Netherlands.

2. WHY AND WHEN WILL JUDICIAL CONSTITUTIONAL REVIEW COME ABOUT?

Under what conditions will judicial constitutional review be introduced?[8] In his thought-provoking book *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*[9], Ran Hirschl has undertaken research into this very question. He focuses, in particular, upon the origins of judicial constitutional review with regard to fundamental rights in Canada, New Zealand, South Africa and Israel. In fact, he asks himself a two-part question: first, has judicial constitutional jurisdiction indeed been established, as is often alleged, as a result of the need to better protect human rights; a need that is supposedly inspired by views on social justice? Or, second, is the introduction of judicial constitutional review the product of a political struggle of a completely different nature?

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[7] See Book IV of his *Politica*. The translation is by E. Barker and R.F. Stalley, Oxford, Oxford University Press, 1998, no. 1288b21, p. 134. In this quotation the word 'constitution' is of course used in a more general sense, referring to the way a society is organized.

[8] In this article we make no difference between the introduction of constitutional review as a general competence for *all regular courts* in a specific jurisdiction (as is the case in South Africa, and as is being contemplated in the Netherlands at the moment), or as a competence for *one specific* constitutional court (as is the case in Belgium).

[9] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge (Massachusetts), 2004, 294 pp.

According to Hirschl the answer to this double question is especially pertinent because the introduction of judicial constitutional review is far from evident. Why should the political elites in power accept throwing themselves at the mercy of non-elected institutions, *in casu* judges? Why should they in other words relinquish control?

When put this way, the question points to an answer. Hirschl quite clearly prefers the second proposition as the more convincing. In his opinion, understanding the strategic interests of political and otherwise influential actors in society is crucial in order to explain why and when judicial constitutional review is introduced in a specific jurisdiction. Hirschl more particularly claims that constitutional review by the judiciary gets off the ground when on the one hand the political, cultural and economic elites believe that their privileged positions are under threat, and when on the other hand the judicial elites can enhance their political influence and international reputation. The introduction of judicial constitutional review is from this point of view the result of a strategic alliance between important politicians and other elites wanting to protect their personal interests and value systems, while "they profess support for democracy".[10] And this is particularly urgent when on the one hand the social cleavages within a certain society are intensifying and becoming sharper, and on the other hand when the aforementioned elites fear future subjugation to the masses. Thus, in societies where 'hegemonic' elites find themselves existentially confronted with other competing groups who do not share the same 'neoliberal'[11] values, interests and world vision, they seize the chance to ascend their particular values and interests beyond the usual political confrontations and, by that, outside the generally accepted mechanisms of decision making based upon majority rule. The introduction judicial constitutional review is a way for these elites to institutionalize a fundamental mistrust regarding majoritarian decision-making.

> "[V]oluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to the courts seems, prima facie, to run counter to the interests of power-holders in legislatures and executives. The most plausible explanation for voluntary, self-imposed judicial empowerment is therefore that political, economic and legal power-holders who either initiate or refrain from blocking such reforms, estimate that it serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere. In other words, those who are eager to pay the price of judicial empowerment must assume that

[10] *Ibid.,* p. 3.

[11] Hirschl uses the phrase neoliberal(ism) quite often, but does not explain what he means by this and how it is different from liberal *tout court*.

> their position (absolute or relative) would be improved under a juristocracy."[12]

What is more, the introduction of judicial constitutional review is made before it is too late, which means *before* the masses, which the elites resist and whom they fear, really seize power.

According to Hirschl, his theory is more convincing than alternative explanations for the introduction of judicial constitutional review: the fact that it can better predict the timing of the introduction of constitutional review is his proof of that.

> "None of these theories [i.e., alternative theories for explaining the introduction of judicial constitutional review] accounts for the precise timing of constitutional reform. If we apply these theories to a concrete example, they consistently fail to explain why a specific polity reached its most advanced stage of judicial progress at a specific moment and not, say, a decade earlier."[13]

To be sure, constitutional review is often also supported by political players and stakeholders other than the hegemonic elites identified by Hirschl, but the support of the elites are nevertheless necessary. The latter, in other words, have disproportionate influence over the decision-making process and ultimately determine the timing, extent and nature of constitutional reform.

Hirschl believes his hypothesis is vindicated by the fact that the courts in the jurisdictions he researched do not, as far as he is concerned, support the interests of the masses. According to him they do *not* primarily, by exercising constitutional review, further social justice by eliminating the existing socio-economic inequalities between different parts of the population – therefore they do not support the interests of the oppressed but nevertheless emerging masses - but rather endorse the 'conservative' agenda of neo-liberalism and that of the elites. And they do so first of all through the protection of classic 'Lockean' fundamental rights - defensive rights such as the right to private property, privacy and freedom of speech - rights protecting negative liberty, in the terminology of Isaiah Berlin. Social and economic rights - 'claim' rights enabling positive liberty, especially beneficial to the poor masses - are in practice scarcely supported by the courts.[14]

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12 Hirschl, R, *Towards Juristocracy*, *o.c.*, p. 11.
13 *Ibid.*, p. 36.
14 *Ibid.*, pp. 146-147.

> "Whereas the constitutionalization of rights has proved effective in expanding the boundaries and protection of the private sphere, it has utterly failed to promote progressive or egalitarian notions of distributive justice in a meaningful way."[15]

Judges thus have much hesitation "to diminish the stark disparities in life-conditions within and among polities in the neoliberal age."[16]

According to Hirschl, the chances of success for a constitutional 'putsch' by the elites is more likely to succeed when the judiciary within a given society has a better reputation for independence and professionalism amongst the population when compared to the political class, and if at the same time the interested elites largely control the judicial training and appointment process.[17] The latter point is indeed the reason why the elites expect that their interests will be actively served by the judiciary: the judiciary is perceived by the political and economic elite as a trustworthy partner within the political 'play' since they predictably mirror the cultural propensities and policy preferences of the elite.[18]

With these elements in hand, Hirschl also answers a second important question which he put forward: when (i.e. at what moment) is constitutional review introduced? The answer has in fact already been given above, namely when societal conditions are of the kind which makes the elites fear soon being at the mercy of the *vox populi*.

Interestingly, Hirschl's argument strongly resembles Jean-Jacques Rousseau's (who Hirschl does not line up) word in his *Discourse on the Origins and the Foundations of Inequality Among Men* (1755). Rousseau explains why the state was founded and believes that this was mainly done in order to protect the interests of the privileged classes: nation building as a 'ruse of the rich', a confidence trick of the wealthy to consolidate their power. The 'rich' sell their story under false pretences to the less well off men as follows:

> "Let us join," said he, "to guard the weak from oppression, to restrain the ambitious, and to secure to every man the possession of what belongs to him: let us institute rules of justice and peace, to which all without exception may be obliged to conform; rules that may in some measure make amends for the caprices of fortune, by subjecting equally the powerful and the weak to the observance of reciprocal obligations. Let us, in a word, instead of turning our forces against ourselves, collect them in a supreme power which

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15 *Ibid.*, p. 14.
16 *Ibid.*, p. 155.
17 *Ibid.*, p. 44.
18 *Ibid.*, p. 44.

> may govern us by wise laws, protect and defend all the members of the association, repels their common enemies, and maintain eternal harmony among us."[19]

The cited phrase is a rather direct reference to the social contract doctrine of Thomas Hobbes, which Rousseau strongly opposed. Having been enchanted with the supposed advantages of state construction, Rousseau believed the people fall wide-eyed into their chains while they thought they had secured their freedom. The law thus imposes 'new shackles', giving even more power to the rich.

> "The most capable of foreseeing the dangers were the very persons who expected to benefit by them; and even the most prudent judged it not inexpedient to sacrifice one part of their freedom to ensure the rest; as a wounded man has his arm cut off to save the rest of his body."[20]

Hirschl's argumentation thus remembers us of Rousseau, when the former says that the introduction of judicial constitutional review in the countries he researched (i.e. Canada, New Zealand, South Africa and Israel), is aimed at securing the various elites' interests by telling seducing stories about the introduction of a culture of human rights. But in fact the behavior of these elites are based upon a different and covert agenda; in particular it is about the judicial embedding and securing of their own values and economic interests. And, at least according to Hirschl, they succeed wonderfully well in doing so. About Israel, to give but one example, Hirschl writes that:

> "the judicial empowerment and judicialization of politics in Israel can best be understood a planned strategy on the part of Israel's ruling elite and its bourgeois constituency (…) The primary political motivation for this initiative was a strong interest in preserving the political and cultural hegemony of the ruling elite and its secular bourgeois constituency, as well as entrenching Israel's contested western, relatively cosmopolitan identity. (…) [T]he forces behind Israel's constitutional revolution were able to transfer sensitive political and cultural issues to the legal arena and reduce some of the growing costs they were being obliged to pay

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[19] J.J., Rousseau, *On the Origin and Foundation of the Inequality Among Men*, (Cole, GDH, transl.), Cosimo, New York, 2005 (1755), p.78.

[20] J.J. Rousseau, *o.c.*, p. 79.

> in complying with the rules of the game of proportional political representation."[21]

For each of the other jurisdictions that Hirschl researches similar conclusions are drawn.[22]

We will now analyze the political and legal dynamics of the introduction and development of judicial constitutional review in Belgium and South Africa respectively. We will subsequently see if the theory put forward by Hirschl can explain the situation in these jurisdictions.

3. BELGIUM: FROM A MODEST COURT OF ARBITRATION TO A FULLY-FLEDGED CONSTITUTIONAL COURT

a. Features of the constitutional system

After the Napoleonic wars, the United Kingdom of the Netherlands was established in the Low Countries in 1815. This kingdom encompassed the (northern) provinces that nowadays constitute the Netherlands as well as the (southern) provinces that now constitute Belgium. Support for the then King William I's policies was far less strong in the south than it was in the north. In the south, Roman Catholics and liberals pursued greater liberty in shaping their own identities: the Roman Catholics sought freedom of religion from the Protestant north, while the liberals wanted to strengthen parliamentary democracy. In addition, the Francophone population found it hard to stomach William's Dutch language politics. And southern underrepresentation in the States General, the parliament, was sorely felt by many in the region too.[23]

These factors eventually came to a head when in 1830 the pursuit of liberty sparked a revolution. A provisional government was formed and shortly afterwards the National Congress was elected which drafted and promulgated the founding Constitution of the Belgian Kingdom in 1831. Because of the French Revolution and the Napoleonic occupation, these developments were largely, though not exclusively, French in influence.[24] Despite the fact that Belgium, like its northern neighbour the Netherlands, has only ever had a single constitution

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21 Hirschl, *o.c.*, p. 74.

22 *Ibid*., p. 82 (Canada), pp. 88-89 (New Zealand) and pp. 96-97 (South Africa).

23 See G. Martyn, *Geschiedenis van de politiek en het publiekrecht*, Bruges, Die Keure, 2005, pp. 257-262, and E. Witte *et al*., *Politieke geschiedenis van België. Van 1830 tot heden*, Brussels, VUBPress, 1997, pp. 19-22.

24 A careful analysis of the various influences on the Belgian Constitution can be found in J. Gilissen, "Die belgische Verfassung von 1831. Ihr Ursprung und Einfluss", in W. Conze (ed.), *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert*, Stuttgart, Klett, 1967, pp. 38-69.

since its founding, this document has been substantially amended in the course of the country's history chiefly to reflect the kingdom's ethnic and linguistic diversity (as well as to tone down the tensions that inevitably followed in the wake of such heterogeneity). These developments will be described below, with the emphasis being put on the role of the judiciary in upholding the Constitution.

b. A strict separation of powers qualified by international law

The original version of the Belgian Constitution was silent on judicial constitutional review, as were any preparatory documents. How was this silence to be interpreted? Had the drafters of the Constitution taken judicial constitutional review for granted? Had the issue escaped their minds? Or should the absence of relevant provisions be construed as implying that the judiciary lacked the authority to review the constitutionality of legislation? The historical context favors the latter. It is generally assumed that as a result of the confidence in the legislature, a confidence that was inspired by the ideals of the French Revolution, the drafters of the Belgian Constitution put their faith squarely in that body as the sole legitimate representative of the people and as the exclusive interpreter of the Constitution. So great was their trust in the legislative branch that the drafters of the Constitution could not conceive of the legislature disrespecting their constitutional limits. Even the very thought of such a transgression was considered an unconscionable insult to the well-disposed legislature.[25]

This outlook was confirmed in 1849 by Belgium's highest court, the *Cour de cassation* (Court of Cassation), when it held that the strict separation of powers denied it the competence to determine whether legislation was in keeping with the Constitution.[26] It was the duty of the courts to apply legislation in individual cases, not to impair the legislature. The lower Belgian courts adopted this line of reasoning, which soon proved to represent the consensus on the doctrine of separation of powers.[27]

Still, an increasing number of jurists advocated judicial constitutional review, but the doctrine of the separation of powers was not relaxed by testing laws directly against the Constitution.[28] However it did become possible for the courts, as was the case in the Netherlands, to examine acts for compatibility with *international law*. This competence was recognized and developed by the courts themselves. More particularly, in the 1971 *Franco-Suisse Le Ski* case,[29] the Court

[25] R. Leysen and J. Smets, *Toetsing van de wet aan de Grondwet in België*, Zwolle, Tjeenk Willink, 1991, p. 6.
[26] Court of Cassation [*Hof van Cassatie*], 23 July 1849.
[27] R. Leysen and J. Smets, *o.c.*, p. 14.
[28] *Ibid.*, pp. 7-12 for an overview.
[29] Court of Cassation, 27 May 1971, *Pasicrisie Belge* 1971, I, p. 886.

of Cassation ruled that courts should give precedence to a directly effective provision of international law over a national rule if these rules conflicted. Although the Court thus refrained from expressing a view on the relationship between national legislation and the national constitution as such, the effect of the judgment was to acknowledge that legislation might be subordinate to higher (i.e. international) law, thereby obliging the courts to observe the highest rule even in the face of the legislature. Nevertheless, the issue of the powers of the judiciary regarding the competence to perform *constitutional review* (including the competence to nullify legislation) as such remained unresolved.

Three years later, in the *Le Compte* case, the Advocate-General with the Court of Cassation took a similar position concerning the relationship between national legislation and the Constitution: "When two acts of parliament or the law and the Constitution are incompatible, is it not of the essence of the court's mandate to decide which must be applied if such a decision is required for the court to pronounce judgment?"[30] And:

> "Is it reasonable and in accordance with the necessity of legal logic that individuals must need to resort to international proceedings when they feel one of their rights has been violated, while the Constitution safeguards the right in question, but the courts cannot legally ensure that right?"[31]

The Advocate-General argued that Belgium did not observe a strict separation of powers as it was described, at least according to him, in Montesquieu's *De l'Esprit des Lois*, but rather used a system of checks and balances with all three powers exercising a measure of control over each other:

> "The principle of the separation of powers is just a way of dividing public power in such a fashion that those who possess one of the powers control each other within the limits of their respective jurisdictions. Despite this principle and in the absence of an [explicit] constitutional rule, the courts have obtained the competence to, under certain conditions, examine the constitutionality of legislation."[32]

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30 Court of Cassation, 3 May 1974, *Arresten van het Hof van Cassatie* 1974, p. 967, including the opinion of Advocate-General W.J. Ganshof van der Meersch (authors' translation). In it, the Advocate-General used logic similar to that of the US Supreme Court in the famous case of *Marbury v. Madison*. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31 Opinion, *l.c.*, p. 976 (authors' translation).

32 *Ibid.*

However, the Court of Cassation did not want to stretch the argument so far, probably because it feared a political reproof for granting too much explicit power to the courts. The Advocate-General's position did indeed draw a response from the political quarter: a group of senators submitted a legislative proposal explicitly prohibiting the judicial review of constitutionality. Surprisingly enough, they too referred to the separation of powers doctrine, yet they arrived at the opposite conclusion:

> "The legislature is the only one to enact legislation, and this legislation applies to all. The judiciary is the only one to decide if and how legislation should be applied to the disputes brought before the courts. Its duty is not 'to review legislation', nor is it the duty of the executive, which also exercises exclusive powers within its jurisdiction, to decline to execute judicial decisions or legislation it may consider 'unconstitutionial'."[33]

And so, instead of opting for a functional separation of powers – i.e. separating the powers but not necessarily the institutions that exercise them – the senators held on to the traditional view of conferring each competence exclusively to one particular institution and purposefully avoiding any overlap. The aforemetioned proposal prohibiting judicial constitutional review was unanimously carried by the Senate, but it was never put to vote in the House of Representatives, which in any case might have been fairly futile: ever since the aforementioned *Franco-Suisse Le Ski* decision the immunity of legislation from judicial review had been a thing of the past. At any rate, both in Belgium and the Netherlands constitutional review developed along similar lines: judicial review was based on international law, not on national law.

In the 1980s, however, Belgium began to steer a different course (away from the Netherlands) as judicial constitutional review had come to be deemed a political necessity. What had happened?

c. Federalism and judicial constitutional review[34]

Belgium's transition in the 1970s and 80s from a unitary to a federal state ultimately resulted in judicial constitutional review being accepted, initially solely in order to resolve conflicts of competence between the different levels of government. Belgium consists of two language communities of roughly the same

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[33] *Parliamentary Proceedings*, Belgian Senate, 1974-75, no. 602/1, p. 1 (authors' translation).

[34] See also M. Adams and D. Vanheule, "The Theory and Practice of Constitutional Review in the Civil Law: The Case of Belgium" in L.J. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence*, Aldershot, Ashgate 2005, pp. 187-216.

size, the Dutch-speaking part in the north and the French-speaking part in the south. They are separated by a language border, which has also been laid down in the Constitution, and as a result, Dutch is the official language in the north, and French in the south. In addition, Brussels has been constitutionally recognized as a bilingual area of Dutch and French speakers. Constitutional recognition has also been granted to the small German-speaking part of the country bordering Germany.

Tensions between these language communities are at the heart of the wish for increased cultural, personal, and socio-economic self-rule. As of 1969, these aspirations set off a series of reforms, creating two levels of constitutionally recognized legislative and executive decision-making: the Communities (competent in cultural, personal, and educational matters) and the Regions (competent in territorial and economic matters). As there is no hierarchy of legislative instruments enacted by the various entities of the Belgian state, conferring these powers could cause conflicts of competence between the Communities/Regions and the federal state. To resolve these conflicts, it was felt a constitutionally created body was needed since leaving this to the parliaments would lead to a situation of Belgium becoming ungovernable. Instead of assigning this role to the existing courts, the initiators of a constitutional amendment of 1980 chose to set up a special court, the so called *Cour d'Arbitrage* (Court of Arbitration), which would adjudicate on disputes between the various legislatures of the federal Belgian state.[35] The Court of Arbitration could thus check whether legislation introduced by the Federal state, or the Communities or Regions was in line with the competences that were assigned to them by the Belgian constitution.

The foundation of this institution (in 1983) was consistent with the conventional skepticism in entrusting constitutional review to the regular courts. This restraint is for example illustrated by the fact that the provisions on the Court of Arbitration were incorporated into a separate chapter of the Belgian Constitution thus setting the Court apart from the ordinary judiciary. Another example of this reserve can be seen in the composition of the Court of Arbitration. The twelve bench seats were evenly divided between Dutch-speaking and French-speaking Belgians, with at least one of the judges required to have an adequate knowledge of German. But the originators of the Court of Arbitration also paid particular attention to the background of these judges. Up to the present day, three judges from each language group are former politicians, all of whom must have served in a legislative assembly for at least five years. Through their work as parliamentarians they are presumed to have developed the requisite skills to bring

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[35] P. Peeters, "Expanding Constitutional Review by the Belgian 'Court of Arbitration'", 11 *European Public Law* 2005, pp. 475-479; R. Leysen and J. Smets, *Toetsing van de wet aan de Grondwet in België*, *o.c.*, p. 39 *et seq.* See also J. Velaers, *Van Arbitragehof tot Grondwettelijk Hof*, Antwerp, Maklu, 1990, pp. 34-74.

their knowledge of political sensitivities to bear on their judicial duties.[36] The other judges are jurists from the Court of Cassation or the Council of State, professors of law at Belgian universities, or clercks (called legal secretaries) with the Court itself. The purpose of this mixed composition, seeking to balance theory and practice, was to render the principle of judicial constitutional review palatable to the legislature. In addition, these judges are appointed by the King on the recommendation of one of the Houses of Federal Parliament in an effort to partially obviate the democratic impediment to constitutional review by the judiciary, namely that of unelected judges reviewing and nullifying legislation created by the people's chosen representatives. This procedure also disposed the constitutional legislator more favourably towards establishing the Court of Arbitration. Moreover, the required two-thirds majority for appointment proposals was intended to make the Court of Arbitration reflect as accurately as possible the political and ideological movements in the country. The creation of such a specialised court was thus regarded as complying with the principle of the separation of powers, and was aimed at dispelling fears of a *gouvernement des juges*.[37]

d. Expansion of competence and judicial dynamics

As indicated, the Court of Arbitration was originally only authorised to verify whether legislation enacted by the federal government, the Communities, or the Regions was in accordance with the constitutional division of legislative powers. In time, however, this jurisdiction of the Court of Arbitration gradually came to expand, both formally and factually. For instance, since 1989 the Court was also required to determine whether the right to equal treatment, the right not to be discriminated, and the right to freedom of education were violated (encapsulated in the Sections 10, 11, and 24 of the Belgian Constitution respectively).

The immediate cause for this expansion was the devolution of educational powers from the Federal State to the Communities. The Roman Catholic minority in the French-speaking part of the country and the liberal minority in the Dutch-speaking part were greatly concerned that this devolution would subject the organisation of their respective educational projects to considerable restrictions. To put it differently, significant cultural-ideological minorities feared their

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[36] These court officials were not required to be jurists (unlike the other judges). It should be noted that appointing 'political' judges to the Belgian constitutional court did meet with criticism because of the lack of independence and impartiality this would allegedly bring about. See C. Berx, *Rechtsbescherming van de burger tegen de overheid*, Antwerp, Intersentia, 2000, p. 246, and L. Vermeire, "De oud-politicus als onpartijdig rechter in het Arbitragehof", *Rechtskundig Weekblad* 1986-87, p. 2441.

[37] J. Velaers, *Van Arbitragehof tot Grondwettelijk Hof*, Antwerp, Maklu, 1990, pp. 419-420.

freedom of education would be substantially restricted. That at the same time, next to Section 24 of the Belgian Constitution, Sections 10 and 11 of the Constitution were included – a concession to proponents of a wider-ranging extension of the Court's powers – does not detract from the immediate cause of the expansion of the Court's jurisdiction. Before, education had remained within the federal field of competence, precisely because the two ideological minorities were fearful of being marginalised.[38] The Francophone christian democrats in particular were explicitly adamant that they would only agree to the devolution of educational powers to the respective Belgian 'Communities' if the right to freedom of education were enshrined more firmly in the Belgian Constitution and its observance could be reviewed by the Court of Arbitration.[39]

The notable feature of this development is of course that constitutional review in Belgium was originally perceived as a practical necessity springing from the country's federalization. Yet the broadening powers of the Court of Arbitration was not so much brought about by federalisation (and the ensuing conflicts over powers) as such, as it was by the anxiety of substantial ideological minorities over their rights no longer being adequately protected. But the wider powers of the Regional and Communal legislatures also lead to another type of constitional review in which the court's competence went from a technical check of powers (which in a federal nation no doubt also carries major political sensitivities) to a substantive review of the meaning of equality and non-discrimination provisions. This development was all the more remarkable given that the Court of Arbitration had been created amidst fears of a *gouvernement des juges*, and that the aforementioned expansion of powers did in itself not seem to be the most suitable step to allay these concerns. Remarkably enough, the parliamentary proceedings nonetheless show that this fear had all but dissipated. In fact, most parliamentarians welcomed the extended powers of the Court.[40]

Simultaneously, citizens were given the right to bring annulment actions before the Court of Arbitration. They had previously not been able to do this because it had always been assumed that ordinary citizens did not have an interest

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[38] G. Monard, "De overdracht van de onderwijsbevoegdheid naar de Gemeenschappen", in A. Alen and L.P. Suetens (eds.), *Zeven knelpunten na zeven jaar staatshervorming*, Brussels, Story Scientia, 1988, p. 345.

[39] For that reason, these conditions were expressly laid down in the coalition agreement of 21 October 1987. See *ibid.*, p. 361.

[40] *Parlementaire Handelingen*, Belgian Senate, 1988-89, 30 November 1988, 432 and *Parlementaire Handelingen*, Belgian House of Representatives, 1988-89, 4 January 1989, 979. See R. Leysen and J. Smets, *Toetsing van de wet aan de Grondwet in België*, *o.c.*, 52-53. Yet objections continued to be raised, and the limited expansion of the Court's powers of review to the three rights mentioned can be partially explained from this perspective: it was a compromise.

in the legislative provenance of a particular regulation.[41] However, from then on, citizens could challenge any new legislative instrument before the Court of Arbitration within six months of its promulgation. In specific disputes they may also assert the unconstitutionality of applicable legislation before an ordinary court of law, enabling or, as the case may be, obliging the court to refer the matter to the Court of Arbitration for a preliminary ruling.

Along with the formal expansion of the Court's powers, the Court itself interpreted its powers broadly. For example, between 1989 and 2003, the Court developed as its main responsibility to arbitrate disputes over breaches of the equality and non-discrimination principles in Sections 10 and 11 of the Belgian Constitution. In interpreting the equality principle, the Court of Arbitration drew inspiration from decisions of the European Court of Human Rights, and the *Belgian Language Case* in particular.[42] The Court came to emphasise the crucial importance of the principle of equality as being inherent to the Belgian legal order as it developed its case law by stating that the principles of equality and non-discrimination apply to *all* rights and freedoms the Belgians are entitled to.[43] This statement was later construed to include the enjoyment of all rights and freedoms granted under directly applicable international treaties as well.[44] More recently, the Court asserted that rights and freedoms guaranteed by international instruments without any direct national effect should also be taken into account.[45] In addition, the Court started to verify whether a contested provision wrongfully infringes the principle of equal enjoyment of protection derived from what may be called general legal principles (such as legal certainty and the non-retroactive force of legislation).[46] The Court even chose to apply the equality principle and the ban on discrimination to the equal enjoyment of rights and freedoms recognized by the legislature but not based on any constitutional provision, treaty stipulation, or universal principle of law.

Equality, according to the Court, also implies the duty of the legislature to introduce coherent laws which reflect the equality before the law of all members of society by taking their separate interests into account and integrating it into the

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41 Initially, annulment proceedings could only be instituted by the Federal Cabinet, a Regional or Communal government, the chair of the legislative assembly, or two thirds of the members of a legislative assembly.

42 European Court of Human Rights, case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium* of 23 July 1968, *Publ. Eur. Court H.R.*, Series A, no. 6, para. 10.

43 Court of Arbitration no. 23/89, 13 October 1989.

44 Court of Arbitration no. 4/96, 9 January 1996.

45 Court of Arbitration no. 41/2002, 20 February 2002; Court of Arbitration no. 189/2004, 24 November 2004.

46 Court of Arbitration no. 18/90, 23 May 1990; Court of Arbitration no. 24/96, 27 March 1996.

legislative process. Within the framework created by the legislature and giving due consideration to these interests, legal norms must succeed in reaching those categories of people the legislature wants to address. This duty allows the Court to identify passive discrimination resulting from gaps in the applicable legislation, and can thus oblige the legislature to act. The principle of equality therefore necessarily entails coherence. The legal norm itself can only remain in force, insofar as it is constitutional and appropriate to the party not discriminated against, but at the same time the legislature is implicitly compelled to apply the law equally to those who had at first been disregarded.[47]

Through its non-restrictive reading of the general ban on discrimination in Sections 10 and 11 of the Constitution, the Court of Arbitration has undeniably enlarged the span of its jurisdiction to cover virtually all kinds of discrimination regarding the enjoyment of freedoms and rights. As a result of the broad scope of Sections 10 and 11, most provisions of the Constitution can also be reviewed indirectly: as everyone has fundamental rights, infringement of a fundamental right automatically constitutes an infringement of the principles of equality and non-discrimination, so the Court argued.[48] However, this led to artificial constructions needlessly complicating both theory and practice[49], since infringements of fundamental rights always had to be adjudicated through the lens of Sections 10 and 11 of the Belgian Constitution. To simplify matters, in 2003 the Belgian constitutional legislature therefore decided to formally extend the review powers of the Court of Arbitration to include, especially, all the rights and freedoms listed in Title II of the Belgian Constitution ("On Belgians and Their Rights") and to a number of other constitutional provisions.[50] Finally, in 2007, the Court's name was changed, because as this brief overview shows its name had become inadequate: the Court was no longer an arbiter in disputes between the various federal entities of the Belgian state, but a fully-fledged court of constitutional review.[51] Empirically, however, the signal role of the Court is without a doubt its jurisdiction over Sections 10 and 11 of the Belgian Constitution. The majority of its decisions concerns these provisions even today.

It may be relevant to mention here the Court's extensive conception of review for compliance with the provisions of Title II of the Belgian Constitution and its related practice of reviewing for compliance with analogous treaty

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47 Court of Arbitration no. 31/96, 15 May 1996.

48 Court of Arbitration no. 136/2004, 22 July 2004.

49 *Parlementaire Handelingen*, Belgian Senate, 2000-2001, no. 2-897/1, 2-3; P. Peeters, *l.c.*, p. 483.

50 Act of 9 March 2003.

51 Act of 7 May 2007 amending the Constitution: "In Article 142, first paragraph of the Constitution the words 'Court of Arbitration' will be replaced by the words 'Constitutional Court'." *Belgisch Staatsblad* (Belgian Official Journal) of 8 May 2007, p. 25101 (authors' translation).

provisions. The Court has followed this line since its decision in case 136/2004 in which it argued:

> "Pursuant to Section 26, paragraph 1, under 3 of the Court of Arbitration Act of 6 January 1989, amended by the Act of 9 March 2003, the Court is authorised to review legislative norms by way of preliminary ruling for compliance with the provisions of Title II "On Belgians and Their Rights" and with Sections 170, 172, and 191 of the Constitution. However, when the scope of a treaty provision binding on Belgium is analogous to that of one or more of the above-mentioned constitutional provisions, the safeguards contained in that treaty provision form an integral part of the safeguards included in the constitutional provisions concerned. The infringement of a fundamental right automatically constitutes an infringement of the equality and non-discrimination principle. It follows that when an infringement is asserted of a provision of Title II or of Sections 170, 172, or 191 of the Constitution, the Court in its examination takes into account international legal provisions that safeguard analogous rights or freedoms." [52]

Summarising, it may be said that, firstly, the division of legislative power among several federal entities signified the end of the strict separation of powers in Belgium. Through the Court of Arbitration, the judiciary had to keep the peace between the various legislatures. The then prevailing doctrine in Belgium viewed judicial review of constitutionality with reserve and caution, but practical necessity nevertheless exacted change. As a result, in addition to being a political instrument, the Belgian Constitution became a robust legal document. Secondly, by the late 1980s, the formal extension of its powers spurred the Belgian Court of Arbitration to develop its own internal dynamics initiating a steady substantive expansion of its powers. The legislature did not speak out against this evolvement. Thirdly, and finally, the Court's formal powers were extended to include all provisions of Title II of the Belgian Constitution ("On Belgians and Their Rights"). As a consequence, the rationale for the establishment of the Court of Arbitration has become immaterial: the *raison d'être* of the Court is no longer the federalisation of the Belgian state alone, but just as much the judicial protection of its citizens and their fundamental rights. Eventually, the name *Court of Arbitration* was changed to *Constitutional Court* in order to do justice to its present powers.

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[52] Court of Arbitration no. 136/2004, 22 July 2004 (author's translation).

4. SOUTH AFRICA: JUDICIAL CONSTITUTIONAL REVIEW AS A FACILITATOR OF TRANSFORMATION

a. Features of the constitutional system

Unlike Belgium and the Netherlands, each of which only ever had a single constitution since the Napoleonic wars - albeit drastically amended in the course of time - South Africa has had several constitutions. It has had five constitutions, to be precise, since the country's formation, after the Second Anglo-Boer War of 1899 to 1902, from British colonies and defeated Boer republics. Whereas in Belgium the legislature had long been responsible for interpreting and applying the constitution, and only gradually and reluctantly conceded ground to the judiciary, the South African constitutional system underwent an abrupt, two-stage transition.[53]

In the first stage, from 1910 to 1994, the successive constitutions were the manifest instruments of elected politicians. In the second stage, from 1994 onwards, the social and legal order has come to rest on constitutions whose interpretation and application are also determined by the courts. This reversal was not so much the result of a natural evolution as it was of a sudden and crucial alteration of the role of the judiciary. In this part, the two stages will be examined, with the focal point being the changing relationship between the South African constitutions and the judiciary.

b. Parliamentary supremacy and limited democracy

The South Africa Act of 1909 was passed by the British parliament and for all intents and purposes served as the Constitution of South Africa.[54] It had been chiefly drafted by the all-white National Convention which after the Anglo-Boer War had been charged with designing a common future for the two British colonies, the Cape and Natal, and the two Boer republics, the South African Republic and the Orange Free State. The South Africa Act of 1909 established the Union of South Africa by transforming these four territories into provinces of the newly-created country.

As an overt political document in the time-honored Westminster tradition, it was devoted almost entirely to the creation of the state and its institutions, and thus, a bill of rights had not been included. Nor had the South African courts been

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[53] See I.M. Rautenbach and E.F.J. Malherbe, *Constitutional Law*, 4th ed., Durban, Butterworths, 2004, pp. 13-19. For a historical overview see P.N. Bouckaert, "The negotiated revolution: South Africa's transition to multiracial democracy", 33 *Stanford Journal of International Law* 1997, pp. 375-411.

[54] South Africa Act, 9 Edw. VII, C 9.

empowered by the British constitutional legislature to review constitutionality of legislation, although the majority of delegates to the National Convention had interestingly enough been in favor.[55] The constitutionally established legislature was thus a typical example of parliamentary sovereignty, even if it functioned under the authority of Westminster (since full independence would only come in 1931).

As in the United Kingdom everyone was considered to enjoy extensive common-law rights and freedoms, which is why many held it superfluous to have a bill of rights.[56] These rights and freedoms could be exercised insofar as they were not restricted by the legislature which meant that the constitutional system was firmly based on a specific democratic premise: citizens were free to the extent that their liberty was unaffected by the will of the people as expressed by the people's chosen representatives. Consequently, the legislature could largely qualify liberties at its discretion, as it was only accountable to the electorate. So a heavy burden of responsibility came to lie with the national parliament as great faith was placed in the democratic process.

But the South African constitutional system had one major failing, namely that the quality of the nation's democracy was significantly impaired by the limitations on the right to vote. Only whites could be elected to parliament, and each new province retained its voting conditions that had been in force before its incorporation into the Union. As a result, non-racial citizenship remained in effect in the Cape, but in the other provinces the right to vote continued to be reserved for white people only. And although the constitution itself could be amended by a simple majority of votes, the provision regulating this as well as the provision guaranteeing equal status to Dutch (later Afrikaans) and English language were protected by a qualified majority. These provisions could only be amended by a two-thirds majority of votes in a joint session of both Houses of Parliament.

Preparations were underway to remove black South Africans from the voters' roll in the Cape, and in 1936 a law to this effect was enacted.[57] With racial discrimination being formalized in the form of apartheid, an attempt was also later made to remove 'coloured' voters from the common roll as well. Despite the required qualified majority not having been secured this time, parliament adopted a bill relegating 'coloured' voters in the Cape to a separate list by removing them from the common voter's roll.[58] Almost inevitably, the Appellate Division of the

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55 Z. Motala and C. Ramaphosa, *Constitutional Law: Analysis and Cases*, Oxford, Oxford University Press, 2002, p. 2.

56 See R. Singh, *The Future of Human Rights in the United Kingdom*, Oxford, Hart Publishing, pp. 5-14, on the concept of common law rights.

57 Representation of Natives Act, no. 12 of 1939. See J. Dugard, *Human rights and the South African legal order*, New Jersey, Princeton University Press, 1978, p. 29.

58 Separate Representation of Voters Act, no. 46 of 1951.

Supreme Court invalidated the Act, because the constitutionally established procedure had not been respected.[59] The National Party government responded by creating the High Court of Parliament.[60] This body was comprised of all members of parliament and decided on the validity of legislation nullified by the courts. However, the act of parliament establishing this body was also annulled by the Supreme Court, as the High Court of Parliament was parliament thinly disguised as a court and because the relevant constitutional provisions could not simply be ignored, otherwise they would become a dead letter.[61] The ruling party was on the horns of a dilemma, since it could not muster the required two-thirds majority to pass legislation in accordance with the Constitution. Instead, it enacted ordinary legislation to enlarge both the Senate and the Appellate Division, thus maneuvering itself into a position to up the numbers of its allies in both bodies.[62] The South Africa Amendment Act could now be enacted without any further complications: 'coloured' voters were registered on a separate roll, while the courts were explicitly denied the authority to review the constitutionality of legislation.[63]

In this way, any remaining doubts about the nature of the constitution of 1909 were dispelled. It was now perfectly clear that the courts were not meant to become involved in constitutional matters, not even when parliament chose to disregard the Constitution. This state of affairs would endure until the enactment of the Constitution of the Republic Act of 1961, which replaced the Constitution of 1909 and created a republican form of government. Section 59 of the 1961 Constitution unequivocally provided that "parliament shall be the sovereign legislative authority" adding that the courts were barred from pronouncing on the validity of acts of parliament. This provision was clearly addressed to the courts that were supposed to be charged with applying and obeying the law, not questioning it.

More so now than ever before, the government could implement its policy of apartheid in all areas of life. The concept of self-governing territories for the black population (the homelands) became a sad reality. For internal purposes, for instance, the National States Citizenship Act granted citizenship of the various homelands to the African population on the basis of ethnicity, regardless of whether the persons concerned were born or actually resided in them.[64] As soon

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59 *Harris v. Minister of the Interior*, 1952 2 SA 428 (A). On this, see E. Griswold, "The 'coloured vote case' in South Africa", 65 *Harvard Law Review* 1952, pp. 1361-1374.

60 High Court of Parliament Act, no. 35 of 1952.

61 *Minister of the Interior v. Harris*, 1952 4 SA 769 (AD). On this, see E. Griswold, "The demise of the High Court of Parliament in South Africa", 66 *Harvard Law Review* 1953, pp. 864-872.

62 Senate Act, no. 53 of 1955; Appellate Division Quorum Act, no. 27 of 1955.

63 South Africa Act Amendment Act, no. 9 of 1956.

64 National States Citizenship Act, no. 26 of 1970.

as the South African parliament had granted "independence" to a territory, its residents lost their South African nationality. Millions of people were thus deprived of South African nationality against their will. In spite of all failure and domestic as well as foreign opposition to the discriminatory policy of apartheid, the government persisted in carrying out racial segregation. It tightened its grip on the country by putting down dissidence, for example by prohibiting many public meetings and several political parties, as well as by exiling or incarcerating opponents.[65] However political unrest increased, especially towards the latter part of the 1970s.

Still, in order to gain support, the government wanted to broaden the social foundation of its institutions and tried to consolidate its power through modest reforms, such as a new constitution created by the Republic of South Africa Constitution Act of 1983.[66] The Constitution of 1983 retained the principle of parliamentary sovereignty and again did not contain a bill of rights. Unlike previous constitutions, however, the new constitution included the office of a powerful executive state president and extended the scope of citizenship to include "coloured" and Indian communities for the purpose of electing a tricameral parliament. Each of the three population groups (white, 'coloured', and Indian) had its own chamber of parliament, which had jurisdiction over matters pertaining to its own group. Yet, as before, true power rested with the all-white House of Assembly, which continued to dominate the political landscape.[67]

The Constitution of 1983 and a few superficial reforms were utterly insufficient to redress the fundamental iniquities so deeply ingrained in South African society. In the 1980s, violent opposition to the apartheid regime had virtually spiraled out of control and a state of emergency was becoming the order of the day. Thirty years of violence – better known as "the struggle" – between liberation movements and the government had resulted in a costly stalemate with large parts of South Africa verging on anarchy. Apartheid had become too expensive and could not be sustained with cosmetic surgery. In addition, reform-minded leaders were gaining the upper hand in parliament. The system was facing a legitimacy crisis which could only be tackled by introducing drastic constitutional changes.

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65 J. Dugard, *Human Rights and the South African Legal Order*, *o.c.*, pp. 53-202.

66 Republic of South Africa Constitution Act, no. 110 of 1983.

67 H. Klug, "Historical background", in M. Chaskalson, J. Kentridge, J. Klaaren, G. Marcus, D. Spitz, and S. Woolman (eds.), *Constitutional law of South Africa* Revision Service 5, Kenwyn, Juta, 1999, pp. 2-10.

c. Constitutional supremacy and universal suffrage

Efforts at constitutional change and democratization gained strength when Nelson Mandela was released in 1990, the prohibition of liberation movements was lifted and calls for negotiations between the various parties were raised. Circumstances for a full democracy were propitious, but which form should it take?

In 1991, the Convention for a Democratic South Africa (Codesa) met to address this issue.[68] Codesa consisted of most political organizations and also other interest groups. However, it soon become apparent that views on issues such as the form of government, the sharing of power, the extent of government interference in the economy, and the protection of private property were poles apart. Although general agreement was reached on the drafting of a new constitution by democratically elected representatives of the people, participants were deeply divided over the details on who should act as a provisional parliament.

A particularly thorny issue was how a new constitution should reflect the national balance of power. The African National Congress (ANC), the largest liberation movement, pressed for a democratically elected body that would have ample room to draft a constitution; whereas the government and the smaller parties made out a case for strict guidelines that this body would have to observe in drawing up a constitution. These smaller players feared that if a democratically elected body were to have free reign that the constitution would only reflect the views of the victors and not those of the losing side and sizeable political minorities as well. In other words, one of the pivotal questions concerning a new constitutional future for South Africa was how the will of the democratic majority could be contained so as to prevent it from deteriorating into a tyranny of the majority.

In the end, Codesa failed, which led to renewed violence and instability. But great national and international pressure ensured that the most important players resumed negotiations in what was known as the Multi-Party Negotiation Process. The ensuing tentative political agreement resulted in the tricameral parliament adopting the historic Constitution of the Republic of South Africa Act of 1993 (the Constitution of 1993).[69] This document was referred to as the transitional Constitution, as it was intended to create the required democratic foundation for negotiating and concluding the final Constitution. One of its main

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[68] On this, see G. Devenish, "The interim Constitution in the making", 60 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 1997, pp. 612-613, and H. Corder, "South Africa's transitional Constitution", *Public Law* 1999, pp. 291-297.

[69] Constitution of the Republic of South Africa Act, no. 200 of 1993. A.J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: an evaluation in light of international human rights norms", 17 *Human Rights Quarterly* 1995, pp. 101-126.

achievements was to abolish the doctrine of parliamentary sovereignty once and for all. Section 4(1) of the 1993 Constitution stipulated that:

> "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

An enforceable Bill of Rights was included for the first time, and a Constitutional Court was established to ensure the application of the Constitution, while a number of existing courts were also granted certain powers of review. Additionally, it was decided that multiracial elections had to be organized for a new, bicameral parliament. It fell to the two Houses of Parliament together constituting the Constitutional Assembly to draft and adopt a definitive constitution. The newly created Constitutional Court was authorized to verify whether the final Constitution adopted by the Constitutional Assembly complied with the 34 Constitutional Principles set out in Schedule 4 to the 1993 Constitution. These principles, described as the solemn pact, represented the core values of the new democratic order and it was imperative that they also be reflected in the final Constitution.[70] The principles included the requirement to establish a democracy characterized by equality and fundamental rights, and based on the separation of powers and the supremacy of the constitution. The role of the new Constitutional Court was so crucial that it could even reject a new constitution submitted by the Constitutional Assembly if the document did not comply with the fundamental principles laid down in the transitional Constitution of 1993.

Following the peaceful elections of 1994, the provisional and non-racial parliament started the process of drafting the definitive Constitution – a process more favored by circumstances than the gestation of the provisional Constitution had been. For the first time, the proportionally elected, non-racial parliament mirrored the national support for the political players. This inevitably held true for the composition of the Constitutional Assembly as well, and it conferred much-need legitimacy on the public institutions that were to shape the new democracy and, in particular, the definitive Constitution. The Constitutional Assembly could now dedicate itself to the task of drafting the final Constitution in keeping with the Constitutional Principles, without being paralyzed by fears of the nation succumbing to violence. It was generally felt that the country had passed the point of no return. The process had to succeed, and it did. In 1996, a constitutional text

[70] See F. Venter, "Requirements for a new constitutional text: the imperatives of the Constitutional Principles", 112 *South African Law Journal* 1995, pp. 32-44.

was adopted and submitted to the Constitutional Court, but approval was withheld because of ten defects, in response to which the Constitutional Assembly renegotiated and redrafted the text, which was then approved by the Constitutional Court.[71] And so, the final Constitution of South Africa came into being. It ensured *constitutional supremacy* and *universal suffrage*, as opposed to the old constitutional foundation of *parliamentary supremacy* and *limited democracy*. A negotiated revolution had taken place, resulting in a new order based on human dignity, equality, and the general improvement of human rights. In this new order the Constitution is paramount. It is not merely a set of guidelines that may (or, as it happens, may not) be observed in the political process, but it is a legal document which the legislature itself must adhere to. In rising to the occasion, the Constitutional Court embarked on its mission by actively trying to define the significance of the Constitution on a host of issues[72], and probably most interestingly the adjudication of socio-economic rights.[73]

d. Judicial dynamics

In the eyes of the Court, it has a special responsibility concerning socio-economic rights and in righting the historic wrongs of racial discrimination. For instance, in *Government of the RSA v. Grootboom,* the Court ordered the state to provide emergency housing for a group of homeless people after they had been evicted from private land.[74] The Court ruled that if state measures fail to make provision for the needs of those homeless whose needs are the most urgent it would constitute an infringement of the right of access to adequate housing as laid down in Section 26 of the Constitution. However, the Court refrained from formulating a claim to immediate shelter. Instead, it chose to verify whether the measures taken by the state to progressively realise adequate housing were reasonable. In doing so, the Court demonstrated that it did not aim to substitute judicial decisions for the priorities of political bodies, but wanted to check the state's compliance with its positive obligations towards the population.

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71 *Certification of the Constitution of the Republic of South Africa*, *l.c.*, para. 482. *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 1 BCLR 1 (CC), 1997 2 SA 97 (CC). See J. Sarkin, "The drafting of South Africa's final Constitution from a human rights perspective", 47 *American Journal of Comparative Law* 1999, pp. 67, 70-71, and A. Cockrell, "The South African Bill of Rights and the 'duck/rabbit'", 60 *Modern Law Review* 1997, pp. 513, 514-517.

72 Such as the death penalty (*S. v. Makwanyane*, 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC)) and the recognition of same-sex marriage (*Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs*, 2006 3 BCLR 355 (CC)).

73 See also R. Malherbe, "The development of socio-economic rights in South Africa", 60 *Zeitschrift für öffentliches Recht* 2005, p. 111.

74 *Government of the RSA v. Grootboom*, 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

In *City Council of Pretoria v. Walker* the Constitutional Court held that the Pretoria City Council was justified in levying residents of historically black townships on the basis of a comparatively low uniform or 'flat' rate for water and electricity in every household, whereas households in historically white suburbs were levied consumption-based or meter-based tariffs.[75] This differentiation was legitimate, because the respondent belonged to a formerly privileged community (the white minority) and was not himself disadvantaged by the black community benefiting from different and lower rates. The Court also emphasized that cross-subsidization of communities was not necessarily objectionable. In other words, the white community had to learn to accept contributing towards the socio-economic uplifting of the black community as white people had benefited from apartheid to the detriment of their fellow black compatriots. Differential treatment was also acceptable, because the city council would discontinue differentiation as soon as actual consumption could be measured in the former black townships.

These and other 'social' decisions of the Court have been frequently commented on, approvingly as well as critically (with critics complaining that the Court did not press ahead *far enough*).[76] Whatever the case may be, these decisions show that the judicial review of constitutionality can serve to develop the socio-economic claims of the majority of the population.[77] In this the South African Constitutional Court is generally perceived to be of the most progressive in the world.

Judicial decisions on the protection of private property are also interesting. Section 25(1) of the South African Constitution prohibits the arbitrary expropriation of private property in the following terms: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." On the other hand, this Section contains a number of provisions dealing with the restitution and reallocation of property (land, mostly). In the *First National Bank* decision, it was decided that

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75 *City Council of Pretoria v. Walker*, 1998 2 SA 363 (CC).

76 For praise see, e.g., C. Sunstein, "Social and economic rights? Lessons from South Africa", 11 *Constitutional Forum* 2000-01, p. 123; S. Liebenberg, "The right to social assistance: The implications of *Grootboom* for policy reform in South Africa", 17 *South African Journal on Human Rights* 2001, p. 232. For critical comments see D. Bilchitz, "Giving socio-economic rights teeth: The minimum core and its importance", 119 *South African Law Journal* 2002, p. 484.

77 See also *Premier v. Mpumalanga v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, 1999 2 SA 83 (CC); *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v. Ed-U-College (PE) (Section 21) Inc.*, 2001 2 SA 1 (CC), T. Roux, "Legitimating transformation: Political resource allocation in the South African Constitutional Court", in S. Gloppen, R. Gargarella, and E. Sklaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, London/Portland, Frank Cass, 2004, p. 92, and H. Klug, "South Africa: From constitutional promise to social transformation", in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford, Oxford University Press, 2007, pp. 266.

the purpose of Section 25 "has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[78] Notice can also be taken of Section 9(2) of the Constitution, which stipulates that equality "includes the full and equal enjoyment of all rights and freedoms" and that to "promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." The Court explicitly recognizes that this implies policies of affirmative action as envisaged by the Constitution, even where such action may jeopardize the private interests of people from formerly privileged segments of society.[79]

It is important to note that the Constitutional Court insists that it must endeavor to *interpret* the Constitution, instead of simply following the personal preferences of judges or the will of the (political) majority. As the first president of the Constitutional Court argued in *S. v. Makwanyane*, if the will of the majority had to be a court's only guide there would be no need for constitutional adjudication in South Africa and one could just as well leave the protection of rights to parliament and its democratic mandate, a move which would obviously betray the new constitutional order which had turned its back on parliamentary sovereignty.[80] The duty of the Court is clearly to interpret the Constitution without fear or favor by basing its judgments on the values it has to uphold and not so much on the political views of the day.[81] This is because the legislature, and the legislature alone has to set the policy agenda, yet in doing so even it will have to observe the Constitution. A point that was made vividly clear in respect of socio-economic rights in the case *Treatment Action Campaign*:

> The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the

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78 *First National Bank of SA t/a Wesbank v. Commissioner for the Minister of Finance*, 2002 4 SA 768 (CC), 7 BCLR 702 (CC), para. 50.

79 *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism*, 2004 4 (SA) 490 (CC), 2004 (7) BCLR 687 (CC), paras. 74, 76.

80 *S. v. Makwanyane*, *l.c.*, para. 88.

81 In *S. v. Mhlungu*, 1995 3 SA 867 (CC), 1995 7 BCLR 793 (CC), para. 111, the Court stressed that a pure positivist, technical and value-free approach had to be avoided as it would be repugnant to the values of the Constitution.

> judicial, legislative and executive functions achieve appropriate constitutional balance.[82]

It would appear that the Constitutional Court is trying to steer a middle course between acknowledging individual rights enshrined in the Constitution and the necessity, also expressed in the Constitution, to repair the inequalities inherited from the past. One could say it is a path between a hurried transformation and the need to realize a balanced execution of this transformation. The Court performs this delicate balancing act in many of its decisions.[83] But it also clearly articulates its view on who in a democracy should ultimately achieve this transformation, namely elected members of parliament. The main duty of the Court is thus to check the legislative wisdom of parliament on the basis of interpreting the Constitution. And it is the South African Constitution itself that requires the government to effect transformation, leaving the Court constitutionally beholden to verify whether the government does so.

5. AN OVERSTATED EXPLANATION?

Can the theory put forward by Hirschl (see section 2) explain the situation in Belgium and South Africa as far as the introduction of judicial constitutional review is concerned? How does the development of judicial constitutional review in Belgium and South Africa relate to Hirschl's theory?

As we saw in section 4 of this article, in South Africa the notion of parliamentary sovereignty and the corresponding rejection of a bill of rights had, during the apartheid years, been (ab)used in order to preserve the white regime. Abandoning that notion through instituting judicial constitutional review proved later, after the demise of apartheid, to be one way of leaving the past behind. It was thus not just a way of covertly safeguarding elitist interests. At the very least, it also symbolized and confirmed a clear break with the past which allowed the South African Constitution to achieve a position of solidity and independence, away from the erratic workings of power. And this was especially significant since it was exactly the notion of parliamentary sovereignty that had been abused to keep up with the apartheid regime. In any case, the history of South Africa shows that the development to a judicially entrenched constitution (by means of

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82 *Minister of Health and Others v. Treatment Action Campaign and Others (no. 2)*, 2002 10 BCLR 1033 (CC), 2002 5 SA 721 (CC), para. 38.

83 See H. Botha, "Transforming state and society: from the public/private dichotomy to mutual cooperation and destabilisation", in G. van der Schyff (ed.), *Constitutionalism in the Netherlands and South Africa. A Comparative Study*, Nijmegen, Wolf, 2008 (includes copious references to judicial decisions).

introducing judicial constitutional review) had, and still has, immense meaning for the formerly oppressed masses.

In the light of court decisions on socio-economic rights, it can hardly be maintained that only the interests of the erstwhile ruling echelon are served and that the South African Constitutional Court does not envision a 'transformative' task for itself.[84] Of course, opinions may differ on the question of which institution should handle transformative policy-making - the judiciary or the legislature - and how far its powers should extend.[85] In this respect, Hirschl declares himself an opponent of judicial constitutional review: the courts should not have the authority to determine "the very definition and scope of a given polity's constitutive values"[86], since there is no consensus about either the content or even the existence of these values. It therefore better be the chosen legislature that deals with these issues. That might as well be dubbed a democratic argument in favor of parliament. At the same time Hirschl's critical stance against the courts appears to be driven by a rather particular ambition for what constitutes a *just* society. "The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions."[87] An aspiration he feels to which South African courts do not contribute in the way they should according to him. So not so much, or so it seems, the fact that the courts have too big an impact is why Hirschl declares himself an opponent of judicial constitutional review, but the fact that constitutional courts decide the way they actually decide (i.e. not, according to him, in favor of egalitarian values). His appraisal of the judicial reality in for example South Africa is therefore ultimately grounded in the fact that the South African Constitutional Court does not, according to him, adequately meet the needs of the masses. But such an assessment is debatable since the South African Constitutional Court does

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[84] See on this C. Sunstein, "Social and economic rights? Lessons from South Africa", 11 *Constitutional Forum* 2000-01, p. 123. The term 'transformative' is inspired by K. Klare, "Legal Culture and Transformative Constitutionalism" 14 *South African Journal on Human Rights* 1998, pp. 146-188: "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (...) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." p. 150.

[85] On who should be primarily responsible for policy-making in this context, see, e.g., M. Wesson, "*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court", 20 *South African Journal on Human Rights* 2004, pp. 284-308.

[86] R. Hirschl, *o.c*., p. 188. In this context he strongly accentuates the fight over inclusion of property rights in the constitution. See pp. 94-95.

[87] Ibid., *o.c.,* p. 3. Quoting R. Dworkin, *Freedom's Law*, Cambridge (Massachusetts), Harvard University Press, p. 34.

indeed take important steps to promote equality and socio-economic rights.[88] And it does so more progressively than anywhere else in the world.

In Belgium, as we saw, judicial constitutional review was first and clearly adopted as a method to resolve conflicts over legislative competence between the various regions and communities of the Belgian federal state. The establishment of it was necessary, so it was perceived, to keep the country governable: this was an issue of installing political stability to the country by non-political means. In 1989 the review powers of the Constitutional Court were extended to include freedom of education and the principles of equality and non-discrimination. This extension indeed served the interests of two major ideological minority groups (denominational and non-denominational) in both Flanders and Wallonia respectively, particularly regarding the freedom to organize their own educational programs. However, these interests were not obliquely referred to or implicitly acknowledged, but explicitly voiced; there was no hidden agenda.

At the same time, the Belgian Constitutional Court does in fact demonstrate strong dynamics *sui generis* in its decisions and it seems thus insusceptible to serving the interests of the elites, despite the close connection Hirschl postulates between the goals and hopes of these elites and the behaviour of judges. It moreover appears improbable that the internal dynamics that the Belgian constitutional court has shown through its decisions in recent years had been anticipated by them. In any case, in Belgium, as it turns out, the body politic relinquished part of its leeway to the Constitutional Court: Political control of the Court is very limited. So although the Belgian constitutional judges are indeed appointed by the legislative assembly (some are even former assembly members), once appointed they forge their own way. Therefore, Hirschl elitist model cannot fully explain the independent dynamics of judicial constitutional review in Belgium.

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[88] Hirschl's analytical distinction between positive 'claim' rights and negative 'classic' rights (see paragraph II of this article), with negative rights barely imposing obligations on the government according to him, cannot be maintained in practice either. This is because also negative rights can give rise to positive obligations for the state (e.g. in terms of financial claims). If, for instance, heterosexual couples are granted certain rights, the government may be obliged to confer certain benefits on homosexual too, as happened in the South African *Satchwell* case (2002). In this case, the Judges' Remuneration and Conditions of Employment Act denied life partners of gay judges certain benefits which the spouses of heterosexual judges received. The Court ruled this distinction discriminatory. On this, see R. Hirschl, *o.c.*, pp. 122-125. In *Re: Certification of the Constitution of the Republic of South Africa 1996* (case CCT 23/96), para. 77, the Court rightly described the relationship between negative and positive rights as follows: "It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits."

More generally on this point, to Hirschl's theory it is of course crucial that judicial constitutional practice actually meets the expectations of the ruling elite. Otherwise introducing judicial constitutional review makes no sense from the elite's point of view. Yet the jurisdictions we examined in this article show that constitutional courts move independently to a large extent, and that it is far from certain that their actions deliberately further the interests of elites. Moreover, if political stakeholders do indeed act strategically, as Hirschl suggests, they must realize fairly early on that as soon as they have been ousted, new political stakeholders will take centre stage outside their predecessors' control. They will also understand that the new rulers, at least in Hirschl's logic, will control entry to the judiciary and that they will try to use this control to manipulate the staffing of the courts. Those in power will do all this, again in Hirschl's logic, with hopes and expectations that these courts will 'deliver the goods' for them. But why would this expectation hold true? When Eisenhower was asked if he had made any mistakes as US president, he reportedly and famously replied: **"**[T]wo and they're both sitting on the Supreme Court."[89] Courts, in short, do not necessarily do what they are expected to do from the perspective of political interests.

There are other snags in Hirschl's analysis. His choice of case studies, for instance, is revealing. The countries he examined are indeed all strongly internally divided (and, interestingly, without exception have been under direct or indirect British colonial domination): in Israel, there is deep animosity between various Jewish population groups (secular and non-secular); Francophone and Anglophone Canadians are not really on smooth terms; in South Africa, the white minority and the rest of the population each harbored deep resentment; and in New Zealand, tensions between the white population, the Maoris, and non-white newcomers from the Pacific and Asia are growing. In the case of, for instance, Israel, the main area of tension is that between the secular Jewish citizens of European and American descent (the Ashkenazim, who are in control of the political, cultural, and economic structures) and their fellow Jewish citizens from North Africa, the Middle East, Ethiopia, and the former Soviet Union (who are economically underprivileged and mainly, though not exclusively, orthodox in religion). In New Zealand, the affluent and influential population of European origin is locked in discord with the less prosperous population groups whose numbers have grown dramatically in the final quarter of the twentieth century.

These cases can indeed be easily explained as examples of safeguarding, through the introduction if judicial constitutional review, specific strategic interests of elitist sections of the aforementioned societies. But does his explanation hold good for developments in societies that Hirschl does not discuss, such as Spain, where judicial constitutional review was fairly recently introduced?

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[89] Stephen J. Wermiel, "The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record", 11 *Consitutional Commentary*, 1994.

What was the point of constitutional transformation there if not at least also the facilitating and safeguarding of the democratization of its newly established political system? A similar point concerns the foundation of the German *Bundesverfassungsgericht*. The why and when of its establishment are sufficiently well known, as is the relationship between this why and (especially the) when.[90] Wasn't getting behind the past not the main element here, much more than safeguarding the interests of a (former) elite?

All in all, it would appear that Hirschl's thesis cannot be fully supported by evidence from Belgium and South Africa. His theory seems to be too much based on inductive reasoning or on occasional proof, and as a result it can be critiqued as less than universal.

6. AN ALTERNATIVE EXPLANATION

Consider this as an alternative: could legal change by means of introducing judicial constitutional review not just as much be an organic response to a structural failure of a society's political institutions to establish societal peace? Put differently, when essential societal issues cannot be resolved or addressed via the regular political channels, for example because of structural political deadlock in parliament, other bodies (e.g. courts) will be empowered to cut the knots.[91] Extending the competences (powers) of these bodies is then the direct result of a (still) weak or even systematically ineffectual political system. The more vulnerable a political system is in this respect, the more probable it becomes that decisive powers will disperse to bodies outside the regular political system. From this point of view, the establishment of judicial constitutional review could also be a function of an impaired political system; judicial constitutional review can then act as a compensating or corrective mechanism for a political system that is dysfunctional or otherwise in need of support.

In considering such an alternative, Arend Lijphart's political theory could well offer an explanation for the specific institutional configuration of a society's political system and the behavior of the actors shaping that society. Lijphart has termed his model 'consociational democracy'.[92] [93] It means "government by elite

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[90] On this, see, e.g., the recommendable book by U. Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik*, Munich, Karl Blessing Verlag, 2004. See also on all this C. Closa, in 4 *International Journal of Constitutional Law* 2006, p. 582.

[91] On this, see, e.g., C. Guarneri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2002, pp. 161-180. Hirschl too refers to this work (p. 33).

[92] On this, see in particular his *The Politics of Accommodation. Pluralism and Democracy in the Netherlands*, Berkeley, University of California Press, 1968; *Democracy in Plural Societies: A Comparative Exploration*, New Haven, Yale University Press, 1977; and *Democracies: Patterns of Majoritarian & Consensus Government in Twenty-one Countries*, New Haven, Yale University

cartel to turn a democracy with a fragmented political culture into a stable democracy."[94] Such a type of democracy is most often found in societies, as is clear from the definition just cited, that are ideologically or otherwise strongly divided. It was generally assumed that political stability was beyond reach for such societies, but Lijphart has demonstrated that this *nec plus ultra* is not unreachable for them; political *instability* is thus not a predestined terminus. The potentially destabilizing effects of political division in a disunited society are on the contrary likely to prompt the established powers (political actors and other elites) to search for pragmatic ways to deal with societal cleavages other than through the regular political structures. Alternative methods of political accommodation and pacification are thus explored, and judicial constitutional review *might* be one of them.

The Dutch and Belgian[95] societies for the greater part of the twentieth century play an important illustrative part in Lijphart's views and theories.[96] They were both deeply ideologically divided between liberals and socialists, and between Catholics and protestants on the one hand (in the Netherlands) and Catholics and non-confessional groups of society on the other hand (in Belgium). And in Belgium there where moreover the tensions between the different language groups (French and Dutch speaking in particular). The rise of mass democracy did however not lead to the establishment of judicial constitutional democracy in the Netherlands; other means of accommodation were found there.[97] When in Belgium on the other hand judicial constitutional review was

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Press, 1984. Not coincidentally, in 1985 Lijphart recommended politics of accommodation to find a way out of the South African impasse of the day. See his *Power-Sharing in South Africa*, Berkeley (Institute of International Studies), University of California, 1985. See also J. Klabbers, in 16 *European Journal of International Law* 2005, p. 162.

[93] The hallmarks of a consociational democracy are broad government coalitions, political proportionality (in elections and representative bodies, but also in advisory bodies, the civil service, etc.), mutual rights of veto in political decision making, and 'pillarisation'. According to Lijphart, Dutch society from the 1960s onwards was a classic example of both a pillarised society and a consociational democracy. Pillarisation is a term that described the vertical organisation of a society along traditional ideological, religious, and/or politico-economic divides. Pillarised societies are divided in several smaller segments or pillars according to different religions or ideologies. All of these pillars have their own social institutions (broadcast companies, newspapers, schools and universities, sports clubs, mutual sickness funds, etc.).

[94] A. Lijphart, "Consociational Democracy", 21 *World Politics* 1969, p. 216.

[95] Lijphart considered Belgium "the most thorough example of *consociational democracy*." A. Lijphart (ed.), *Conflict and Coexistence in Belgium*, Berkeley, Berkeley University Press, 1981, p. 1.

[96] Recently, Lijphart's views were also used to help explain the process of legal change concerning the issue of euthanasia in Belgium, in M. Adams, J. Griffiths and H. Weyers, *Euthanasia and Law in Europe*, Oxford, Hart Publishing, 2008, Chs. 7 and 8 especially.

[97] See further in this and the next paragraph on these other means. See also J. Klabbers on this in 16 *European Journal of International Law* 2005, p. 162.

indeed established it was mainly because of a fear that the country would otherwise become ungovernable because of growing tensions between the different language groups. Both these countries therefore do not seem to fully fit the elitist explanatory model by Hirschl.

Even though today some of the characteristics of a consociational society[98] no longer appear to be the most characteristic or dominant features of these societies, Lijphart's theory might still be relevant today. And this is so, because his perspective is much more systemic than Hirschl's. Lijphart's theory offers a *functional-institutional* view of how political actors in a democracy behave and relate; political courses of action do not only follow from the power struggle as perceived by the privileged classes (the elite), as Hirschl argues, but also from considerations of political practicability. So understood, Lijphart's theory does not condense the drivers of constitutional change and accommodation to personal motives to the same extent that Hirschl's theory does. Lijphart focuses not so much on elitist distrust of majoritarian rule as on keeping the political system 'operational'.

In line with Lijphart's reasoning it could well be argued that for example the renowned late 20th-century Dutch 'polder model' (consultation model) is an offshoot of a consociational democracy. The phrase 'polder model' has uncertain origins, but is mostly used to describe the typically Dutch version of more or less formalized consensus policy, developed in the 1980s and 90s in socio-economic affairs.[99] It is a short hand, referring to the typical Dutch 'polders'[100], for an institutionalized form of cooperation and consensus seeking between political actors, social partners and other societal organizations.[101] So following the gradual dissolution of the old way of organizing Dutch society, the Dutch system of political decision-making found new (mostly distinctly non-judicial) ways to channel potential bottlenecks in the political decision-making processes, as will also become more clear in the discussion below. The Dutch example can be seen as a clear indication that functional or institutional approaches, like Lijphart's, can also help explain the way a political and legal system is organized and functions.

It is true that functional or institutional explanations such as Lijphart's do not very specifically provide for the actual moment or timing of the introduction of judicial constitutional review. Even stronger, the Lijphart model itself does not even provide specifically for the creation of judicial constitutional review as such.

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98 See fn. 93.

99 J.J. Woldendorp, *The Polder Model: From Disease to Miracle? Dutch Neo-Corporatism 1965 – 2000*, Amsterdam, doctoral dissertation 2005, p. 28.

100 A 'polder' is a low-lying piece of land, which was originally flooded by water and was later won as land. It is enclosed by embankments to prevent the land from flooding. It is a very typical (though not exclusive) Dutch phenomenon.

101 The term was however quickly also adopted for a broader meaning, i.e. pragmatic consensus decision-making in the face of diversity and plurality in general.

It rather suggests reasons why there *might* be a need for its creation, and, more generally, provides explanations for the institutional build up of a given society. Hirschl, on the other hand, claims that his thesis has the advantage of being able to better explain the timing of the introduction of judicial constitutional review, which according to him makes it a better theory. He alleges that he can more accurately explain why judicial review is introduced *at a specific moment*.[102] That moment occurs when the elite detect a politico-economic-cultural interest in intervening in the normal political process (and before a competing group comes into power). In this view, the cooperation of the elite is a *conditio sine qua non* for the successful realization of legal transformation; at some point, the elites must be ready to accept the conversion. And this point is reached *before* the masses, which the elites resist and whom they fear, really seize power, as a result of which their value system is clearly at risk.

But who would deny that in most cases the support of elites, political or otherwise, is indispensable to achieving institutional change? However, Hirschl necessitates the rational nature of the political elite such that they would *only* take actions in pursuit of their own interests. Yet as we saw before, it turned out that at least in Belgium and South Africa there is counterproof for the universality of this claim. In the end, the fundamental weakness of Hirschl's explanatory model is its one-sidedness. It seems unable to accommodate explanations that do not rely heavily on the supposedly calculated interests of political, economic and cultural elites in a democratic society. What therefore is needed is a theory that is less exclusive than Hirschl's and can add to it. Lijphart's theory might well offer this.

7. AND WHAT ABOUT THE NETHERLANDS?

As indicated in the introduction to this article, in recent years the debate in the Netherlands on the introduction of judicial constitutional review has gathered pace. Although the topic had been on the Dutch political agenda on several occasions since 1848 already, it gained in significance when an opposition member of parliament submitted a legislative bill to partially lift the ban on constitutional review in Section 120 of the Constitution.[103] Never before has a proposal concerning this issue progressed as far as it has now. The purpose of the proposal is not to repeal the ban on judicial constitutional review laid down in Section 120 of the Dutch Constitution, but rather to add an exception to it, empowering the judiciary to review acts of parliament against constitutional provisions that protect most of the fundamental rights encapsulated in the Dutch

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102 R. Hirschl, *o.c.*, p. 36.

103 *Parliamentary Proceedings* II, 2001-2002, 28 331, no. 2. On the Dutch history regarding judicial constitutional review, see C.A.J.M. Kortmann, *Constitutioneel recht*, 5th ed., Kluwer, Deventer, 2005, pp. 374-381.

constitution. The effect of the amendment would be that courts must refuse to apply legislation that is inconsistent with these provisions.

The obvious question now is why judicial constitutional review has not already taken root in the Netherlands. A partial answer to this question can be attempted by combining elements from the preceding discussion.

In view of what has been set out above, the introduction of judicial constitutional review in the Netherlands could be valid from an abstract point of view, yet redundant from a concrete politico-institutional perspective. Dutch institutions and society have long availed themselves of channels other than parliament or judicial constitutional review to deal with social or political conflicts and interests, including the protection of fundamental rights. Pivotal organizations dealing with these topics include the Council of State, the Social and Economic Council, the Auditor's Office, the Scientific Council for Government Policy, the High Council of the Judiciary and other public advisory and decision-making bodies ('poldering' bodies).[104] This fact tones down one of the essential arguments put forward in the current proposal to introduce judicial constitutional review, which is that the Netherlands would be the better for having an extra link in the review chain leading to new legislation or regulation; essentially the argument that an extra-legislative check is necessary to secure proper checks and balances.[105] More particularly it is argued that the dwindling influence of parliament makes judicial constitutional review necessary in order to safeguard or enforce the protective function of the law. But from a systemic perspective there would not appear to be a dearth of checks and balances in the Netherlands, despite the courts not being able to review the constitutionality of legislation. Another reason put forward to advocate the introduction of judicial review in the Netherlands is that it would be consistent and logical to do so: this is because Section 94 of the Constitution recognizes, and even prescribes, the judicial review of legislation against binding provisions of *international* law, leaving some to argue that it would only be consistent to allow courts to examine acts of parliament for compatibility with the country's own Constitution as well.[106] However, this argument works both ways, as it can be used to support the introduction of judicial review as well as to discourage it. After all, with judicial constitutional review with respect to fundamental rights as encapsulated in international law in place, why opt to increase the competence of the courts?

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104 See on all this C.A.J.M. Kortmann, *o.c.*, pp. 286-292, pp. 541-544. The Council of State for example among other things advices on the legislative quality (including the constitutionality) of pending bills.

105 *Parliamentary Proceedings* II, 2001-2002, 28 331, no.3, pp.13-15.

106 See G. van der Schyff, "Rethinking the justification for the constitutional review of legislation in the Netherlands. A critique of the 'treaty argument' and thoughts on the way forward", in R.A.J. van Gestel & J. van Schooten (eds.), *Europa en de toekomst van de nationale wetgever*, Nijmegen, Wolf Legal Publishers, 2008, p. 129.

So the question is what, from a systemic perspective, problem the introduction of judicial constitutional review in the Netherlands resolves. Even though the arguments supporting the proposal might be considered laudable from an abstract point of view, the relevance and added value of judicial constitutional review in political practice and to the quality of legal protection (guarantees for citizens) are not beyond dispute. Introducing judicial constitutional review would thus add yet another layer to the already complex Dutch system of checks and balances.

If introducing judicial constitutional review would nevertheless succeed in the Netherlands (which we do not expect, to be sure), it is not inconceivable that an overburdened system of checks and balances could develop rejection symptoms, particularly regarding the Senate. It could easily be this 'upper' House of Dutch parliament, with its core duty of verifying the quality of legislation (including the protective function of legislation), to be the first to fall overboard.[107] After all, the Senate's right to exist is already frequently being challenged as it is.[108]

But surely, one might argue, constitutional review by the Senate or other institutions on the one hand and the judiciary on the other do differ fundamentally. The former is pre-emptive and the deliberations about constitutional compatibility are open to public scrutiny (through political and parliamentary debate), whereas the latter is retrospective and less public (discernible only in the grounds of a judicial decision). Why treat them as interchangeable? From a systemic perspective, however, such distinctions are not particularly germane, because what is relevant here is whether the political system as a whole (macro perspective) is perceived to demonstrate compositional balance and is able to addresses societal issues. As to this, the Netherlands seems relatively well balanced with the legislature being checked by a variety of bodies such as for example the Council of State.

8. CONCLUSION

How must the establishment of judicial constitutional review in a given jurisdiction be perceived? What reasons did the principal actors in Belgium and South Africa have for introducing judicial constitutional review? To answer these questions, events must first be unfolded and subsequently appraised. In this article, we have attempted just that. The final assessment rests on an interpretation

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107 Explaining this particular chamber's function, see C.A.J.M. Kortmann, *o.c.*, pp. 237-239.

108 Whether or not this criticism is justified is not the issue here. Suffice it to say here that dissenting voices are not few and far between. See also H. Broeksteeg and E. Knippenberg, "The role of the Senate in the legislative process", *Maastricht Journal of European and Comparative Law* 2006, p. 219.

of the context and motives relating to the establishment (and development) of judicial constitutional review in Belgium and South Africa, and the possible introduction of it in the Netherlands. In this article we tried to show that the introduction of judicial constitutional review might just as well be the result of a particular or concrete systemic need of a tangible political system, in the fashion of Lijphart, and cannot simply be ascribed *exclusively* to the covert strategies of a particular societal class that wants to protect its value system, as Hirsch argues. Applied to the Netherlands that particular systemic need for the introduction of judicial constitutional review seems not pertinent, which could probably explain its absence to date.

On a parting note, we wish to make it clear, perhaps superfluously, that in this article we have not meant to make an abstract or principled case either for or against judicial constitutional review. We have only been trying to develop a *descriptive* explanation for why and when judicial constitutional review will as a matter of fact emerge. To be able to do so, we drew on political theories by Hirschl and Lijphart. And although Lijphart himself argues that a consociational democracy is superior in quality to a regular majoritarian (parliamentary) democracy – thus upgrading his descriptive and explanatory theory with a prescriptive-normative component – we did not set out to make such qualitative statements. Nor did our research lend itself to such a purpose.