Although the title of this paper may seem extremely broad, a very particular topic is addressed in this paper. It focuses on the extent to which the Dutch legal order recognises norms of constitutional and international law as binding not only on the legislative and regulatory authorities, but also on private parties when acting either contractually or unilaterally. In other words, it examines whether constitutional and international law can impose limits on party autonomy under Dutch law.

The paper has been divided into four sections. In the first section we will identify the material constitutional and international norms limiting party autonomy which have been applied in cases before Dutch courts concerning contracts and torts. In Section 2 we will elaborate on the manner in which these norms are being enforced before Dutch courts. The method of these norms producing effect as well as the circumstances of enforcement will be discussed. Subsequently, the non-judicial enforcement mechanisms ensuring respect for the constitutional and international limitations will be discussed in Section 3. In Section 4 finally the theoretical underpinnings for the enforcement of the constitutional and international limitations are addressed.

1 Constitutional and international limitations on party autonomy

1.1 Constitutional Norms

In this paragraph we will describe whether under Netherlands law and if so, to what extent constitutional norms limit the freedom of a person (a) to enter into contracts with other private parties and (b) to take unilateral legal acts.

1.1.1 Public authority acting as a “private party”

Whilst this paper focuses on “private parties”, it should be noted that under Netherlands law it is accepted that the State and other public entities are also, subject to certain conditions, subject to the law of contracts and the law of torts, as applicable to private parties in accordance with the Civil Code.

In this regard attention should be drawn to Article 3: 14 Civil Code, according to which:

“A right which a person has by virtue of the civil law, may not be exercised in violation of the written or unwritten rules of public law”.

It would appear that it is the prevailing opinion that this provision is addressed not to any “person” generally, both public and private, but rather specifically to public
authorities. Consequently, it may be submitted that in effect, this provision is constructed as ensuring that public authorities, also when they act under the guise of private party capacity, should fully comply with their public law duties and respect the specific public law constraints imposed upon them.

An illustrative case in this regard relates to the refusal by a municipality, acting in its capacity as the owner of a theatre, to conclude a contract for a public “hypnosis-show” in that theatre. As it was established that the refusal was based on the finding by the municipality that “hypnosis as a public show would not be in accordance with the Christian faith values which in that municipality were generally shared by the population”, the Hoge Raad (Netherlands Supreme Court) ruled that this amounted to a ban on the basis of the content of the show and that it was therefore contrary to the fundamental right to the free expression of opinion, as guaranteed in Article 7 of the Constitution. (HR 26 April 1996, AB 1996, no. 372, m.o.v. Th.G.D. Rasti Rostelli)

Again, a case where a Congresshall refused to let a room to an association which was deemed to sympathise with South African “Apartheid” gave rise to the issue as to a possible infringement of the freedom of assembly, as guaranteed under Article 9 of the Constitution. The Court found that it was relevant to the case that 30% of the share capital of the Congresshall was owned by the Municipality of The Hague, which appointed 50% of the members of the Supervisory Board. In that light the Court expressed doubts as to whether the legal relationship between the Congresshall and the association concerned could be qualified as “horizontal”. It went on to say: “If one wishes to confirm this, then one has to admit in any case a horizontal effect of the constitutional fundamental right”. On that basis an injunction was issued to waive the tortuous refusal (President Rechtbank (District Court) The Hague, 9 June 1987, AB 1987, 580).

Another noteworthy judgment in this regard is that of the Court of Appeals Leeuwarden of 1983, in which the latter found that public authority may make use of private law (contractual) means beyond what would be allowed under its public law powers, provided it would not, had it acted on a public law basis, have acted in violation of a provision of a higher rank, such as in c a s u Article 10, para 2, of the European Convention of Human Rights (ECHR) (Court of Appeals Leeuwarden, 23 March 1983, AB 1983, 336).

1.1.2 Private parties as such

As mentioned above it is generally understood that Article 3: 14 Civil Code is not addressed to private parties as such. As far as the latter are concerned, the issue has to be addressed on a different basis, therefore.

The issue as to what is the proper legal basis for the effects of constitutional and international norms, more particular fundamental human rights, on relations between private parties will be addressed in Section IV below. At this stage it seems adequate for the purpose of relating the state of affairs in practice, to refer to this as the issue of horizontal effects of fundamental human rights.

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It would appear fair to say, that the courts in The Netherlands tended, through the years, to be rather reticent in their recognition of “horizontal effect”. It should be stressed, however, that this did not leave necessarily the substance of fundamental rights unprotected at a “horizontal” level. Rather, reference was made, in some instances, to general principles and an equitable balancing of interests. Examples of such approach may be found in the following cases:

- It has been established that a religious congregation acting as landlord cannot refuse to renew a lease contract with a tenant on the ground that the latter has ceased being a member of that congregation. Rather than a direct reference to the freedom of religion (Article 6, Constitution) this judgment was based on an equitable balancing of interests of both sides. In this regard it should be noted that the court distinguished between a situation where a lease contract would be concluded for the first time and that of a renewal of such contract, the interest of the lessee clearly being of more relevance in the latter case as opposed to the former. (Hof (Court of Appeal) Arnhem 15-11-1958, NJ 1959, 472; Hof Arnhem 24 June 1958, NJ 1959, 473).

- The freedom of education (Article 23(2), Constitution) was at issue in a case where it had been stipulated in a contract that under certain specific circumstances one party to the contract would be barred from certain teaching activities (“Mensendieck”). Again, the case was adjudged in terms of “public order and fairness” (“openbare orde en goede zeden”), rather than those of a direct applicability of the fundamental right to education as enshrined in the Constitution. (HR 31 October 1969, NJ 1970, 57, m.o.v. G.J.S.) (a second judgment by the Hoge Raad in the same litigation related to the First Protocol of the ECHR, see p.7).

- On the other hand, in that same period an instance of an explicit reference to a fundamental right is to be found in a judgment of the Court of Appeals in Amsterdam of 30 October 1980 (NJ 1981, 422). In that case the court held that under the circumstances a refusal to accept an anti-Apartheid advertisement, was an infringement of the freedom of expression although this refusal was based on reasons related to the form, rather than to the content (“Outspan”).

In some other cases, the courts appeared prepared to hear argument based on fundamental rights but dismissed the claims on the facts. Against that background it is interesting to note that at the occasion of the revision of the Constitution which entered into force in 1983, not only was a catalogue of “fundamental rights” put into prominence at the beginning of the text of the Constitution, but also the issue of “horizontal effect” was addressed in the parliamentary discussions as a specific issue. Whilst it would seem that there was consensus as to a more flexible approach to the issue of “horizontal effect”, no clear guidelines could be distilled from the debates and the issue was in effect left to be dealt with by the courts on a case-by-case basis. As it is, as from 1984, whilst the courts may have been more inclined to act upon a “horizontal effect” of fundamental rights, this by no means meant that this was now
the dominant line. Accordingly, there is a mixed harvest of cases, some making specific reference to one fundamental right or another, others relying on the more “classic” balancing of interests within the canons of interpretation. An instance of the former is the judgment of the Court of Appeal, Amsterdam of 17 February 1984 (NJ 1985, 96). It was alleged that the defendant Electricity company acted in tort in that it discriminated against certain migrant persons living in campers by requiring certain additional contractual guarantees as a condition for the supply of electricity to those persons. On the facts it was established by the court that there was no instance here of treating cases differently, “as would have been prohibited by virtue of Article 1, Constitution” On the other hand, in its judgment of 30 March 1984 (Inan v De Venhorst, AB 1984, 366) the Hoge Raad tested a claim for unfair dismissal because of absence from work for religious reasons, not directly against the fundamental right to freedom of religion, but rather assessed whether this absence could be deemed a “pressing reason for dismissal” under labour law provisions of the Civil Code. A typical instance of judicial discretion in this regard is to be found in the Hoge Raad’s judgment on a plea to the effect that the fundamental right to a free choice of work implied that an explicit written stipulation in the labour contract would be required under the circumstances of the case. The Court held that “this view would grant to this fundamental right a wider horizontal effect than would be warranted” (HR 1 July 1997, NJ 1997, 695, Kolkman). To wind up on this section, attention should be drawn to the sequence of judgments in what is referred to as the “aids-test case”. This related to a case of rape where the victim fearing that she might have been infected with HIV first had herself tested (with negative outcome), but was then informed that for a conclusive result she would have to be tested a second time. Not being able to face the psychological stress of a second test she then sued for the perpetrator of the rape to have himself tested, on his part, which the latter refused to do. As it is, each side in the ensuing legal battle relied for its part on the same fundamental human right enshrined in the Constitution, in respectively Article 10 (respect for private life) and Article 11 (inviolability of the human body).

- In the first instance the court recognised that each side indeed could rely on those fundamental rights and that accordingly the respective interests of each side had to be weighted against each other. On that basis it found for the plaintiff (the victim of the rape). (Pres. District Court Amsterdam, 11 July 1991, KG 1991, 242; NJCM Bulletin 16.6 (1991), p. 560 e.v., m.n. A. Sas).

- On appeal the Court of Appeals in Amsterdam appears to deny that in the issue of obtaining conclusive evidence on the aids-risk as a consequence of the rape the fundamental human rights of the victim of the rape are at stake, which leaves only the defendant in a position to rely on his fundamental rights not to be subjected to a HIV-test against his will. Accordingly, the action by the victim of the rape was dismissed. (Court of Appeals Amsterdam, 5 March 1992, RN 1992, 296).

- On further appeal (cassation) the Hoge Raad, however, in its turn found for the
plaintiff. The supreme court based itself on the finding that both sides could indeed each rely on the fundamental human rights referred to and that accordingly, in order to come to a solution of the conflict, a concession on the right of one of the opposing parties had to be accepted. Whereas the Court of First Instance had not further explicited the basis for its weighting of the interests at stake, the Hoge Raad for its part held that the concession to be required from one of the opposing parties had to be based on the principles relating to tort law under the Civil Code. More particularly, the court relied on the principle that the perpetrator of a tort-action is bound in law to limit as much he can the damaging consequences of his action. On that basis, derived from civil law, the fundamental human right of the defendant, enshrined in the Constitution had to suffer an exception in the case at hand (Hoge Raad, 18 June 1993, RvdW 1993, 136; NJ NICM Bulletin 18-7-1993 p. 786 m.n. L.F.M. Verhey).

1.2 International norms

In this paragraph we will address the question whether under Netherlands law and if so, to what extent international norms limit the freedom of a person (a) to enter into contracts with other private parties and (b) to take unilateral legal acts.

With regard to this question it should be stressed in the first place that the Netherlands Constitution expressis verbis provides for the precedence of directly effective binding provisions of international treaties and of decisions of public international law organisations (Articles 93 and 94). Accordingly the Dutch courts are bound to assess the possible conflict between self executing provisions of those international law instruments and provisions of Netherlands national law. On the other hand, non-written public international law and non-self executing provisions of written public international law instruments will not be taken into account on the same basis (HR 6 March 1959, NJ 1962, no. 2).5

Within the context of the present paper it has been decided to leave undiscussed the impact which the law of the European Union, more particularly the law of the European Community (formerly the European Economic Community) has had on the legal relations between private parties in the Netherlands. Indeed, that body of law permeated the Dutch legal system in such detail and in such scope that any meaningful discussion would require a separate report in its own right. Just to mention two instances, both with regard to competition law as well as the labour law regime as to the equal treatment of men and women the position of private parties has been fundamentally affected by EC law as it has developed over the years. Perhaps more important in this regard is the consideration that the body of EC law does not for its effect in Dutch law, depend on the provisions of the Dutch Constitution (see Court of Justice, 5 February 1963, Case 26/62, (1993) ECR 1, (“Van Gend & Loos”) and 15 July 1964, Case 6/64, (1964) ECR 585 (“Costa/ENEL”). For that matter, the Dutch courts have generally accepted the doctrines of autonomy and supremacy of EC Law as well as the enforcement

2. More on the technique of enforcing international norms in the Dutch context p. 11-16.
mechanisms of direct effect, conform interpretation and state liability. On the other hand, attention here will mainly focus on the norms which can be derived from the European Convention on Human Rights (ECHR). As a matter of fact, it is submitted that this body of law has by now been recognised as affecting legal positions in the Netherlands on a regular basis. By contrast it has been found that the International Covenant on Civil and Political Rights, with an exception for Article 26, does not play a meaningful role in current developments in Netherlands case law on “horizontal effect” of fundamental human rights. It has been suggested that this can be explained by the fact that contrary to the ECHR there is no international judiciary institution provided for, and that the Dutch courts apparently feel they can achieve acceptable results already on the combined basis of the ECHR, the Nethrlands Constitution and general principles of Dutch civil law.

1.2.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Whilst for obvious reasons focus here is still most frequently on “vertical” relations between private parties and public authority, also “horizontal” disputes between private parties inter se have come to be increasingly affected by those Convention-norms.

When considering now how the ECHR (including of course the Protocols attached thereto) has come to condition contract law and tort law between private parties in The Netherlands, it should be noted that we have chosen not to discuss here those provisions of the Convention which relate to family-relations, more particularly Articles 8 and 12. Indeed, whilst these are essentially private party-relations, the issues which arise in that context concern nevertheless involvement of public authorities (here also including the courts) with the public regulation of family relations. This being said the following cases may be mentioned, in a sequence according to the relevant ECHR-provisions.

Article 4: Prohibition of slavery and forced labour

- In a case brought by a professional football player who found himself hindered in a transfer by the rules of the national Netherlands football league, the Hoge Raad was prepared to hear the argument based on Article 4, but rejected it on


Article 5: Right to liberty and security
- It was found that within the framework of insolvency proceedings the courts, when deciding on the possible detention of the insolvent party, should weigh the interests served by the detention against the right to liberty of the person concerned (HR 2 December 1983, NJ 1984, 306).

Article 6: Right to a fair trial
- Whilst insolvency proceedings are also covered by Article 6, the principle of a “public hearing” should, in principle, suffer an exception in the interest of the debtor whose insolvency is sought to be declared, unless one of the parties to the proceedings requests a public hearing and no valid grounds are advanced against such request (HR 20 May 1988, NJ 1989, 676).

Article 8: Right to respect for private and family life
- It was found that the refusal by a private school to continue admission of certain pupils who refused to attend religious instruction which was a regular item of the curriculum did not amount to non-respect for private and family life within the sense of Article 8 (HR 9 April 1976, NJ 1976, 409).
- Within the framework of insolvency proceedings certain inroads upon the respect for private life may be justified in the light of the protection of the interests of the creditors (HR 21 February 1984, NJ 1984, no. 63, p. 394).
- Tortuous liability was found by the Hoge Raad in a case where a private individual had passed on certain damaging information on his neighbour to a public authority which thereupon stopped the payment of certain allowances to the latter. Indeed the defendant was found to have infringed the right to respect for privacy and family life and to have therefore acted in tort (HR 9 January 1987, NJ 1987, 928).
- If it is established that the publication of a picture infringes upon the respect due to private life, this infringement then represents a “reasonable interest” within the sense of Article 21 Auteurswet (Copyright Act) on which a ban on publications can be based (HR 1 July 1988, NJ 1988, 1000).
- The Court of Appeals, ’s Hertogenbosch, was confronted with a dispute over a request for access to information about the identity of the parents of the applicant which information was in the hands of a social medical institution which had, at the time, assisted the presumed mother, since deceased. The Court found that it had to balance three categories of legitimate interest against each other:
  - the interest of the applicant to know the identity of her parents (protected under Article 8 ECHR);
  - the public interest to protect the confidentiality of information received in confidence by institutions such as the defendant from their patients;
  - the interest of persons in a position such as the presumed mother to see her private and family life protected, again protected under Article 8 ECHR.

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The Court found that none of the three categories of interest should prevail over the two others in all circumstances. In particular, absolute protection for the right to information about the identity of the parents would have such far-reaching consequences, that such absolute protection could only be based on an explicit statutory provision to that effect (Court of Appeals, 's Hertogenbosch 18 September 1991, NJ 1991, 796).

Article 9: Freedom of thought, conscience and religion
- It was found in general terms that on the basis of Article 9, par. 2, it must be concluded that the law of torts can provide a legal ground or limitations upon the freedom of thought, conscience and religion (HR 5 June 1987, NJ 1988, 702).

Article 10: Freedom of expression
- In a case relating to TV broadcasting of football matches the Hoge Raad found that Article 10 does not impose as such a ban on the refusal of data to the newsgathering media (HR 23 October 1987, NJ 1988, 310).
- In a judgment of 1988 the Hoge Raad found that under certain circumstances the interests protected under Article 8 and Article 10, respectively, will have to be balanced against each other (HR 4 March 1988, NJ 1989, 361).

Article 2, First Protocol
- In 1988, the Hoge Raad was confronted with a dispute concerning the refusal by the Maimonides Lyceum to admit a boy who was found not to qualify under the rules for admission reserved to Jewish children according to the guidelines of the Halacha.

As to the impact of Article 2 First Protocol, ECHR the Hoge Raad found that "parents were entitled to respect for their choice of education based on certain principles corresponding to their religious and philosophical convictions, but do not have a right vis-à-vis a private institution which provides education on this basis, to have their children admitted to that education" (HR 22 January 1988, AB 1988, no. 96).

1.2.2 European Social Charter

In a case adjudged by the Hoge Raad, the Court relied on Article 6(4) of the European Social Charter, “on which employees and employers can rely directly” to find that under the circumstances a strike by employees of the Dutch railways was not illegal, notwithstanding certain (alleged) political overtones (HR 30 May 1986, NJ 1986, no. 688, N.S. v Vervoersbond FNV e.a.).
1.2.3 OECD Guidelines for Multinational Enterprises

Whilst as has been indicated above, it is submitted that the case of the ECHR provides sufficient illustration for the impact of international treaty norms on private agreements and tort actions under Dutch law, attention should be drawn also to the fact that under specific circumstances such impact has also been found for certain rules which on the face of it were not intended to be binding. The prime illustration of this is the so-called BATCO-case which was adjudged by the Court of Appeals, Amsterdam on 21 June 1979, (NJ 1980, 71). The Court found that the closing by BATCO Nederland of its Amsterdam factory was illegal under the circumstances and should be blocked by an injunction. Amongst the circumstances relied on by the Court, specific attention should be drawn here to the so-called Guidelines for multinational enterprises (Annex to the Declaration of 21 June 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises). These Guidelines provided i.a. that:

“Enterprises should (...) in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees (...) and co-operate with the employee representatives (...) so to mitigate to the maximum extent practicable effects”.

As it is, the Chairman of BAT Industries (the parent company of BATCO Nederland) had gone on record as stating:

“The standards they (i.e. the Guidelines) set are very much in line with our own established policies in these matters and we certainly support their efforts to have then widely applied”.

It was under those circumstances that the Court found:

“It is not without significance that BAT Industries has accepted the OECD Guidelines as guideline for its policy. These Guidelines too provide that in a case like the one under consideration “consultations” with the representatives of the employees should take place. Under these circumstances, the termination by BATCO Nederland of the consultations with the unions and the works council is a serious neglect of its obligation to consult. Therefore, BATCO Nederland acted in violation of fundamental principles of responsible entrepreneurship. The decision of BATCO Nederland to close its factory in Amsterdam, taken in violation of these principles, therefore is to be considered as mismanagement and should be annulled.7

1.2.4 General principles of public international law

This translation has been taken from André Nollkaemper, Public International law in Transnational Litigation Against Multinational Corporations: Prospects and problems in the Courts of The Netherlands, in M.T. Kamminga and S. Zia-Zarific (eds) Liability of Multinational Corporations Under International law, 200 (p. 265).
In a case which received rather wide publicity in several regards a number of agricultural enterprises in The Netherlands had sued the French Potassium Mines in the Alsace before the Dutch courts on a claim for damages for pollution of the Rhine from which they took the water necessary for the exploitation of their enterprises. At subsequent levels of proceedings this case gave rise to issues related to the impact of international law on tort liability before the Dutch courts. In the first place, it had been held in the judgment in first instance by the district court that the general principle of public international law that a state may not use its territory for activities which cause damage to another state, should find application also between private parties. Moreover it found that infringement on this general principle provided a basis for claims for damages between private parties, also. (District Court Rotterdam, 8 January 1979, NJ 1979, no. 113; 16 December 1983, NJ 1984, no. 341). This judgment was quashed on appeal, where the case was decided on the basis of Dutch national law alone (Court of Appeals The Hague, 10 September 1986, TMA 1987, 15).

2 The judicial function in enforcing constitutional and international norms

2.1 Extent of intervention by the courts

This paragraph deals with the extent to which national courts are expected to intervene to ensure enforcement of the constitutional and international norms limiting party autonomy.

Preliminarily we can say that the parties to a dispute can enforce the norms limiting party autonomy identified above before Dutch courts. All Dutch courts are entitled (and obliged) to apply these norms, as these norms are binding on all authorities (including courts). Moreover, for neither set of rules, constitutional or international, there are special courts or special procedures. National procedural law and national remedies are used for the enforcement and protection of constitutional and international norms and limitations.

2.1.1 Constitutional norms

Dutch constitutional law distinguishes between classic fundamental rights and liberties and social and economic fundamental rights. The first category of rights consists of directly applicable rights, which may be enforced before Dutch courts, either as a 'shield' or as a 'sword' against alleged violations. The majority of the social fundamental rights, however, cannot be invoked in court as they are considered to be instructions addressed to the public authorities. As already discussed above, before 1983 Dutch courts generally denied horizontal

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8. An example of application of social fundamental rights is to be found in HR 14 April 1989, AB 1989, 486. Also the social fundamental norms may play an indirect role in judicial procedures, e.g. in case of discrimination in the application of the social right.
effect of constitutional rights. However, as illustrated in the previous paragraph, in the past decades the judiciary realised constitutional norms could also be relevant in horizontal relations. Fundamental rights were enforced via the interpretation of civil law concepts, such as public order and fairness/moral (‘openbare orde en goede zeden’), and general principles, in which cases the courts often proceeded to a weighing of interests of the parties. In legal literature difference of opinion existed as to whether these kind of applications of constitutional norms qualified as horizontal effect of constitutional rights or as the effect of general principles of law.  

During the constitutional reform of 1983 the government explicitly asserted that the rights also apply when the government is acting as a private party. It was also acknowledged that fundamental rights could also operate between two private parties. This was instilled by the idea that fundamental norms apply not only vis-à-vis the authorities but also vis-à-vis any person in society. Therefore, constitutional norms may affect the rights and obligations of (groups of) individuals vis-à-vis each other in private law. The constitutional rights and freedoms of individuals are thus protected against violations thereof by other individuals or private organisations and may be invoked against other individuals.

Advocates of horizontal effect have also argued that since parties to a contract are their own and each other's 'legislator' fundamental rights needed to be taken into account. On the other hand, horizontal effect causes tension between the idea that every subject of law is in principle equally able to shape the legal relation as it sees fit, i.e. the freedom to enter into contracts - which may be qualified as a fundamental right in itself -, and other fundamental rights. What is clear however is that the rights and obligations stemming from (other) fundamental constitutional norms may limit party autonomy, one of the tenets of private law. In 1983 the government also widened the concept of horizontal effect. Several forms of effect, apart from direct literal application, where the constitutional norm is involved in the judicial assessment in one way or another, are considered to be horizontal. The application of the fundamental norm 'as such' (as a mandatory norm with clearly defined restrictions) is referred to as direct horizontal effect, the other variations are referred to as indirect horizontal effect. The government discerned a gliding scale of indirect application of fundamental norms ranging from fundamental norms constituting 1) a norm of instruction for the legislator to ensure in the horizontal context, 2) a factor of the interpretation of civil law concepts and open terms (such as ‘goede trouw’, ‘redelijkheid en billijkheid’ en ‘maatschappelijke zorgvuldigheid’), 3) an interest that needs to be weighed in a general weighing of interests of parties, to being 4) an expression of a legal principle which may be disregarded only in specific circumstances. It was left to the courts to determine

12. Ibid. p. 42-44.
when a form of horizontal effect presented itself. The potential of the horizontal effect of fundamental norms is vast: be it in the sphere of family life, labour law, freedom of association, rent law etc.

Jurisprudence on constitutional review in the horizontal context provides us with a mixed picture, as situations in which constitutional norms play a role differ considerably. On the one hand the horizontal relation that is being reviewed may vary, from private law obligations either resulting from the law (such as tort) or from contract, to family law obligations and from relations between employees. On the other hand the standard of review varies. Although some cases attest to the acceptance of direct horizontal effect of fundamental norms, in others Dutch courts show their tendency to resolve the issue via indirect effect. It is unclear why the courts recognised horizontal effect in some cases and denied it in others. Radical changes in Dutch case law after 1983 can not be discerned. No coherent conclusions can be drawn so far.

In all remedies available for individuals in order to obtain judicial protection constitutional review is possible and imperative. Dutch courts may thus adjudge the constitutional compatibility of contracts and assess whether an individual act infringing constitutional norms constitutes a wrongful act.

A general aspect, which is relevant here, relates to the place of constitutional and international norms in the hierarchy of norms to be applied by the courts in the Netherlands. In so far as this relates to Acts of Parliament a sharp distinction is to be made between the position of constitutional norms on the one hand and international norms, on the other hand. Indeed, whilst of course the Constitution is binding on all public authorities, according to Article 120 of the Constitution no constitutional review of Acts of Parliament by the courts is allowed for. As there is no Constitutional Court, constitutional review is indeed reserved to the legislator himself, as the emanation of the sovereignty of the people. It should be stressed that this applies only to the ultimate legislator himself, i.e. the Crown and Parliament together, and not to any form of derived or delegated legislative power. The latter, therefore, are always subject to judicial review under the Constitution (as well as under the relevant Acts of Parliament). According to the Supreme Court in the Harmonisatiewet case article 120 Constitution comprises the prohibition to review the compatibility of Acts of Parliament with unwritten (fundamental) general principles of law. In an earlier case (Sproevliegtuigen) the Supreme Court decided however that legislative acts of lower authorities could be reviewed as to their compatibility with unwritten (fundamental) principles of law. On the other hand the Netherlands Constitution has enshrined in its Articles 91 and 93 a moderate monist system. International law, written as well as unwritten law, has domestic validity and can be applied by Dutch courts without any transformation being necessary. Moreover, according to article 94 of the Constitution directly

effective provisions of treaties and of resolutions by international institutions take precedence over conflicting national law. It is a moderate system because only provisions that are ‘binding on all persons’ take precedence and parliamentary ratification and publication is needed before these provisions can be applied directly before Dutch courts. Dutch courts are not entitled to question the validity of treaties. It is for the Parliament to decide whether a treaty is in conformity with the Dutch Constitution.

The restricted constitutional review of Dutch courts has stimulated the application of directly effective international human rights before the Dutch courts. When an individual is confronted with an Act of Parliament which he/she considers to be incompatible with the Constitution, he/she will have to invoke a comparable directly effective treaty provision, even if the constitutional right offers more protection.

2.1.2 International norms

In the Netherlands international law may be enforced via the mechanisms of direct and indirect effect.

**Direct effect**

Individuals can only rely upon international norms before the Dutch courts if the provisions of a treaty (or of a resolution by international institutions) are considered to be ‘binding on all persons’ or rather, have direct effect. This wording means that when a provision contains unequivocal norms, which can be applied by the courts without needing any further implementation, it can be invoked before national courts and can impose duties on individuals. Whether a provision has this effect is to be determined by the courts. In doing so the wording and content of the provision are of main importance. Other elements, which have been taken into account by Dutch courts, include context, character and nature, goal and objective, intent of parties and 'travaux préparatoires'.

International law having direct effect is directly applicable and takes precedence over conflicting national law, even over the Constitution. This entails e.g. that Parliamentary Acts may be considered by the courts to see the extent to which they comply with treaties, whereas Dutch courts cannot review whether a Parliamentary Act conforms to the Constitution. Parliamentary Acts shall thus not be applied if they are at variance with self-executing treaty provisions. This has happened with regard to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. More and more use is made of these instruments, especially in matters of family law, social security law and criminal procedure. As in the constitutional context, classic fundamental rights tend to be

more appropriate for direct effect than socio-economic rights laid down in the International Covenant on Social and Cultural Rights and the European Social Charter.\(^{20}\) As a rule the latter do not have direct effect. Non-human rights treaties, such as environmental treaties, may also contain directly effective provisions.\(^{21}\) Two kinds of situations may be distinguished as regards direct effect of international law in the vertical context in the Netherlands. On the one hand there are cases in which provisions providing rights for individuals or groups of individuals are invoked before the national courts.\(^{22}\) On the other hand there are cases concerning treaties imposing obligations on individuals (e.g. international crimes)\(^{23}\) or on states in which the relationship between the treaty and the plaintiffs is not even addressed.\(^{24}\) A different question is whether international law can also be applied in the legal relationship between two individuals. Under current international law individuals can derive rights from international law, which may be enforced in private relations. Examples thereof can be found in the context of human rights (as has been illustrated in Section I) and (intellectual) property rights. Moreover, several international norms may be discerned imposing obligations on individuals (or private organisations).\(^{25}\) These may also apply in the civil law context, such as e.g. the prohibition to sell endangered species.\(^{26}\) Only treaty provisions and decisions of international institutions can have direct effect in the Dutch context. The wording of articles 93 and 94 was interpreted restrictively in the (severely criticised) Nyugat case.\(^{27}\) By using an a contrario reasoning the Dutch Supreme Court clarified that the rule is not applicable to other rules of international law. Customary law, principles of international law and non-directly effective treaty provisions do not take precedence over conflicting national law. National courts may thus not check whether national parliamentary legislation is consistent with unwritten and non-directly effective international law, although this has a higher legal status.\(^{28}\) Also according to the Harmonisatiewet case there is no

\(^{20}\) However, HR 30 May 1986, NJ 1986, 688; CRvB 3 July 1986, AB 1987, 299.


\(^{22}\) E.g. HR 21 March 1986, NJ 1986, 585.


\(^{24}\) The Dutch courts have taken a liberal approach to the question who can invoke international law, e.g. Zwiers v. Provincial Executive of Gelderland, Council of State 30 December 1993, AB 1995, nr. 24, in which case the treaty did not grant any individual rights, but only imposed obligations on states. This did not stop the court from reviewing the contested decision. This kind of review may also be referred to as objective review.

\(^{25}\) Private organisations, such as multinationals, may also be subject to international norms (e.g. BATCO case (above) and Schiphol case (below)). A number of codes of conduct (which are usually non-binding) in the field of consumer protection, environmental protection and working conditions, bilateral and multinational investment treaties have been concluded.

\(^{26}\) There is not much support for this kind horizontal direct effect however in the case law on tortuous liability, see below.

\(^{27}\) HR 6 March 1959, NJ 1962, 2.

\(^{28}\) Cf. also Kruisraketten, District Court The Hague, 20 May 1986, AB 1986, 445.
provision in the Dutch constitution for reviewing Dutch legislation by reference to fundamental principles of law, which have not yet been incorporated in any treaty provision binding on all persons. It is unclear whether this restriction comprises the review of the compatibility of legislation of lower authorities with unwritten international law. Maybe review, analogous to the Sproeivliegtaigen case, is possible.

An example of application of a general principle of international law in a horizontal situation is offered by the Kalimijnen case, already referred to in Section I. The District Court of Rotterdam found that certain unwritten rules of international law, such as the general principle that states may not cause substantial pollution harm to other states, applied to the case and used it to determine the legality of the discharges of waste by individuals. The District Court established that MDPA committed a tort against the Dutch farmers and ordered damages to be paid. However, in appeal the Court of Appeal took a more traditional view. It considered incorrect to apply unwritten rules of international law, lacking direct effect and applying exclusively to states, in a dispute between private persons.

Jurisprudence of international courts may also be applied in the Dutch courts. Via the ‘incorporation doctrine’ the jurisprudence on a specific provision of international may be binding upon national courts. This view is adhered to with regard to the ECHR jurisprudence.29

Indirect effect
International (treaty) law may also have indirect effect in the Dutch legal order. Directly effective provisions of international law and those lacking direct effect (non-directly effective treaty law, customary law, principles of international law) may be applied via the mechanism of conform interpretation. As early as 1919 the Supreme Court clarified that, unless Parliament decides otherwise, courts should construct national law so as to prevent any conflict with treaty obligations.30

However, as we will describe below, based on art. 93 Constitution, international law lacking direct effect does not entail obligations for individuals. Interpretation should not lead to imposing obligations via the backdoor.

2.1.2.1 The technique of enforcement of international norms in tort law

Dutch practice in section I has shown that in certain contexts international law can be used to determine the legal relationship between two individuals. International law has been held relevant to determine whether individuals act wrongfully and may be liable towards other individuals. Treaty provisions may either be invoked as a ‘sword’ to argue that an act is contrary to a treaty norm or as a ‘shield’ to argue that an act was not wrongful because it would be in accordance with a treaty. But it may also be possible to apply international law to determine the legality of contracts. As regards tortuous liability Dutch courts have shown in a handful of cases that they

can enforce international law in civil litigation because they can read it into the conditions for a tort set out in the Dutch Civil Code. Under Dutch tort law a tort is committed in case (1) an act or omission violates a statutory duty, (2) a right is violated, or (3) an act or omission violates a rule of unwritten duty of care. Nollkaemper clarified that in each of these three alternatives international law may play a role.  

Ad (1) Statutory duties include obligations derived from international legal norms that are directly applicable under article 93 Constitution. When international norms are self-executing they may thus constitute the basis for an action in tort. International duties may either be express or implied. Express duties, creating individual obligations enforceable in national courts, are rare. Individual duties may also be implied by duties of states. However, apart from the Hot Air case, where the 1974 Air Transport Agreement between the Netherlands and Canada was found to be directly binding upon individuals, Dutch case law does not show much support for this construction.  

The Supreme Court in the Mettes case denied (horizontal) direct effect of treaty provisions. It held that the provisions only entailed obligations for the state, lacking effect in a horizontal context. The Court of Appeal found that art. 11 of the Netherlands-French Commercial Treaty of 1935 was binding upon the subjects without requiring any further implementing legislation. According to the Court:

“art. 11 lays down legal obligations and can be understood as being directly applicable as regards the subjects. It must therefore be held as being directly binding upon them. The Article has in its third and fifth section very precise provisions of a prohibitive nature and these provisions address themselves to everybody, (...) In case of infringement of these prohibitive provisions such infringement will constitute a tort”.

The Dutch Supreme Court disagreed however, finding that the Court of Appeal misinterpreted the contents and scope of Article 11. According to the Supreme Court Article 11 did not make clear that by the entry into force of that Article a situation would have come into existence carrying an obligation for everyone. The Article only contained obligations for the contracting parties. Therefore, treaty provisions lacking direct effect were denied to have effect in a horizontal context. Article 93 precludes individuals from being bound by treaty provisions that are not directly applicable. They can not be the basis for an action in tort. Only in the Save the Toad case the District Court of Alkmaar did not reject the possibility that the norms in the 1979 Bern Convention on the Conservation of European Wildlife and natural Habitats, imposing obligations on states could be used to the determine the legality of activities of individuals.

33. J. Mettes v. Institut National des Appellations d’Origine des vins et Eaux-de-Vie, Supreme Court 1 June 1956, NJ 1958, 424.
34. Werkgroep Red de Pad v. Timmerman, President District Court Alkmaar, 22 April 1993,
Ad (2) Treaties expressly granting rights to individuals, such as human rights treaties (as has been illustrated in Section I), can be invoked before Dutch courts in the horizontal context in case of alleged violations. So far, it does not seem possible for an individual to rely on a right that a treaty confers on a state. A right for a state does not imply a right for the individual. In the Kalimijnen case MDPA appealed in cassation to the Supreme Court against the judgment of the Court of Appeal finding that a tort had been committed under Dutch tort law. It argued that the Bonn Salt Convention would preclude liability as the discharges of the mines on the Rhine were below the limits set by the Convention. According to MDPA the fact the Netherlands and France acceded to this Convention, which was intended to reduce the problem of cross-border pollution of the Rhine to proportions acceptable to Dutch users of water from the Rhine, precluded the Dutch farmers from accusing MDPA of failing to observe the duty of due care towards them. This defence would be possible if the treaty granted a directly applicable right on individuals. The Supreme Court found that the treaty did not confer such a right on individuals and therefore disagreed by stating that:

“… it follows from the text and purpose of the Convention that it is intended only to impose obligations on the Contracting States. There is no indication that the Convention is partly intended to regulate mutual relations between nationals of the Contracting States, even in such a way that a court in one of those States would be obliged to give judgment on a dispute among those nationals on the basis of the Convention”.

Ad (3) International law may also have a more indirect effect in tort law as it may be relevant in constructing what constitutes a violation of ‘a rule of unwritten duty of care’. Especially for international norms lacking direct effect, this might be a manner to enhance its application and assurance. Also, courts often prefer indirect effect of directly effective provisions above direct effect given its less stringent consequences. There is hardly any support for this kind of interpretation of national liability provisions however.

2.1.2.2 The circumstances of judicial intervention

TMA 1994, p. 52.
37. This ‘implied rights’ argument was raised again in a case concerning Schiphol airport. A number of airlines sued by environmental organisations argued that they did not act wrongfully because their flights were in accordance with open skies agreements. They maintained that these treaties did not only grant certain rights to the contracting parties, but that also the airlines could rely on these rights. As the claim was dismissed on other grounds, the court did not address the argument. Vereniging Milieudefensie et al v. NV KLM et al, President District Court Amsterdam, 9 October 1997, Milieu & Recht 1997, p. 247.
38. Possibly only the Save the Toad case mentioned above.
As regards the circumstances of judicial intervention two issues merit attention: the method and scope of review and *ex officio* review.

**Method and scope of review**

The method of review exercised by the court may be abstract or concrete. Review of the compatibility of a legal rule (not being an Act of Parliament) as such with a higher rule – such as a constitutional norm – constitutes abstract review. Concrete review is review of the compatibility of the application of a legal rule in the concrete case with the higher norm. Indeed, it may appear in some cases that whilst the rule as such is not incompatible with constitutional norms, the application of this rule in the concrete case is incompatible. Concrete review may therefore often offer better protection of the individual’s interests, especially since courts perform a less restricted review (see below). Both kinds of review supple-ment each other. Where the first kind of review will entail the annulment of the provision or leave the provision without legal effect (‘onverbindend verklaaren’), the second kind will ‘only’ lead to disregarding the legal norm in the individual case at hand or to the annulment of the individual legal act.

Given the nature and character of the civil process, civil courts will usually test concretely. An objection that has been raised is that in using this technique it remains unclear whether the rule as such is in conformity with the constitutional norm. The reserved position must be considered in view of the prohibition of article 120 however (civil law rules usually being Acts of Parliament)\(^39\).

Depending on the powers attributed to the courts, judicial review may be integral, marginal or amount to a test of reasonableness. Where integral review contains an assessment of whether the rule or act violates the constitutional norm, marginal review whether the contested rule or act may be interpreted not to violate the constitutional norm. The standard ‘may be considered to be necessary’ or ‘can or cannot reasonably be considered to be in conformity with the constitutional norm’ is easier to satisfy, than ‘is necessary’ or ‘is in conformity with’. In reviewing rules (not being Acts of Parliament) abstractly, the Dutch Supreme Court is not hesitant to do this in an integral manner. Concrete judicial review by the Supreme Court tends to be less reserved and may provide better judicial protection of the individual’s interests\(^40\).

As in the constitutional context, this direct review of international norms may either be concrete or abstract, although Dutch courts hesitate to perform abstract review given its consequences. This is why until the seventies Dutch courts preferred abstract marginal review, but since then examples of abstract integral review of Acts of Parliament can be found. The Supreme Court clarified that although *constitutional* review of Acts of Parliament is forbidden, Acts of Parliament may be disapplied when they may not reasonably be taken or be maintained in case of conflict with international norms. Abstract marginal review of Acts of Parliament is thus considered to be in line with article 120, but abstract review without concrete review

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40. Ibid.
may not be in conformity with article 94 however, as this provision demands a review in the concrete case. According to Akkermans this kind of review may provide too little individual judicial protection. For, the rule may be (interpreted to be) in conformity with the international norm, but the application of the rule in the concrete may not.

The negative consequences of abstract review may be evaded by using the technique of conform interpretation. This indirect effect may have advantages over direct review from the perspective of judicial protection since in case of non-application action of the legislator would have to be awaited, whereas in case of conform interpretation the defective rule is healed immediately.

*Ex officio* review
In procedures between private parties the courts are under an obligation to assume a passive role. The court has to adjudge the case as the parties to the dispute present it to it. It should be noted, however, that this essentially relates to the factual basis of the case at issue: the scope of the dispute as such. As for the law as it applies to the case, the court has its own responsibility to assess the legal basis and thus possibly to add legal grounds left aside by the parties, on an *ex officio* basis. As Dutch courts are expected to know and apply ‘generally binding rules’ which includes constitutional norms and international norms, it may be concluded that Dutch courts are expected to intervene to ensure constitutional norms limiting party autonomy are respected.

To our knowledge there are no examples of application of own motion of international law by the Dutch courts in a horizontal context.

Under current international law there is no obligation to apply international law *ex officio*. International law need only be applied when invoked by parties to a dispute. However, several Dutch authors have advocated the application of international law of the courts own motion. First, Lawson cautiously argues for the *ex officio* application of the European Convention on Human Rights. He foresees practical problems though. To expect judges to examine whether a rule of international law is applicable in the case under consideration would not be feasible. According to Nollkaemper however, the duty to *ex officio* examination need not be restricted to the ECHR. Human rights treaties do not take a special place in international law. From a perspective of international law it is irrelevant whether it is a treaty on aviation, commercial law or human rights, he argues. The obligation to apply international law stems from international law and its relation to the Dutch legal order. The Dutch courts are as an organ of the state to apply with, where its competencies and the nature of the procedure allow it.

2.1.2.3 Differences with regard to national legislative limitations

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41. Ibid.
42. HR 18 June 1980, NJ 1980, 463.
It is submitted that subject to the issues discussed earlier here there is no difference of any substance between the judicial role when applying constitutional or international limitations and that role under purely national conditions.

3 Other Enforcement Mechanisms

3.1 Non-judicial national mechanisms

This paragraph examines which non-judicial mechanisms exist for ensuring respect for constitutional and/or international (including treaty) limitations on party autonomy in contract or unilateral acts and whether these mechanisms differ from those that are available for enforcing comparable national legislative (as opposed to constitutional or international) limitations on party autonomy.

Here mention should be made of the Commissie gelijke behandeling (Commission Equal Treatment) of 1994. Members of this Commission are appointed under conditions which should secure their independence in terms which are similar to those applicable to the judiciary. However, its responsibilities are not those of adjudicating disputes. Rather, while acting either on a complaint or of its own motion, the Commission will conclude its procedures by findings, which whilst written and reasoned, are not judgments. As a matter of fact, the Commission for its part may institute proceedings in a court with a view to having established that certain actions which are within its remit are illegal, with possibly an injunction to cease and desist.

It should be noted that the Commission’s brief is a very wide one in that it relates to difference in treatment on the basis of religion and other beliefs, political orientation, race, sex, nationality, hetero- or homosexual inclination or marital status. It is, however, confined to specific categories of cases in that the Act prohibits difference in treatment with regard to employment offers, interviews and employment contracts and further labour conditions (including civil service and the liberal professions) and, on the other hand, the offer of goods and services.

Accordingly, in a recent case it concluded that it had to declare inadmissible a complaint which was filed against a political party in The Netherlands which excludes women from active membership, when it was established that the plaintiff explicitly did not aspire to any employment in that capacity.45

3.2 Specific constitutional mechanisms

In the Netherlands there is no Constitutional Court or any other specific constitutional mechanism for enforcing the limitations referred to.

4 Theoretical underpinnings

As has been mentioned above, the issue of the “horizontal effect” of fundamental human rights, has been explicitly addressed in the parliamentary debates on the revision of the Netherlands Constitution which entered into force in 1983. In particular, the government claimed for itself an “undogmatic” approach to the issue which would leave room for a differentiation of “horizontal effect”, which, after unconclusive parliamentary debate, left the issue to be decided by the courts, on a case by case basis.

To be sure, this is only true where the constitutional or treaty norms, as the case may be, have not been implemented in statutory law, as has been the case with e.g. General Act on Equal Treatment (“Algemene wet gelijke behandeling”) of 1994. Indeed, where the legislator has intervened, the balancing of interests which appears the hallmark of private litigation, has been pre-empted, and the courts’ decision are more or less closely conditioned by the legislator’s choices.

Where this is not the case, however, the courts have indeed to assume full responsibility for dealing with the issue of horizontal effect. As it is, it would appear that on the one hand, the rights as enshrined in the human rights catalogues, notably in the Netherlands Constitution and the ECHR, respectively, have found recognition and enforcement in private litigation on a more or less regular basis. On the other hand, as to the theoretical underpinning, the picture appears hardly consistent. Direct references to concrete provisions alternate with (more or less) oblique references, embedded in “general principles”.

In this regard particular attention should be drawn to the issue of the impact which the difference between “vertical” and “horizontal” effects has on the qualifications with regard to the otherwise absolute terminology of the human rights-provisions (“... except such as is in accordance with the law and is necessary in a democratic society...” and the like). Whilst these qualifications may give rise to thorny issues of interpretation already in a “vertical” situation, they take on a different dimension in “horizontal” relations. Indeed, private parties will not normally be able to influence, let alone be responsible for doing what “is necessary in a democratic society”. Accordingly, rather than being a qualification at the same level as the basic provision, this is a reference to a level of action which is different from that at which the private parties themselves operate.

Whilst this is already true in a situation in which action by one private party allegedly infringes upon the fundamental right of another private party (e.g. freedom of religion), the issue takes on still more marked features in cases where each private party relies on its own fundamental right (such as was the case e.g. in the “aids test” case). In such situations, it is submitted, it will be virtually impossible to operate the necessary weighing of the interest at issue, whilst confining oneself to the letter of the fundamental rights-provisions, only. Rather such weighing of interests will bring into consideration concepts and principles which, whilst of course closely related to the wording of those provisions as such, cannot, in all fairness be said to be a mere application of those provisions. But then it is not very attractive to apply one explicit Constitutional or Treaty provision only to make that provision subject to an exception which as such is not provided for in the provision at issue. Rather, the court will then be understandably inclined to “translate” the explicit Constitutional
or Treaty provision into a “general principle” of civil law, which can, on that base, be made subject to reasonable qualification and restriction, so as to arrive at the inevitable weighing of interests.