The Netherlands

Fundamental Structures of the Constitution of the Netherlands*

Introduction

In terms of actual constitutional provisions, institutions, and its practice, the present Constitution of the Kingdom of the Netherlands (*Grondwet van het Koninkrijk der Nederlanden*)[2] presents some distinct features. Though none of them is in itself unique, their combination gives this Constitution its distinct character. These most distinctive features are the absence of constitutional review of acts of parliaments by courts without sovereignty of parliament, an openness to international law and international society, the lack of an explicit constitutionally relevant concept of sovereignty, and an overall low degree of ideology in the text of the Constitution: it lacks a preamble with its attendant rhetoric, and terms like 'democracy', 'people' or 'nation' are absent. We will describe these features mainly in Parts II and III below. These features, however, can only be properly understood when viewed in historical perspective. It is precisely this historical perspective which brings out the character of the Netherlands Constitution.

In Part I we sketch the outlines of the historical development of the Constitution, which is marked by continuity and incrementalism. In Part II we elucidate the sources of constitutional law by looking at the role played by the various actors in constitution-making, including the role of individuals and of foreign examples. Part III looks at the fundamental concepts and structures of the constitutional system, while Part IV concludes this contribution with a discussion of the constitutional identity which inheres in these.

I. The historical factors of the constitution

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* Abkürzungsverzeichnis: AB – Administratiefrechtelijke beslissingen; ABRvS - Afdeling bestuursrechtspraak Raad van State; CDA – Christen Democratisch Appèl [Christian Democrat Party]; CMLRev – Common Market Law Review; D66 – Democraten '66 [social liberal party]; ECHR – European Convention for Protection of Human Rights and Fundamental Freedoms; EK – Eerste Kamer [Upper House]; HR – Hoge Raad; ICCPR – International Covenant on Civil and Political Rights; LJN – Landelijk Jurisprudentie Nummer; NJ – Nederlandse Jurisprudentie; NJB – Nederlands Juristenblad; PCIJ – Permanent Court of International Justice; PvdA – Partij van de Arbeid [Labour Party]; Rb – Rechtbank; RM Themis – Rechterlijk Magazijn Themis; Stb – Staatsblad; TK – Tweede Kamer; W - Weekblad voor het Recht.

The texts of all acts is published officially in a *Staatsblad*, of the year of Act and has a separate number, which starts every year with 1. It can be consulted by internet at < http://www.overheid.nl/op/index.html >, via the option 'Staatsblad' and contains every *Staatsblad* published after 31 December 1994.
Mostly, legislation is not published in consolidated form in the *Staatsblad*, but only the respective amendments. There are various consolidated versions published in commercial editions, of which *Schuurmans en Jordens* is the most complete.
All consolidated legislation in force at any moment since 1 May 2002 or lapsed since, however, can be consulted at < http://wetten.overheid.nl/ >.
Most case law, particularly of courts of highest instance, but also much case law of lower courts, can be found via < www.rechtspraak.nl >, via the link 'zoeken in databank' → 'uitspraken', or via < http://zoeken.rechtspraak.nl/zoeken/zoeken.asp >.

[2] In this contribution, the term 'Constitution' (with a capital) is used when we refer to the *Grondwet*. When we refer to the broader complex of constitutional norms, we refer to 'the constitution' (in small case). The German translation of the *Grondwet* provided by the Netherlands Ministry of Foreign Affairs, translates its title as *Die Verfassung des Königreichs der Niederlande*. This is somewhat unfortunate, because – as we shall explain in the course of our contribution – the *Grondwet* should be viewed as a *Grundgesetz* rather than a *Verfassung*.

Incremental constitution of British type

1. *Introduction*

If constitutions can be distinguished in historical terms between, on the one hand, modern revolutionary, blue-print constitutions, which have their origin in an identifiable more or less revolutionary constitutional moment which is usually connected with some form of political cataclysm, such as a war or revolution which caused political and economic collapse, and on the other hand old-fashioned constitutions which are the product of incremental historical events and socio-political developments and evolutions which have become codified in a more or less continuous document, then the Constitution of the Netherlands is definitely to be grouped in the last category. It is, so to say, more like the British constitution and those of the Nordic countries (as they were until a few decades ago), than like the German, Italian or French constitutions.

This poses a problem for dealing with the present Constitution of the Netherlands and its development historically. Due to its incremental nature, there is no self-evident original version of the present Constitution. What is from a formal point of view the original text (1814/1815), no longer constitutes present constitutional reality, whereas the text which provides the nearest complete framework of present constitutional reality (the text of the Constitution after the general revision of 1983) was substantially not the product of major constitutional innovation at all.

A long term and a short term perspective can be chosen. One could take the last general revision of 1983 as a starting point (as is often done in the legal treatment of the Constitution), or one could begin with the Constitution as it found its origin in 1814 (or 1815 as some would have it – the disagreement is symptomatic). But even if one were to begin with the latter – as we do – this could only be understood as a product of earlier movements and developments. Indeed, as will be argued below, the experience of two centuries of the Republic of the United Provinces seems to have had a long lasting influence in some constitutionally relevant respects.

In this Part, then, we take 1814/1815 as the origin of the present Constitution, in order to discuss the constitutional moments which have led to the amendments and revisions which have been the most decisive in shaping the present Constitution. The emphasis will be on the acts and events making the present constitution, which incorporates the long series of amendments to the 1814/1815 Constitution.

2 *National constitutional development: international parameters and national causes*

2.1 From a formal legal point of view, it is possible to trace the present Constitution fairly precisely to the years 1814-1815. It is quite clear, however, that since then, there have been developments which have transformed the constitution – not only the *Grondwet* but more importantly the political framework and practices which constitute the constitution in a broader sense. And also, the experience of two centuries of the Republic of the United Provinces preceding the 19th century, as well as the short term intermediate period of constitutional upheaval from 1798 to 1813, should not be ignored for a correct understanding of the direction which constitutional development took.

The importance of the international context

At the basis of the constitutional transformations and adaptations are historical experiences of which, from a long term, external perspective, many (but not all) coincide with developments in the international context. Most of these are also shared by other European countries. But necessarily, events at the international level are translated into and channelled through one's own traditions, institutions and

particularities to arrive at solutions which turn out to be peculiar to each country. International events may not always have had the same constitutional impact abroad which they had in the Netherlands.

The influence of international events on the Netherlands' constitutional development reflects two fundamental external facts of the Netherlands political history: its geographic size and geographic location. Both have entailed an openness towards the outside world.

The Netherlands is a relatively small European country, although for centuries it possessed important overseas territories. These, for instance, made the Kingdom one with the largest Islamic population of the world for centuries. At the time, however and quite contrary to what it would mean today, this had no bearing whatsoever on European politics: the economic importance of the East Indies outweighed their cultural and religious importance for the Netherlands by far. Within Europe, its geographic size is small, but this has to a considerable extent been compensated for by its location in the delta of main continental rivers, the Rhine and Meuse, which made large parts of the continent into Holland's hinterland, while its North Sea coast opened up the country to other parts of the world. Its economic potential, and its colonial empire in particular, was thus based on its sea power as well as its favourable location for international trade.

This openness to the outside world was continued after the Netherlands' major colony, Indonesia, gained independence after the Second World War. Politically, its international orientation was to a large extent westward (north-atlantic), but at the same time in favour of supranational integration of Western Europe. In this respect, an economic and trade interest was again dominant, although throughout the 20th century international policies have had certain nearly moralistic overtones. The 'Merchant and the Vicar' (*koopman en dominee*) have gone hand in hand in Holland.

Apart from the international context as an explanatory background factor to constitutional change, as we shall see below, there have also been purely endogenous reasons for a number of constitutional amendments which have occurred. One may submit that at the background of the (mainly abortive attempts at) constitutional reform since the 1960's, we can discern in constitutional affairs a certain primacy of national socio-political relations: while the world globalized, the constitutional debate in the Netherlands reduced to national concerns.

2.2 *The years*

Within the process of constitutional development and change one can distinguish between moments of transformation, moments of constitutional adaptation and the more minor changes. If we may generalize the tendencies, then we can say that in the Netherlands the transformations mainly took place in the 'long 19th century',[3] the first one being the political transformation which brought about 1814/1815 Constitutions, the last one that of 1917. The amendments of roughly the first half of the 20th century (with the exception of the one of 1917, which we mentioned) are forms of constitutional change which can rather be characterized as adaptations. The second half of the 20th century has seen

The great transformations

(1579 'Union of Utrecht'-1795, followed by post-revolutionary instability until the end of 1813)	
1814/1815	the post-Napoleonic settlement
(1840) 1848	the liberal revolution
1917	the democratic break-through

The adaptations

1887	parliamentary onsolidation
1922	after the War
1948	post-colonial constitution
[1949]1953/ 1956[1963]	post-colonial Internationalism
[1972] 1983	*Zeitgeist* of the 60's
2000	after the fall of the Wall

The minor amendments

1884, 1938, 1972, 1987, 1995, 1999, 2000, 2002, 2005…

[3] I.e. until the end of the First World War.

an ever increasing number of constitutional amendments, but paradoxically few of these – if any - transformed the constitution, even though 1983 saw an important overall revision of the text of the Constitution.

The various amendments are represented in the frame above. We briefly elucidate them in the next sections.

The great transformations

3. *The Original Constitution*

3.1 *1814 or 1815?*

The present Constitution of the Kingdom of the Netherlands dates back to the beginning of the 19th century.[4] There is no agreement on whether it is the Constitution of 1814 or that of 1815 which is legally the origin of the present Constitution.[5] The reason for this is partly legal, and concerns mainly the procedures for revision, and partly a matter of semantics.

Adhoc procedures for amending the 1814 Constitution after the Vienna Congress' decided to merge Belgium

Legally, the formal continuity of the 1814 and 1815 Constitutions is problematic in terms of the procedures for constitutional amendment followed at the time. The revision of the 1814 Constitution was necessary due to the decision of the Congress of Vienna after the defeat of Napoleon, to make Belgium part of the Netherlands. It would not have been plausible for the Northern Netherlands to stick to the formal procedures which were never intended to provide for a situation in which the country would be merged with another country. Following the formal procedures would involve the institutions of the Northern Netherlands only, and would amount to imposing a constitution on the Southern Netherlands unilaterally. So what happened instead was that a Constitution was negotiated in a committee composed of equal numbers of Dutch and Belgian representatives, which, in accordance with Belgian desires,[6] introduced such features as bicameralism (a nobility of the blood was politically prominent in the Southern Netherlands, and these wished not to assemble with the commons) and entrenchment of the prohibition of censorship (which in the Netherlands had already been abolished by royal decree in 1814, but had no further constitutional basis) (Article 227 Constitution 1815).

This text was adopted by the institutions of the Northern Netherlands with near unanimity, and then presented to Belgian noblemen and outstanding citizens (who only by applying 'Dutch arithmetic' were considered to have voted in favour).[7] This referendum was not provided for in the provisions on constitutional amendment of 1814 and to that extent implied discontinuity with the Constitution of 1814.[8]

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[4] The last amendment dates from 8 February 2005, Stb. 52.

[5] *Kranenburg*, Het Nederlands staatsrecht, 1958[8], S.46 had serious doubts on whether the 1815 Constitution was a new Constitution; *A.F. De Savornin Lohman*, Onze Constitutie, 1926[4], S. 59 denied it was; whereas *Struycken*, Het staatsrecht van het Koninkrijk der Nederlanden, 1928, S. 54, *Van der Pot/Donner*, Handboek van het Nederlandse staatsrecht, 2001[14], S. 120, has submitted in all its editions that the 1815 Constitution was not an amendment of that of 1814, but a new Constitution.

[6] The documents are in *H.T. Colenbrander*, Ontstaan der Grondwet, Bd. II, 1909.

[7] Of these 1323 cast a vote, 796 negative and 527 a positive vote. Of the negatives, 126 declared that they were voted against only because they were opposed to the clauses on freedom of religion which implied the equality of the Protestant and Catholic religion. These had been imposed by the Congress of Vienna and were therefore not liable to amendment. William I assumed therefore that those 126 votes were otherwise in favour of the Constitution and had therefore to be considered such, shifts the balance 670 against to 653 in favour. Also, he assumed that those who did not show up at the ballot box acquiesced in the proposal, which added a further 281 to those in favour. Thus, a majority was reached.

[8] *P.J. Oud*, Het constitutionele recht van het Koninkrijk der Nederlanden, 2e druk, 1967, deel 1, pp. 4-10.

Another formal reason for holding that the 1815 Constitution is not a continuation of that of 1814, is that the text of the Constitution itself was established entirely anew. The form of the revision was not a text specifying which provision had to be amended to read differently as specified, as ever since 1815 has always been the case. A wholly new text was established and promulgated.[9]

Semantically, the Constitution of 1815 is the first one of the 'Kingdom of the Netherlands'. In 1814, William I, son of the last *stadhouder* William V, accepted sovereignty but refused the title of King. By 1815, and particularly because of the void in Belgium which William I had filled by assuming royal authority over that country,[10] it was merely admitting the prevailing state of affairs, which was, if not decided upon, at least expressed in the Final Act of the Congress of Vienna.[11] Thus the sovereign principality, which had until then been officially referred to as 'the State of the United Netherlands', became a Kingdom, and the Constitution of 1815 necessarily the first Constitution of that Kingdom of the Netherlands.

The 1814 Constitution as the real revolutionary constitution

Are these legalistic, formal and semantic reasons conclusive evidence for holding the Constitution of 1815 as the original one? Not if one is aware that the union with Belgium soon proved to be a brief, temporary and constitutionally unsuccessful addition to the political formation of the Netherlands as it had existed as a polity since the 16th century, which was ended in formally the same 'unconstitutional' manner in which it had begun, but this time the other way round: without the Belgians participating in the institutions involved in constitutional amendment. Politically, the real 'revolution' was the Constitution of 1814, which established the political structure as we still know it, not the Constitution of 1815; apart from the failed union with Belgium, the latter's lasting importance is the fact that it made William I what he already was – a king – and the country what it in reality was: a kingdom.

So in the end, it is at least debatable which Constitution is the original of the present one. This is symptomatic for the utterly historical-evolutionary nature of the constitution of the Netherlands.

We must say a few words about that 'revolution' which established the Netherlands in 1814, but in order to understand the course of history we should also devote some attention to the time of the Republic, which must be considered the true political and constitutional predecessor of the polity established in 1814.

3.2 *The Republican pre-history of the Kingdom (1579-1795): Republic without sovereign*

The Constitution of 1814 had come about at the end of a period of more than 18 years of political instability in the aftermath of the French Revolution. This period of instability, about which we shall say a few things in the next section, began with the ending of the Republic of the United Provinces, a Republic which had its constitutional foundation in the *Unie van Utrecht* of 1579, a Treaty of alliance between the Provinces, and which had lasted until 1795, when formally in full accordance with the constitutional principles of the Republic, the States General and the Provinces decided to end the Republic by calling for a constitutional assembly to convene on the principles of a new Republic. Even the Revolution which had started in France did not interrupt formal constitutional continuity with this Republic. To the Republic which thus came to a legitimate and natural end, we now devote attention.

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[9] It has become usual to place a new consolidated version in the official journal, the *Stb.*, after the promulgation of constitutional amendments. This, however, was not done after the amendments of 1884, 1917, 1999, 2000 and 2005. Mostly these amendments concern minor changes, but this is not true (at least in hindsight) for the amendments of 1917.

[10] By a royal *Proclamatie* of 16 March 1815 William accepted the titles of King of the Netherlands and Grandduke of Luxembourg.

[11] *Acte Final du Congrès de Vienne*, 9. Juni 1815, Article 65.

Heriditary elements in the late republic

By 1795, that is to say at its demise, this confederal Republic had developed into an inefficient, not very successful polity, run by a quasi-hereditary or otherwise co-opting ruling elite, known as the '*Regenten'*. They were mostly patricians, that is to say aristocrats of merit as opposed to nobility by blood, whose merit originally was a contribution to the wealth and well-being of the country, but which was sometimes remote history to the actual successors in office. Also the highest office in the Republic, that of *stadhouder*, (literally, *locum tenens*) shared some of this fate. The importance of this office – each province had its own *stadhouder* – found its origin in the impossibility to find a permanent successor to King Philip II of Spain, who had been abjured in 1581, 9 years after William of Orange called for a revolt. A succession of foreign dignitaries had been approached to be the personification of the polity in each of the Provinces, ranging from the Duke of Anjou to Elizabeth I. But in the end, none of them proved acceptable to the Provinces, also because they claimed a kind of sovereign lordship or kingship which had been cause of the Revolt and in its course abjured. So in the meantime, each Province itself appointed a *stadhouder*, a substitute for the absent sovereign.

Sovereignty inhering in the constituent provinces

Sovereignty for the Provinces, resided in each province itself and in the traditional constitutional arrangement which was deemed best to secure political liberty. This was of lasting importance: the Republic did without a personified sovereign for more than 2 centuries, while during these centuries they even did without the surrogate for nearly 75 years (the so-called *stadhouderloze tijdperken* from 1650 to 1672 and from 1702 to1747, when William of Orange-Nassau became hereditary stadtholder in all provinces[12]).

During the Republic, the Netherlands experienced for more than two centuries a state of which the component provinces each claimed sovereignty without there being a single office being allowed to personify this sovereignty – a Republic which was considered a state for all intents and purposes which could not claim sovereignty. Is it unnatural that to this day neither in constitutional practice, nor in constitutional theory, nor in the Constitution of the Netherlands itself there is to this day any strong concept of sovereignty to be found?

3.3 *Post-revolutionary constitutional instability: the Batavian Republic, the Kingdom Holland and formal part of France (1795-1813)*

Whereas the 17th century was the 'golden age', the 18th was an age of decline. Republican traditions and virtues at the basis of the Republic eroded. As we noticed in the previous section, the stadholdership had become an inherited office in most of the provinces, while some of the key offices were dominated by patricians. By the end of the 18th century, this made it possible for the 'patriots', ignited by the French Revolution, to conceive of the governing class of the end of the Republic as an *ancien regime*.

Initially, the Batavian Republic as successor to this ancien regime, was modelled on certain ideas from the French Revolution. The Batavian republic soon came more and more strongly under the spell of French influence and interference, issuing in the Kingdom of Holland under the French puppet king Louis Napoléon in 1805, ultimately ushering into direct French rule from 1810 until the end of 1813. Legally this period ended with the proclamation of 21 November 1813 by which two prominent statesmen, Van der Duyn van Maasdam[13] and

[12] Holland and Zeeland had introduced the hereditary *stadhouder* already in 1674, while Frisia had introduced it in 1675. Until 1647, Frisia had usually chose a *stadhouder* from the House of Nassau-Dietz, and the other provinces from the House of Orange; the two Houses merged in 1747.

[13] *A.F.J.A.* Graf *van der Duyn van Maasdam*, 1771-1848, was a moderately liberal nobleman, who had been a member of the court of the Prince of Orange-Nassau who was to be the later King William I. William II still needed to appoint him in 1848 as a member of the *Eerste Kamer* in order to help the revision of the Constitution to a majority.

Hogendorp[14], took upon themselves the provisional 'general government' (*Algemeen Bestuur*) of the country at national level, thus constituting the new state of the Netherlands.

Hogendorp had been the architect of the proclamation of 1813 but more importantly also of the Constitution of 1814. He had been working on a revision of the *Unie van Utrecht* ever since the end of the old Republic, firstly to reinforce central government in the person of the Prince together with a first minister, *raadspensionaris*, as a kind of chancellor, next to (not under) him. This idea of 'restoring the old Republic' but with strong central government under the Prince of Orange and a chancellor, with the States-General in a central role, and the provinces as regions (thus no longer as the old 'sovereign' powers), was still prevalent in his *Schets eener Constitutie* [Sketch of a Constitution],[15] which William I gave as the groundwork for the constitutional committee which was commissioned to design the Constitution of 1814.

Post-French revolutionary centralism balanced against previous confederalism

One lasting contribution of settlement of 1814/1815 may be considered the option for a decentralized unitary state, which was the result of the compiled experience of over-emphasis on decentralized units during the Republic and of total centralisation during the 'French' period, both being at best inefficient and at worst ineffective. The option for a decentralised unitary state and government, was evident on the one hand in the centralized government in the king (particularly under Willem I), but also the retention of a good amount of decentralisation in provinces and municipalities as original communities with certain autonomous powers of their own, as it exists until this day. In terms of the manner of regulating the exercise of political power at the national level, however, the Constitution of 1814/1815 is far from anything like a democratic state in the modern sense. To become so, the Constitution and constitutional practice had to undergo a radical transformation which began in the 1840's and was carried to its full constitutional conclusion only in 1922.

3.4 *The 1840's and the liberal reform of 1848*

No *constitution octroyée*

The Constitution of 1814 (as well as that of 1815), was not a *constitution octroyée*. To the contrary, a constitution was what William I had asked for as a condition for accepting power as sovereign prince, *soeverein vorst*, in one of his first proclamations (2 December 1813). This constitutionalist stance did not transpire in the mode of exercising his powers. William I, governed in an autocratic manner and to a large extent by royal decree. To consider this constitutional, required an interpretation of the Constitution to the effect that its silence on the king's power to establish rules on matters by general regulations gave the king the freedom to regulate matters by royal decree. Parliament's own approach contributed to such a state of affairs. In 1818 parliament adopted an Act (known as the *Blanket Wet*) on the basis of which infringing royal decrees was made a criminal offence. Thus such decrees were rendered equivalent to legislation proper, and might even be interpreted as a blanket delegation of legislative power – a state of affairs which was changed first by a decision of the *Hoge Raad* [Supreme Court] in 1879 and confirmed by a constitutional amendment 1887, as we shall discuss below (II.4.4). Under this autocratic rule, someone like Van Hogendorp, a vain but ambitious personality, soon fell out of favour and never acquired any truly effective political position. The personal regime of William I also made him the object of broader

[14] *G.K. van Hogendorp*, 1762-1834, who was made a *graaf* by William I, from the old *regenten* party, but with a liberal mind. He played an important role in the constitutional developments in 1813-1814.

[15] Written in three different versions in 1812-1813 and circulated at very limited scale to whom he wanted to show it, particularly around the November and December 1813, but not published until J.R. Thorbecke included it in his *Aanteekening op de Grondwet*, 1839.

political dissatisfaction and exposed him to fierce political criticism in the course of his government.

Revision of 1815 due to separation of Belgium

Thus, the Belgians, who had never been happy with the union with the Northern Netherlands imposed by the Vienna Congress, revolted in 1830 and by winning the attending military battles effectively gained independence. Notwithstanding the fact that their wish for independence had become realized and had even been sanctioned by the great powers, William I kept the country in a state of military alert at great financial expense. The separation necessitated constitutional revision to reflect the new situation. This was done with the amendment of 1840, which was yet another constitutional revision caused by the international situation.

This revision, initiated only in 1839, was accompanied with debate about a broader modernisation of the Constitution than the government was prepared to propose, a debate which had already begun in the 1830's and was caused by the Constitution's obvious condonement of autocratic government. Particularly, a first demand for ministerial responsibility was heard by the end of the 1830's, though this did not receive very broad support in the early stages of the debate. For instance, Johan Rudolf Thorbecke (1798-1872), a Leiden law professor[16] and a member of the *Tweede Kamer* [Lower House] who was to become the protagonist of the liberal reform of 1848, was still against direct election of the House and had not spoken out yet on ministerial responsibility in the first edition of his *Annotation to the Constitution* published in 1839.[17] However, the introduction of criminal ministerial responsibility in 1840 was for Thorbecke inadequate and too little– views began changing fast.

Introduction of criminal ministerial responsibility in 1840

In hindsight, the introduction of this very limited form of ministerial responsibility urged by the Lower House against the initial views of the government in 1840, was indeed a systemic change in the form of government. The new provision required a countersignature of a minister for every royal decree and royal ratification of acts of parliament, and introduced criminal responsibility of the signing ministers for royal decrees and acts of parliament which would contravene the law. The systemic nature of the change resides in the fact that the king could no longer take decisions without involving a minister, as William I had usually done – the Constitutions of 1814 and 1815 only required him hearing the *Raad van State* [Council of State[18]] and made no mention of a council of ministers, nor of the powers of ministers[19] – thus circumventing the political influence of ministers. Also, the 1840 amendment increased the powers of the Lower House over the (as of then) two-yearly budget, but no democratic reform regarding its popular representation was proposed.

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[16] In 1822-1823 he had been Privat-dozent in philosophy and history in Giessen, from 1825-1830 professor of history and statistics in Ghent, and from 1831-1849 first professor of political and diplomatic history, then as law professor.

[17] See footnote 15.

[18] Article 32, Constitution 1814: "The Sovereign Prince performs all acts of Sovereign dignity, after having brought the matter to the consideration of the *Raad van State*. He alone decides and always communicates his decisions to the *Raad van State*."

Article 73, Constitution 1815: "The King submits all proposals to be done by him to the States General, and those done by the States General to him, and also all general measures of internal administration of the state and of its possessions in other parts of the world, to the consideration of the *Raad van State*.

It is to be mentioned in the heading of all promulgated acts and decrees that the *Raad van State* has been heard.

The King also gathers the feelings of the *Raad van State* in all matters of general or particular interest in which he deems this necessary.

The King alone decides, and each time he shall communicate the decision taken to the *Raad*."

[19] Article 35, Constitution 1814 (=Article 75, first and second paragraph, of the Constitution of 1815): "The Sovereign Prince establishes ministerial departments, and appoints and dismisses their heads to his pleasure. He invites, as he deems appropriate, on or more of them to attend the deliberations of the *Raad van State*."

The 1840 reform was to the distaste of William I, who abdicated in favour of his son William II, who initially seemed more liberal but soon proved to try his best at avoiding the council of ministers from developing into a politically homogenous governmental actor.

Economic and financial crisis was around by the 1840's, with occasional rioting as a consequence, but this never amounted to anything approaching full scale revolt, though added to the sense of crisis in politics. There was an ever increasing constitutional debate, kept alive by a fairly small minority of liberals. Thorbecke, a professor in Leiden whose name we have mentioned, was pivotal in this. He had already been a member of the doubled Lower House, which was elected for the purpose of voting on the Constitution of 1840, and he was briefly a member in 1844-1845. In the autumn of 1844 he launched a proposal for constitutional reform, which was supported by eight other members of parliament (hence its nickname of the proposal of the 'nine men', *negenmannen*). The Lower House, whose (then 58) members were appointed by the members of the *Provinciale Staten* (Provincial Councils), answered the question whether to introduce a bill to amend the Constitution negatively by 34 against 21 votes. The quest for constitutional modernisation, however, was and remained a nagging matter. Although the king found it too early to propose constitutional amendments when it had come to rioting again in Amsterdam, the government did decide to introduce a bill on local elections – an attempt at a very moderate modernisation, which was narrowly rejected for being too moderate, during the parliamentary session of 1846-1847, a defeat caused by the critical liberals being joined by a handful of so-called 'moderate conservatives'.

The Nine Men proposal of 1844

When revolution broke out in February 1848 in France, the response in political circles was reactionary, but this mood changed when in March revolutionary events in Germany took place and some governments there gave in to liberal demands. Revolutionary outbreaks abroad would turn out to be decisive for constitutional reform in the Netherlands.

1848

The moral pressure of events on the hesitating and undetermined king mounted. In January, the king had already introduced a series of minor amendments in the Lower House, which could hardly be termed liberal. And on 13 March he suddenly decided to take action. Without consulting his ministers, he called for the speaker of the Lower House and informed him that the king would appreciate to receive the opinion of the House concerning a more far-reaching reform of the Constitution. The conservative ministers took this manouvre behind their backs to be an affront and resigned. Four days later, the king next decided to appoint a committee of five men to tender their advice on a new cabinet and to develop a proposal for constitutional reform. (The royal decree was not countersigned by a minister, but merely by his own secretary, thus it was no doubt unconstitutional.) Thorbecke was one of the members of the committee. Though – to his horror – side-stepped as regards membership of a new cabinet, he chaired the committee's work on the Constitution, drafted its provisions in line with his well-known liberal views, and was able to present them to the king already on 11 April. It proposed, amongst other things, direct elections for both Houses of Parliament and full political ministerial responsibility, counterbalanced by a governmental right to dissolve the houses of parliament by royal decree.

In first reading, the relevant bills were not easily adopted in the predominantly conservative parliament. In fact, the Lower House amended the proposed direct elections for the Upper House into indirect elections by the *Provinciale Staten* [provincial councils]. But as the rest was accepted this did not affect the thoroughly liberal nature of the reform. This acceptance still required the king to exert overt and direct pressure on members of parliament, both in the Lower House and the Upper House, as well as the appointment of five new members sympathetic to the liberal cause to vacancies in the latter House, in order to acquire a majority for the bills. Shortly after its definitive adoption after a second reading in a double Lower House (the extra-ordinary members being appointed by the *Provinciale Staten* for the purpose of deciding the constitutional amendment), William II died from a heart attack.

In many ways, the 1848 Constitution was the product of the pressures of international developments in Europe. As the William II put it on 16 March 1848 – in the middle of the crisis – in a speech explaining his actions to the ambassadors of Austria, England, Russia and Prussia, he "turned from very conservative to very liberal within 24 hours". The fear for what happened abroad inspired the king (also in the dynastic interest) as well as the conservative majority to accept the domestic call for a liberal constitution.[20] Once again, the European international context proved decisive for deciding for constitutional amendment – an amendment which aimed at true reform.

3.5 *Settling for a parliamentary system of government: the 1860s*

Transformations are not a matter of textual amendment, not even when it concerns major amendments of constitutional documents. Transformations only occur through practice, constitutional practice. Precisely when the aim is to reform, texts cannot be decisive: to the contrary, the greater the intended transformation, the more important (and often difficult) is its achievement in practice. This is a truth in Europe as much as in other parts of the world. Notwithstanding its huge importance, the 1848 amendment of the Constitution was not the final and definitive settlement for a parliamentary system of government in practice. There were even voices pleading for undoing the 1848 reforms in the 1850's. It were parliamentary events in the 1860's which definitively settled for a parliamentary system of government. In this respect, two consecutive events in parliamentary history are taken to epitomize this.

The 1860s: The Mijer-affair

Firstly, there was the conflict over the sudden resignation of the Minister of Colonial Affairs, P. Mijer, and his subsequent appointment as governor-general of the East-Indies in 1866. Mijer was the most important man in the new cabinet led by Count Van Zuylen van Nijevelt. His political plans concerning colonial policy were crucial to the cabinet's political programme. The cabinet was conservative, while in principle there was a liberal majority in parliament, but this was not yet organized in terms of disciplined political groups backed by well-structured political parties. The unexpected and unannounced resignation of Mijer, led to dismay in the Lower House. The most important man who designed and was to carry out the most important policy of the government left the cabinet, thus undermining parliamentary support and confidence. Constitutionally significant was that his appointment as governor-general was defended by the government in the Lower House by referring to the prerogative of the king, thus suggesting governmental power in the king which was not covered by a minister. This caused a stir. A resolution was passed on 27 September 1886, which in so many words "disapproved of the line of conduct with regard to the stepping down of the minister of Colonial Affairs". The next day the Lower House was dissolved by royal decree. The electoral results were possibly influenced by a royal proclamation sent to all voters together with the ballot papers, in which the king called upon the voters not to promote the 'constant change of My responsible counsels' (i.e. his ministers) and to support the present government. Yet the majority after elections still was not conservative. Nevertheless, the new Lower House only debated the matter, generally straitening out constitutional lines and principles, without passing a new resolution against the cabinet, which stayed in power.

The Luxembourg affair

A second affair concerned Luxembourg in the aftermath of the French-Prussian war of 1866. King William III was not only king of the Netherlands. Through a personal union he was also head of state (Grand Duke) of Luxembourg. In the aftermath of the French-Prussian war, Napoleon III approached William III to sell Luxembourg to France by treaty. Initially, such a transfer seemed to be tolerated by Bismarck, but when the latter was called to account in the *Reichstag* (1 April 1867), the matter was declared a *casus belli*. Internationally, the matter was resolved at an international conference in

[20] See *J.C. Boogman*, Rondom 1848, 1978, S. 51, with references to sources.

London, at which the independence and neutrality of Luxembourg was guaranteed by the great powers and the Netherlands. At the national level, the Lower House thought the whole affair had not been handled properly by the government, as it had no responsibility for Luxembourg, nor was there any national interest in guaranteeing its neutrality. The conflict expressed itself in the rejection of the budget for Foreign Affairs by the Lower House. The cabinet tendered its resignation, but the king refused it and instead dissolved the Lower House (January 1868). The subsequent elections did not change the political composition of the Lower House, and this time the new Lower House passed a resolution expressing its opinion 'that no interest of the country required the most recent dissolution of the House'. Because after this motion of disapproval the ministers did not immediately resign, the pressure was further stepped up by again rejecting the budget for Foreign Affairs. Upon this, the ministers again tendered their resignation, and this time the king commissioned a person with forming a new cabinet.

Three essential features of the parliamentary system are distilled from these events:

Confirmation of the parliamentary system

1) the scope of political ministerial responsibility as extending to all and every exercise of royal power was confirmed in practice, thus extending parliament's power to approve and disapprove to all exercise of governmental power;

2) the rule that when parliament expresses a motion of censure the cabinet is forced to resign; and

3) that if instead of resignation the course is taken of a dissolution of parliament, the subsequent elections are decisive and no further possibility of dissolution exists.

These constitutional rules remains customary constitutional law to this day.

By the practical confirmation of these rules, the reform of 1848 was brought to its logical conclusion as far the system of government is concerned. It meant the definitive end of attempts to undo the objectives of the 1848 reform. In that sense it is correct to say that the 1868 events did not establish but confirm the parliamentary system of government.[21]

3.6 *Towards democracy – 1917*

The functioning of the parliamentary system developed further in the decades after 1868. Thus until 1887, only when a political conflict occurred within the cabinet or between the cabinet and the Lower House would a cabinet resign. Since the elections of 1887, a cabinet would also resign because of the result of regular elections the Lower House (that is to say, not only at elections due to a dissolution which has its origin in a political conflict between the cabinet and the Lower House). Since 1917 the convention has taken root to resign on the day (or eve) of the elections, so before electoral results are certain, thus opening the way for the forming of whatever cabinet may prove to have a sufficient basis in the Lower House. This convention must be understood as a consequence of, or at least related to, the abolition of the quasi-majoritarian system of a single constituency first-past-the-post electoral system, and the introduction of strict proportional representation – a system which would no longer result in clear political majorities, and hence entrenched the necessity of forming coalitions between the permanent minorities in parliament.

The 'school struggle' and general suffrage

With the definitive settlement for a parliamentary system of government in the 1860's, democracy in its modern sense was not achieved. Electoral rights were reserved to the wealthy few only. Although the basis of the right to vote was extended several times – with great controversy between (in a nutshell) those who found proposed extensions going too far and those who found they did not go far enough – the general franchise was not achieved until 1917 in practice and was constitutionally entrenched only in 1922. The reason why it took so long, is because of the political linkage which was made with

[21] *P.J. Oud*, Honderd Jaren: een eeuw van staatkundige vormgeving in Nederland 1840-1940, 1971[5], S. 89.

the other issue which predominated politics throughout the second half of the 19th century: the issue of state subsidies for protestant and catholic schools: the so-called 'school struggle'. Since 1848 the constitutional provision on liberty of education was in interpreted to mean, initially that it was prohibiting state subsidies for schools which were not under public authority, and subsequently that such subsidies were politically undesirable. Protestants and Catholics, as they became separately identifiable from the various liberal and conservative groups in parliament, came to stand in opposition to the liberals (and later also socialists). As long as the issue of denominational education was not solved, the Protestant and Catholic groups in the Lower House pursued what was called a *non possumus* policy regarding the issue of the franchise. This was notwithstanding the fact that particularly in certain catholic circles – as the 19th century progressed, Catholics were very much in the process of social, cultural and political emancipation from earlier open discrimination – there was an awareness that the franchise would increase their presence and profile in politics, a reason why Catholics earlier in that century had not rejected the idea of popular sovereignty as Calvinist Protestants had done. In 1887 they agreed to a constitutional amendment which extended the right to vote to male residents of Dutch nationality who fulfilled certain criteria of suitability and social welfare which were to be determined by act of parliament. This '*caoutchouc* provision' shifted the emphasis from constitutional amendment to electoral reform by act of parliament. Although this made it possible to extend the franchise, it does not silence the call for the universal suffrage – an issue on which political parties remained internally split until the beginning of the 20th century; even the socialists are at best lukewarm about the right to vote for women. It is only after the First World War had begun – the Netherlands remained neutral– that a breakthrough was made: an agreement was found on a constitutional amendment which grants denominational primary schools financial equality to public schools (those established and operation under responsibility of local government), which in turn led to consent to general suffrage.

The constitutional amendment which entered in force in 1917 stipulated general suffrage for men, opened the possibility of extending the franchise also to women by act of parliament,[22] abolished the constituencies and introduced proportional representation[23]. In 1919, women were granted the right to vote (and by implication to stand for election also, although this did not seem to be contemplated as a probable eventuality), and this was entrenched in the amendment of 1922.

The 1917 breakthrough after decades of deadlock was related to the war surrounding the country. This is not a one to one relationship, but it certainly provided a push to come to a constitutional settlement which could satisfy both sides to the conflict. Thus again the international context played a role at the background of this constitutional reform.

4. The adaptations

4.1 *1922 and beyond: consolidating parliamentary democracy*

Democratizing international relations

The constitutional amendment of 1922 as well can be viewed against the background of the international situation, particularly the devastation which the war had brought on Europe and the revolutionary movements of 1918 abroad. Democratisation was a major element in the reform. Apart from the entrenchment of the universal suffrage, which we

[22] Article 80, Constitution 1917.
[23] This was done in the transitory Article VII, amending the *Kieswet* [Electoral Act].

mentioned above, and an amendment to restrict the succession to the throne to the descendents of queen Wilhelmina,[24] main amendments were the increased role of parliament in international affairs: declaring war and concluding treaties was made dependent on prior approval of the States General. A provision was introduced to the effect that before resorting to war, the government shall attempt to resolve conflicts with foreign powers through judicial and other peaceful means.[25] The amendment on prior approval of treaties, though intended as a major democratisation, was technically not successful, in as much as in the course of the parliamentary treatment the government began shifting its position and distinguishing 'treaties' from 'other international agreements', the former requiring prior approval, the latter (whose definition varied, but extended particularly to international engagements in less solemn form) only needing notification to parliament. This failure was to be corrected with the constitutional amendment of 1953, since when the principle of prior parliamentary approval was extended to all international treaties, whatever their name or form.

There had been discussion of the introduction of referenda, but all relevant proposals were rejected in the Lower House. The democracy to which the Constitution referred, remained representative democracy.

Extra-parliamentary democracy

It would be a serious mistake, however, to think that in the Dutch context representative democracy is the same as parliamentary democracy. Quite to the contrary, parliamentary representation was only one aspect of a much broader concept of democracy, which was a consequence of the permanent minorities of which society was composed. As of approximately the 1870's, society began articulating itself into four religious and ideological streams: Protestant, Catholic, socialist and neutral. These developed into four 'pillars', each of them closed into themselves, each having its own sports clubs, trade unions, employers organisations, broadcasting associations, social clubs, and political parties, through which their political elites brokered the political compromises to keep society together – the ending of the struggle over financial equality of schools and electoral rights was one of its feats. It was during the period stretching from secularisation of the 1960s to the de-ideologized '90s that the pillarized society was gradually dismantled.

Pillarized society also had a constitutional aspect. In 1922, the Constitution provided that by act of parliament public bodies with powers of regulation, other than those expressly mentioned in the Constitution, can be established.[26] In 1938, this provision was elaborated to provide for the possibility of supervision, including the right to quash decisions of these public bodies. Also, there was added a set of provisions on public regulatory bodies for particular professions and industries or professions and industry in general.[27] These provisions still occur in the present day Constitution,[28] and are the basis for the consociational nature of the economy, where representatives of government, trade unions and employers organisations, consult, discuss and agree on main aspects of the economy and economic policies.

4.2 *After the Second World War: the failed constitutional reform (1954 to 1983)*

[24] Queen since the death of her father in 1890, but due to her earlier minority, exercising her royal authority from 1898 until 1848; until she reached the age of 18, the royal authority was exercised by the Queen-Widow, Princess Emma of Waldeck and Piermont. The constitutional amendment intended to keep from the throne far removed German cousins and nephews, who tended to assemble in The Hague when Wilhelmina was more seriously ill, or had one of her miscarriages; the amendment was possible since she had given birth to her (only) daughter, Juliana.

[25] Article 57 Constitution 1922.

[26] Article 194 Constitution 1922.

[27] Article 152 to 154 of the Constitution of 1938.

[28] Article 134 of the Constitution.

The call for post-war renewal

4.2.1 During the Second World War, the Netherlands government was in exile from the beginning of the German occupation (May 1940). Although the provinces south of the great rivers (Meuse, Rhine) were liberated in the autumn of 1944, the entire area above the rivers (in which all the larges cities are situated) was not liberated until May 1945 and experienced a serious famine during the winter months of 1944-'45. During her time in London, Queen Wilhelmina had vented ideas about a 'renewal of the political order' of a rejuvenated country after the regaining its liberty, personal ideas which were not entirely new. In public, these ideas were formulated in very vague terms of the spirit of renewal, and did not provide any detail.[29] Reconsideration of the constitutional order – usually vague and undefined – was also pastime for others during and immediately after the war.[30] In the Speech from the Throne of 1946, the government announced a general revision of the Constitution, but this turned out not to be a very pressing concern. After the liberation wartime ideas about a new constitutional system were soon frustrated. They had been mostly too vague and undefined, while the traditional political parties regained the position they had before the war, thus forming a return to previous constitutional relations.

The 1954 proposals shelved

In 1950, a *staatscommissie* (state commission) was established by royal decree, composed of constitutionalists and a number of politicians from the main political parties and chaired by Minister Van Schaik, with the task to give its advice concerning a general revision of the Constitution. The commission published its final report in 1954. It did not propose systemic changes, did not receive much acclaim and was shelved,[31] although some amendments on international lawmaking suggested in an interim-report of 1952 were successful; these we will briefly discuss below.

The 1960s: contestation and D66

4.2.2 The second half of the nineteen-sixties seemed at first to be a turning-point. Social and cultural movements and contestation of the 'establishment', evidenced by beatniks in their Dutch version as *Provo's*, also affected the political environment. The announced marriage of the probable heir to the throne, Beatrix, with a German, was one object around which socio-political and cultural contestation could centre, with smoke bombs and alternative 'happenings' marking the wedding in Amsterdam in March 1966. 1966 was also the year that a committee calling itself *Democraten '66* (D66) issued a pamphlet in which serious concern was expressed concerning the political system, the existent political parties and parliamentary system.[32] Direct election of the prime minister, abolition of proportional representation, - the very cause of the prevalent culture of permanent compromise and unclear decision-making were declared centre pieces of a proposed overhaul of the constitutional system. For the minister for the interior in charge with constitutional affairs it

[29] *Cees Fasseur*, Wilhelmina [Bd. II], Krijgshaftig in een vormeloze jas, 2001, S. 430 ff..

[30] *D. Simons*, Twintig jaar later, 1966; the unity of the nation as opposed to the pre-war divisions and divisiveness, the dragging on of decision-making, loosing itself in fuzzy compromise if any decisions are taken at all, are returning justifications for 'renewal' of the constitutional order; corporatist ideas re-surface, particularly in some catholic circles, where they were originally developed at the end of the 1930s, for instance by the later catholic political leader Romme. The classic source describing the various ideas in the course of the Second World War, is *L. de Jong*, Het Koninkrijk der Nederlanden in de Tweede Wereldoorlog, [wetenschappelijke editie], 15 Volumes (30 Bd.), 1969-1994, especially volume 4, chapter 12, 'Kritiek op het vooroorlogs bestel'; volume 9, chapter 2, 14, 17, 18; volume 12, chapter 2. For the antecedents in the pre-war criticism of democracy in the Netherlands, *A.A. de Jonge*, Crisis en critiek der democratie: anti-democratische stromingen en de daarin levende denkbeelden over de staat in Nederland tussen de Wereldoorlogen, 1968 [1982[2]].

[31] For an overview and references in the parliamentary documents, see De parlementaire geschiedenis van de Proeve van een nieuwe Grondwet (1950-begin 1967), 1968, S. 1-18, and *passim*.

[32] Initiatiefcomité D'66, Appèl aan iedere Nederlander die ongerust is over de ernstige devaluatie van onze democratie. [1966]

was reason to commission a *Proeve van een nieuwe Grondwet*, written by civil servants in consultation with a number of professors of constitutional law.

Staatscommissie Cals-Donner

In 1967, the government installed another *staatscommissie*, chaired by former prime minister Cals[33], and co-chaired by A.M. Donner, professor of constitutional law and later president of the European Court of Justice and member of the European Court of Human Rights[34]. The report considered the various proposals and ideas about reforming the system of government, especially those concerning the electoral system and the manner of selecting a prime minister.

The *Cals-Donner* commission proposed to retain the principle of proportional representation, but wished to introduce a provision in the Constitution which would make it possible to divide the country into electoral districts in each of which at least 10 members of the Lower House would be elected, thus enhancing the relation between voters and elected.[35]

The smallest possible majority of the commission opted for a provision according to which simultaneous to the elections for the Lower House, voters would cast a vote on the which person was to lead a cabinet which was to be formed after the elections; only in case a person would (in the single round of elections) obtain an absolute majority of the votes cast, the king would have to appoint this person as prime minister.[36] Under this proposal, the parliamentary system, in particular the necessity for a cabinet to have sufficient confidence of a majority of the Lower House (that is to say, the absence of a vote of no confidence) would remain unaltered. In the perception of the commission, its proposal would in effect mean that the elections were an indication of who was to be charged with forming a cabinet, rather than a direct election of the prime minister. The exceptional case in which a candidate would receive an absolute majority of the vote, would according to the commission in practice always be a candidate which would have the support of a majority in parliament.[37]

These proposals, which were presented in a second interim report of the commission in 1969 because of the urgency which was felt concerning a desired amendment of the system of government, were hotly debated. Two members of the Lower House introduced a bill which proposed a directly elected prime minister *tout court* – an option which had been

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[33] J.M.L.Th. Cals (1914-1971), was catholic politician who always preferred political alliances with the social democrats. He was minister of education from 1952-1963 and in that capacity promoted huge reforms in the educational system; he was prime minister of a cabinet from 1965 until 1966, when this cabinet fell victim to a motion of censure.

[34] A.M. Donner (1918-1992) was professor of general theory of the state, constitutional and administrative law at the Free University of Amsterdam from 1945-1958; was member of the European Court of Justice from 1958 until 1979; professor of constitutional at the *Rijksuniversiteit Groningen* from 1979-1984; member of the European Court of Human Rights from 1984-1987; was also a member of the *Van Eysinga*-commission which prepared the constitutional amendments of 1953 and of the *Kranenburg*- commission which prepared the amendments of 1956, concerning international relations and the effect of treaties in the national legal order.

[35] The proposed Article 42, first paragraph, read as follows: 'Elections are based on proportional representation within the boundaries established by act of parliament. An act of parliament can provide that with a view to elections of each of the houses of parliament the country shall be divided into separate electoral districts in each of which at least ten members shall be elected'
[De verkiezingen geschieden op de grondslag van de evenredige vertegenwoordiging binnen de door de wet te stellen grenzen. De wet kan voor de verkiezing van elk der kamers het land in afzonderlijke kiesgebieden verdelen, in elk waarvan ten minste tien leden worden gekozen], Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1971, vol. II.

[36] The proposed Article 32 read as follows: 'Simultaneously to elections for the *Tweede* Kamer [Lower House], and in accordance with rules to be established by act of parliament, a vote shall be cast on the question who shall be charged with leading a cabinet which is to be formed. In case a candidate receives the absolute majority of the votes cast in this election, the King shall charged him with the forming of a cabinet which he shall lead', Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1971, vol. II.

[37] See Tweede Rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1969.

rejected by the *staatscommissie*.[38] But neither this nor the proposals of the commission were accepted by parliament.

Nevertheless, the proposals of the *Cals-Donner* commission were the starting-point for a series of bills introduced by the government, aiming to revise the whole of the Constitution.

Constitution of 1983

4.2.3 This general revision of the Constitution was finally achieved in 1983, after a relatively minor adaptation in 1972, which among other things lowered the ages for right to vote and being elected. The revision, although its initial ambition was much greater, was in the end mainly cosmetic and confirmed the historically incremental and very unrevolutionary nature of the Constitution. Alternatives were considered, but no major systemic changes were made. The language of the text was modernized, and many matters of detail were removed from the Constitution or delegated to the legislature ('deconstitutionalization'). Some called it 'a face-lift for an old lady'.[39]

The system of government remained untouched. Measured by its initial ambition, the revision could be considered a failure. On the other hand, it proved that the system of government was so deeply entrenched in practice and in law that it was found not to be changeable easily. The greatest novelty was the grouping of previously incorporated fundamental rights and a set of new ones (including a number of provisions on policy objectives, *Staatsziele*) in the opening chapter of the Constitution, in this regard following the proposal of the *Cals-Donner* commission. This was a sign of the times, in which constitutional matters began to concern less the government of state than the assertion of the rights of individuals.

Notwithstanding its modesty, the Constitution found its present shape in 1983 and can be expected to last for some time to come. This is further confirmed by a whole series of amendments which are all unimportant, sometimes utterly trivial. Before we say something about these, we first have to discuss the adaptations to the international environment which were translated into constitutional amendments before and after 1983.

4.3 *Adapting to the international environment: decolonisation, international relations and the Fall of the Wall*

The only circumstance urging a revision of the Constitution in the period following the Second World War was in the context of international relations, which had undergone drastic changes. Once again this was a matter of adaptation to a changing environment, rather than an amendment causing changes in the political environment. The international environment was changing in three constitutionally relevant respects: the process of decolonisation, the outbreak of the Cold War (and later on its ending in 1989), and increased international cooperation, especially in transatlantic and European context.

Decolonisation

4.3.1 Of these, the most pressing was the process of decolonisation. Indonesian nationalists headed by Sukarno had declared Indonesian independence on 17 August 1945. After what was in effect a painful colonial war during two so-called *politionele acties* (July 1947- January 1948 and December 1948 – January 1949), sovereignty was finally officially transferred on 27 December 1949, which of the Netherlands East-Indies left only Dutch New Guinea. The relation with the West-Indies, to wit Surinam (in South America) and what is now called the Netherlands Antilles (situated in the Caribbean; before 1948 these islands were known by the name of the largest, Curaçao), was also renegotiated in terms of granting these countries autonomy within the Kingdom at the end of the 1940s and beginning

[38] Bill by the members Van Thijn (of the social democrat *Partij van de* Arbeid) and Goudsmit (D'66), which was defeated in the Lower House in 1971.
[39] *A.W. Heringa / T. Zwart*, Grondwet 1983, 1991[3].

of the 1950s. The process of decolonisation was well beyond the control of the constitutional provisions on the colonies.

The process led initially to adaptations of the Constitution by a number of amendments passed in 1948. These changed the names of the territories mentioned in various constitutional provisions, and made it possible to enter into the federation with Indonesia and to come to an arrangement granting autonomy to other parts of the Kingdom. As the federation soon proved stillborn, later amendments of the Constitution could only be adapted to the new realities. This happened in 1956[40] and 1963. The first removed the mention of Indonesia in various places and the provisions on the federation with Indonesia. Relations with the Western parts of the Kingdom were resettled in a Charter for the Kingdom of the Netherlands, *Statuut voor het Koninkrijk der Nederlanden*, which has supra-constitutional status in 1954. The amendment of 1963 removed the mention of the Netherlands New Guinea, sovereignty over which had been transferred to Indonesia under strong international pressure a year earlier.

Cold war amendments

4.3.2 The cold war led to a number of bills on excluding members from representative assemblies (including the houses of parliament) who had demonstrated to strive after revolutionary aims. A somewhat similar proposal had been rejected in 1938, but the *staatscommissie-Van Schaik* had included it in an interim-report of 1952. In 1948, in response to the communist putsch in Prague, a successful initiative to amend the Constitution with as view to introduce the possibility of a civilian state of siege had been adopted. The commission's proposal of 1952, however, was rejected by the government and was not included in the bills it introduced.

Status of treaties and decisions of international organisations

4.3.3 More successful were the proposals the *Van Schaik* commission had made in its interim-report which built on the work of a parallel commission, and which concerned the conclusion of treaties and the status of treaties and of decisions of international organisations in the national legal order. The proposals to grant them direct effect in the domestic legal order were taken over by the government. An amendment initiated by Serrarens – member of the Lower House, later the first Dutch judge in the European Court of Justice[41] – stipulating expressly also the priority of treaties and of decisions over any contrary national legislation, was adopted against the wishes of the government.[42] A new provision was adopted to the effect that the government 'shall promote the development of the international legal order'[43] – one of the few 'ideological' provisions one can still find in the Constitution. Also, the failure of 1922 to submit in principle all

[40] In 1956 the number of members of the Lower House was increased from 100 to 150 and the Upper House from 50 to 75; also a number of other minor changes was adopted, such as a technical change to provide for the existence of municipalities in new polder areas before the adaptation of the borders of provinces; an editorial change in the reference to the armed forces; an amendment concerning the pension of members of the Lower House and the salary of members of the Upper House.

[41] Petrus Joannes Servatius Serrarens (1888-1963), was a prominent catholic trade union leader; his appointment to the delegation to the ILO in 1921 instead of the socialist trade unionist Oudegeest, led to the very first Advisory Opinion of the Permanent Court of International Justice of 31 July 1922, *Nomination of the Workers' Delegate to the International Labour Conference*, PCIJ, Series B, nr. 1 (1922); Serrarens had been, amongst others, member of the Governing Body of the ILO and member of the Parliamentary Assembly of the Council of Europe; he was the only non-lawyer as judge of the Court of Justice, which was from 1952 to 1958.

[42] Constitution 1953: Art. 65 Statutory regulations in force within the Kingdom shall not be applicable if such application is incompatible *with treaties which have been published* in accordance with Article 66 either before or after those statutory regulations have been made.

Art. 66 [...] *Treaties are binding on everyone* insofar as they have been published.

Art. 67, para. 2: Articles 65 and 66 are also applicable to decisions of international organisations under public international law.

[43] Article 58 Constitution 1953.

treaties, irrespective of the form they take, to prior parliamentary approval was rectified. All this was accomplished in 1953.

In 1956, the provisions on the status of treaties and decisions of international organisations were amended in order to specify that this priority concerned only 'provisions which are binding on everyone', *een ieder verbindende bepalingen*. This was done at the proposal of an advisory commission, established by the government, of which again A.M. Donner, the later president of the ECJ, was a member. Thus the concept behind what was later developed by the ECJ as the doctrine of 'direct effect', was introduced in the Netherlands Constitution.

The end of the Cold War

4.3.4 The radical change in the European context which came with the fall of the Wall, was reflected in the constitutional amendment of the year 2000 which concerned defence. It achieved a change in the description of the tasks of the armed forces. These no longer only concern the 'protection of the State's interests' but also 'maintaining and promoting of the international legal order' (the new Article 97, first paragraph, of the Constitution), thus adapting to the tasks which the armed forces – with a problematic constitutional basis – had already assumed in the 1990s.[44] Also, a new provision was inserted which imposes the obligation on the government to inform the States General prior to the deployment or making available of the armed forces for the purpose of maintaining and promoting the international legal order, including humanitarian assistance in armed conflict, unless compelling reasons prevent the government from giving such information in advance, in which case the information is to be provided as soon as possible (Article 100 Constitution). This duty to give information is to enable parliament to debate such use of the armed forces and, within the normal rules of the parliamentary system, to influence the relevant decisions.[45]

This was the last amendment of Constitution which can be considered an adaptation to a new reality in the outside world.

5. The Minor Amendments

The list of amendments made to the Netherlands Constitution which are of minor importance is fairly long even when it is acknowledged that it is debatable what is 'minor' and what 'important':

1884	amendment to abolish the prohibition of constitutional amendments during a regency[46]
1938	increase in the income of the Crown and that of members of the Lower House; introduction of ministers without portfolio (not heading a ministerial department); extension of the provisions on public bodies for industry and the professions
1972	lowering of the age to vote and stand for elections, abolition of state subsidies for protestant ministers and catholic clergy, adaptation of income of members of parliament and of the members of the Royal House
1987	a technical redrafting of Article 12, concerning entering the home against the will of an occupant by public officials[47]
1995	amendment to clarify beyond doubt that the armed forces do not need to have conscripts in active service

[44] See *Leonard F.M. Besselink*, Military Law in the Netherlands. In: European Military Law Systems. Georg Nolte (Hg.), Berlin 2003, S. 547-646, especially ….

[45] A large number of members of parliament believe that this Article may not give parliament a formal right of approval, but at least a 'substantive' one. This argument is difficult to sustain, as the government denies that there is a true right of approval.

[46] Wilhelmina was born in 1880 and was the only foreseeable successor to the throne, which might mean a long period of a regency – as indeed it turned out to be (from 1890 to 1898).

[47] The obligation of prior identification and notice can be restricted by act of parliament.

1999 lapse of a large number of transitory provisions, which had extinguished; amendment of the provision on ombudsman institutions in order to make explicit mention of the National Ombudsman (established in 1981) without making any change to his position; amendment on guardianship and parental authority over the king who has not attained majority

2002 further amendment of Article 12, in order to make exceptions for the necessity to provide a written report of the entry of a home against the will of the occupant in case when national security is involved

2005 provision enabling to provide for replacement of pregnant or ill members of representative bodies (parliament, provincial and municipal councils) by act of parliament

This list is not without its own meaning. The withdrawal of transitory provisions which as a consequence of the lapse of time have lost their meaning, may be trivial, but amending the provision on the king's guardianship in order to bring it in conformity with the civil code (!), as one did in 1999, does say something about the place of the Constitution within the legal order.

6. Perennial controversies

The previous section may suggest that one is constitutionally lost in trivialities. This may be true as far as the actually promulgated amendments are concerned. It is not true about the attempts at constitutional amendment which have so far failed or which are pending.

Further commissions and committees

Thus, the issue of reforming the system of government has remained controversial. The matter of bridging the gap between voters and the elected has been the object of various official study committees, first the *Staatscommissie-Biesheuvel/Prakke*.[48] Next a series of studies were commissioned by a committee of the Lower House between 1898 and 1993 (Commissie-Deetman). It produced many valuable analyses, although the whole exercise constituted something like a *déja-vu*.

This did not prevent recent attempts at introducing bills which intended to reform the electoral system towards a German system, which might possibly lead to an easier articulation of majorities as well – as this was done in a manner which remained within the boundaries of proportional representation, this did not require constitutional amendment. Also, an attempt was made to introduce a facultative and binding corrective referendum, as well as an attempt to have the mayors and provincial governors directly elected. None of these proposals were successfully passed.

Mid-2005 the cabinet has agreed to study a reinforcement of the position of the prime minister, including his direct or indirect election and yet again a reform of the electoral system.[49] Enthusiasm on the side effects of the referendum on the EU Constitution – particularly, the broad discussions and debates it engendered – occasioned the re-introduction of a bill on a binding referendum.

The study of pending amendments is fraught with difficulties, as unfailingly it is unknown what the future will bring. Suffice to mention the most far-reaching amongst pending proposals. That is the proposal to limit the constitutional prohibition for courts to review the constitutionality of acts of parliament – a prohibition on which we have to say

[48] Eindrapport van de staatscommissie van advies inzake de relatie kiezers–beleidsvorming,'s-Gravenhage, 1985.

[49] Most of these proposals are due to D66, the small liberal party, which has been forming part of recent government coalitions. It got its way much against sentiments of other coalition partners, due to its leverage as the smallest coalition partner needed by the others in power, paradoxically one of the reasons for its rebellion against coalition politics in the 1960s – history's revenge.

more below. The bill, initiated by members of the Lower House, excepts judicial review against classical constitutional fundamental rights from the prohibition.[50] It was passed with a large majority in the Lower House in 2004, but seems to encounter great scepticism in the Upper House. If successful, it would remove one of the particular features of the constitutional system of the Netherlands.

II. The actors of constitutional change

Having described in broad outline the historical development of the Constitution, we now turn to a discussion of the role of the various actors in constitutional change. We do so by looking at the various sources of constitutional law.

1. *Rigidity of the Constitution*

procedure of constitutional amendment

1.1 The Constitution is a rigid constitution. Its amendment proceeds as follows. First by act of parliament adopted by both Houses the proposed amendment to the Constitution must be formulated. After this, the Lower House is dissolved. After the new Lower House has convened, the amendment is considered by each of the Houses in the so-called 'second reading'. Each House can in second reading only adopt the amendment with at least two thirds of the votes.[51] This is basically the procedure which exists since 1848,[52] but also before the Constitution was rigid.

1.2 The precise meaning of this procedure is often misunderstood. Often it is said that the dissolution introduces a plebiscitarian element in the revision of the Constitution. But this is a misunderstanding for two quite different reasons.

The first is that the dissolution traditionally coincides with regular elections of the Lower House. This means that the proposed constitutional amendment has since the second half of the 19th century never played a role in those elections and electoral campaigns; not the proposed constitutional amendment but the general political programmes and political issues dominated the campaigns of political parties.

The second reason concerns the nature of the dissolution and subsequent elections and of the newly elected Lower House. The dissolution of the Lower House has never been to give the electorate the opportunity to vote on the constitutional amendment as if it were a referendum. It is not a referendum at all, but merely an election of a House with constitution-making power (which it exerts together with the Upper House and government). The actual

[50] Kamerstukken EK, 2004-2005, A, is the definitive version of the bill.

51 Article 137 of the Constitution:

1. An Act of Parliament shall be passed stating that an amendment to the Constitution in the form proposed shall be considered.

2. The Lower House may divide a Bill presented for this purpose into a number of separate Bills, either upon a proposal presented by or on behalf of the King or otherwise.

3. The Lower House shall be dissolved after the Bill referred to in the first paragraph has been published.

4. After the new Lower House has assembled, the two Houses of the States General shall consider, at second reading, the Bill referred to in the first paragraph. The Bill shall be passed only if at least two thirds of the votes cast are in favour.

5. The Lower House may divide a Bill for the amendment of the Constitution into a number of separate Bills, either upon a proposal presented by or on behalf of the King or otherwise, if at least two-thirds of the votes cast are in favour.

[52] Before 1995 not only the Lower House, but also the Upper House was dissolved before the second reading. Because the Upper House is elected by the *Provinciale Staten* [provincial councils] which themselves are not dissolved, the Upper House was usually re-elected with the same results as the previous House. This was considered to be a meaningless ritualistic way of proceeding, and was therefore abolished.

wording of the relevant constitutional provisions on constitutional amendment confirms this view.

1.3 In recent practice, the matter has become totally confounded. In May 2002 the Lower House was dissolved with a view to a number of constitutional amendments which had in first reading been adopted (i.e. on the basis of Article 137 (3) of the Constitution). The government formed after these elections, however, fell already in October of the same year due to problems within the coalition with ministers from the political party of Pim Fortuyn, who had been murdered a week before the elections leaving the party he had established a few months earlier in total political disarray. The fall of the cabinet necessitated new elections for the Lower House, but the old House had not found time to consider the pending constitutional amendments. It was only the new Lower House formed after these latter elections which dealt with the constitutional amendments in second reading, although this Lower House had not been formed on the basis of a dissolution for reasons of constitutional amendment, but on the basis of the general provision on dissolution, Article 64 of the Constitution.[53] Of the then pending amendments, only one concerning the temporary replacement of members of parliament and other representative bodies who are ill, pregnant or have given birth, was adopted. Although there is a solid body of opinion that passing this constitutional amendment was unconstitutional, parliament and government have nevertheless adopted it. As there is no competent court to decide the issue, this view prevails.[54]

1.4 The rigidity of the Constitution has been regretted by a long succession of constitutional lawyers. Already Thorbecke had been opposed to the cumbersome procedure for constitutional amendment. Many later professors of constitutional law have followed suit.[55] In 1998 the Ministry of the Interior, which is in charge of constitutional affairs, gave a prize to a group of scholars who proposed to include in the Constitution a provision which sought to make 'experiments' possible by allowing temporary changes, which needed confirmation after lapse of a certain period.[56]

However one may think about this kind of constitutional engineering, there can be no doubt that the cumbersome procedure for constitutional revision has made the adoption of some more far-reaching proposals difficult. This also explains why there have been some constitutional revisions which concern rather unimportant and uncontroversial issues, and which were often left-overs after the more substantial proposals were rejected.

This state of affairs is inherent in the kind of entrenchment which is intended by the provisions on constitutional revision: only those rules which can count on the support of a large majority in two Lower Houses and in the Upper House can be raised to constitutional status.

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[53] Artikel 64:

[54] An advisory opinion from the *Raad van State* argued that it has never been the intention of the makers of the Constitution to let a later House than the one elected after the appropriate dissolution decide on the amendment in second reading; although the language of the relevant provision explicitly excluded such a practice, an unintended rephrasing of 1995 did not literally exclude it; this de *Raad van State* considered decisive. This advisory opinion was adopted uncritically, probably for purely political reasons, by the government and parliament.

[55] Most recently J.A. Peters, Wie beschermt onze Grondwet?, 2003.

[56] *M.L.P. van Houten/ H.R.B.M. Kummeling/P. Mendelts/ R. Nehmelman/ T. Zwart*, De staatkundige proefneming in de Grondwet, RegelMaat 1999, 4/5, S. 175 – 181.

Unchangeable clauses?

1.5 Unlike the constitutions of other European countries, the Constitution does not provide for certain unchangeable provisions. Usually it is assumed that there are no such unchangeable provisions. Nevertheless, one author has argued that certain fundamental rights, as found in the Constitution and the European Convention of Human Rights are unchangeable even for the constitution-making power.[57]

In an advisory opinion on the possibility of diverging by treaty from the Constitution, the *Raad van State* took a similar position. It suggested that it was impossible to diverge from the ECHR and the 'Treaties establishing the European Union' (*sic*) and from certain fundamental rights provisions in Chapter 1 of the Constitution if these were substantially infringed.[58] This opinion referred to the power of the treaty making power, not to the constitution-making power. However, the treaty making power in the case of treaties which diverge from the Constitution, is vested in the legislature by a majority of at least two thirds of the vote in both houses of parliament together with the government; essentially the constitution-making power resides in the 'second reading' of constitutional amendment, which is a majority of at least two third of the vote in both houses of parliament. Thus, the opinion of the *Raad van State* may logically extend also to the limits which the constitution-making power has to observe.

In practice, there are no examples of amendments which were (allegedly) contrary to such supra-constitutional norms.

2. *The role of the government*

2.1 The overwhelming majority of constitutional amendments were passed at the initiative of the government. This agrees with the state of affairs in legislative matters in general. The Lower House (contrary to the Upper House) has the right of initiative, and this extends also to bills proposing a revision of the Constitution. In the manner in which the parliamentary system functions in the Netherlands, however, the Lower House makes little use of its right of initiative.[59]

One of the very few exceptions to this is the (by Dutch standards) very rapid adoption of the initiative to introduce a civilian state of siege in 1948: it took only months to have it passed in two readings, which was helped by the fact that elections were due anyway.[60]

2.2 In the 1960s, the Ministry of the Interior set up a department for constitutional affairs. It played a significant role in the lead up to the revised Constitution of 1983.

As we noticed above, the government has made regular use of official advisory commissions especially established to investigate the desirability of the major constitutional amendments. These commissions were initially chaired by a minister while also active politicians took part as well as constitutionalists, but on later occasions it was mainly the experienced elderly statesman who would chair such a committee together with a prominent constitutional lawyer (e.g. the *Cals-Donner* and *Biesheuvel-Prakke* commissions mentioned above).

This way of proceeding highlights the effort to seek broad consensus and expert input from outside the bureaucracy in the process of constitution-making. It takes the issue of constitutional reform in a sense outside the area of day-to-day politics. Thus on the one hand

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[57] *G.F.M. van der Tang*, Artikel 137, in: Akkermans-Koekkoek, De Grondwet, 1992, S. 1188.

[58] Advisory Opinion *Raad van State* d.d. 19 November 1999 concerning the implementation of foreign jurisdiction in the Netherlands [the Scottish court which was to adjudicate the *Lockerbie* case in the Netherlands pursuant to a Security Council Resolution and subsequent Treaty], *Kamerstukken TK* [Parliamentary Documents of the Lower House]1999-2000, 26 800 VI A, S. 6.

[59] See footnote 128 below.

[60] The other parliamentary initiative which was adopted in two readings was the lowering of the minimum age for elections in 1972.

it renders justice to the nature of constitutional norms as higher norms on which a large degree of consensus is desirable and which are not liable to being essentially contested. On the other hand, this less ideological nature makes it duller and risks making the Constitution a matter for experts only.

3. *The role played by parliament*

3.1 Together with the government, parliament has a role to play in the development of norms of customary constitutional law. In the Netherlands doctrine there is consensus on the principle that the forming of a customary norm of constitutional law requires an *opinio iuris sive necessitates* and a practice expressing it. The *opinio iuris* must exist among the relevant actors which are to be bound by the rule or profit from it. Thus for customary norms concerning the parliamentary system to exist, *opinio iuris* must exist both with parliament and the government. There is some academic controversy on the element of necessity: some argue that the continuity of state government or the coherence of the constitutional system must be at risk if the rule were not to exist; if the coherence of the system or the continuity of state government is not affected, than the relevant practice, even if desirable, is not a rule of customary law, but merely a practice or convention of the constitution.[61] On the whole there is a reticence to accept too easily the existence of a customary or unwritten rule of constitutional law, [62] but a number have been recognized in constitutional practice and in the case law.

The main norm accepted in parliamentary practice is the rule of confidence which holds that if the Lower House passes a motion of censure addressed to the cabinet or a minister, the cabinet or minister will have to offer its resignation to the king, who is under the obligation to grant the dismissal, unless the government decides to dissolve the Lower House.

This alternative of dissolution of the Lower House instead of offering the resignation of the cabinet, has not been practiced since the 1930s for two reasons. Firstly, this is due to the coalitions of which cabinets are composed and the close relations between the members of a cabinet and their respective political groups in parliament. This prevents a conflict between a cabinet which remains politically homogenous and a majority of the House; usually, a conflict between coalition partners in parliament spills over into the cabinet, while a conflict between coalition partners within the cabinet spills over to parliament, so that the conflict itself is not 'put to the country' by calling for elections, but dissolutions are used to solve the political crisis resulting from the conflict. Secondly, since 1922 cabinets offer their resignation on the eve of elections for the Lower House, thus freeing the way for the forming of a new cabinet after the elections. In practice, the dissolution of the Lower House when a political crisis exists, is a matter on which the leaders of all groups in the Lower House are consulted by the Queen (who upon the fact that the cabinet has offered its resignation always consults the leaders of the political groups in the Lower House). Thus, although informally, consent of the majority of the House is sought. All this makes the customary constitutional norm that in case of a motion of censure the government can resort to the Lower House's dissolution theoretical or even less than that.

This practical state of affairs affects also the relevance of another unwritten norm of constitutional law mentioned in the literature: the norm that in case of a crisis of confidence between parliament and the cabinet, the cabinet cannot dissolve the Lower House more than once; in other words, if a crisis leads to a dissolution of the Lower House, and elections do not lead to support for the cabinet in that crisis, the cabinet will have no alternative but to resign.

[61] The doctrine of 'conventions of the constitution', if it is at all a doctrine of Netherlands constitutional law, is not developed coherently in the literature, and is referred to less and less frequently. Although derived from British constitutional law, it is not quite as clear, due also to a different notion of 'law' from the British one.

[62] See C.A.J.M. Kortmann, Constitutioneel recht, Deventer 2005 [5], S. ....

As we said above, a situation of conflict in which the cabinet could even contemplate dissolving parliament twice over the same issue, can hardly be conceived in practice under the present functioning of the parliamentary and electoral system, in which coalitions with narrow political relations between the individual ministers and their political constituency in parliament are necessary. This renders the rule theoretical.

3.2 Parliament rarely initiates bills to amend the Constitution which are successful, but the practice of reverting to committees and committees of which also experts of various political background take part, compensates for this.

In general, the constitutional awareness in parliament is very low indeed and constitutional culture is weak, particularly in the Lower House. This is paradoxical if one is aware of the prohibition of courts to review the constitutionality of acts of parliament. Unlike the British Lower House, which has a committee for scrutinizing the compatibility of bills with the Human Rights Act as well as a committee to scrutinize delegated legislation, or the Finnish Parliament, which has a constitutional committee to review the constitutionality of bills (a committee retained after the prohibition of judicial review of acts of parliament was lifted in 2000), there is no parliamentary committee or any other parliamentary mechanism to guard the constitutionality of parliament's or the government's products.

Under such circumstances, the government is not very eager to raise constitutional issues concerning its own acts and proposals. Mainly, if an objection of a constitutional nature is put forward, it merely tends to seek arguments in favour of its own view of the constitutionality of its action without seriously, if at all, explaining and considering arguments which might lead to a different conclusion.

This state of affairs is hardly compensated for by the advisory opinion of the *Raad van State* which is always be consulted on all bills. The *Raad* is said always also to have regard to issues of constitutionality, but does not mention why a bill is considered constitutional if it thinks there is no conflict with the Constitution. On some occasions the *Raad van State* has shown an unlikely degree of literalness in its interpretation of constitutional provisions, in which it made the letter of the law more decisive than either the intention of the provision or the system of the Constitution,[63] which is far removed from judicial canons of interpretation as used by most constitutional tribunals in Europe.

4. *The role of courts*

4.1 Since 1848, the Constitution prohibits courts to review the constitutionality of acts of parliament (since 1953 also of treaties) as is now provided in Article 120.[64] Yet, courts, particularly those of highest instance, play an important role in constitutional development and constitute sources of constitutional law. After all, courts can establish the constitutionality of all acts other than acts of parliament, unless in case judging such other acts unconstitutional necessarily implies the unconstitutionality of the act of parliament which is at the basis of that act.

4.2 The power to interpret the Constitution and adjudicate constitutional issues is not concentrated in any particular court of law or specialized adjudicating institution: the system of constitutional adjudication is diffuse.

Thus many courts have interpreted the scope and meaning of constitutional fundamental rights. Case law on other provisions of the Constitution, however, is relatively

[63] See above footnote 54.

[64] Presently Article 120 of the Constitution: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

scarce, but not absent. This case law developed certain principles of the Constitution, as well as unwritten principles of constitutional law.

Of the more important constitutional principles, the case law of courts was crucial with regard to

- the status of international law in the national legal order,
- the division of powers between the executive and legislature (the principle of legality), and
- the division of powers between the legislature and the judiciary, and the attendant distinction of political from legal questions.

We say a few words about each.

4.3 The rule of unwritten constitutional law that treaties can be invoked as treaties before courts, and do not need specific transformation into national law, is derived from the case law of the *Hoge Raad* in a standard case which dates back to 1919.[65] The case law has since this judgment assumed that in principle that international law which has become binding on the Kingdom under public international law, is binding in the national legal order.

This monist view is reinforced by the constitutional provision that self-executing international provisions have priority over conflicting national law (see below III.1.5).[66] In a famous judgment, however, the *Hoge Raad* interpreted this provision to mean that a court's constitutional duty to review the compatibility of (acts under) national law with international law is restricted to provisions of treaties and of decisions of international organisations which are binding on all persons in the sense of the Constitution and therefore prohibits review the compatibility with any other form of international law.[67]

4.4 A further example of an unwritten principle of constitutional law established by case law, is the principle of legality which the *Hoge Raad* derived from the general system of the Constitution in the *Meerenberg* case of 1879.[68] The case concerned a royal decree containing a general rule prescribing that mental hospitals were to hold a register of its patients, on pain of a penal fine determined by act of parliament. Rhe *Meerenberg* institution had failed to comply with this royal decree and was prosecuted. In highest instance the matter turned on whether the government had the power to issue the said royal decree, although there was no basis for that decree in an act of parliament, other than the act of parliament which imposes a penal fine on the transgression of royal decrees (an Act known as the *Blanketwet* of 1818). In its judgment, which concerned the powers of the executive versus those of the legislature and hence the powers between government and parliament, the *Hoge Raad* found that the Constitution did not grant a general legislative or regulative power to the government, and that it followed from the scheme and structure of the Constitution that legislative power which is to be enforced with criminal sanctions, can only be derived from either the Constitution itself or from an act of parliament delegating such power to the government. Such an act of parliament or direct basis in the Constitution itself was absent, while also the *Blanketwet* did not provide a basis for the said royal decree.

From this judgment, which was phrased in broad and general language, the unwritten constitutional principle of legality was derived according to which legislative power can only be exercised by the executive if it has a specific basis in an act of parliament. This found an indirect expression in a constitutional amendment of 1887, according to which royal decrees

[65] HR 3 April 1919, NJ 1919, S. 371 (*Grenzvertrag Aachen*).
[66] At present Article 94 Constitution.
[67] HR 6 March 1959, NJ 1962, 2 (*Nyugat II*); reiterated in HR 14 April 1989, NJ 1989, 469 (*Harmonisatiewet*), paragraph 3.2.
[68] HR 13-01-1879, W 4330 (*Meerenberg*).

containing general administrative regulations can only be enforced with criminal sanctions if it has a basis in an act of parliament.[69]

The principle was further elaborated in a judgment of the *Hoge Raad* of 22 June 1973 on fluoridizing drinking water, in which it held that not only measures enforced with penal sanctions, but any measure which imposes a burden on citizens or are 'invasive', *ingrijpend*, must have a basis in an act of parliament.[70]

4.5 Also with regard to the interpretation of the division of powers between the legislature and courts, the case law is constitutive of the relevant constitutional rules and principles.

As we mentioned above, the Constitution prohibits courts from reviewing the constitutionality of acts of parliament (Article 120 Constitution). This provision does not cover review of the legality of bills, nor the question whether a failure to legislate can be adjudicated. Nevertheless, in a number of recent cases the *Hoge Raad* has made clear that the competence of courts does not extend to those issues as long as it concerns the granting of an injunction to legislate. And this does not only apply to purely national cases, but also concerning an injunction to legislate in case the legislature has failed to adopt an act of parliament which would be required to adapt national legislation to an EC Directive (Directive 91/676, the Nitrate Directive).[71]

Although some of the considerations adduced by the *Hoge Raad* are somewhat laconic, this case law can only be understood from the perspective of the separation of powers between the legislature and the judiciary. The language of at least some considerations in these cases refers to the inherently political nature of legislating, and in the case failing to comply with an EC Directive of the political nature of the choice to legislate and letting it come to infringement proceedings under Article 226 and following EC.

This case law is of prime importance for the national constitutional doctrine of the separation of powers.

4.6 We can observe in the case law just mentioned a doctrine of separation of powers which seems to hinge on the dividing line between discretionary decisions to be left to the legislature and legal issues which are the domain of courts of law. There is a broader recent tendency in the case law of the *Hoge Raad* towards a restrictive interpretation of the competence of courts in cases in which political issues are prominent.

This tends to a *political question doctrine*, and mainly concerns issues of foreign policy. It was developed in cases concerning the use of nuclear weapons (in a case concerning *the threat or use of nuclear weapons*)[72] on (cooperation in) the use of armed force in international interventions (in the case on *NATO bombardments in Kosovo*)[73] which hinged on the lawfulness under public international law, but it was extended to an interpretation of Article 90 of the Constitution, which imposes on the government the obligation to promote the development of the international legal order, in the case of the Netherlands' participation in international operations in *Afghanistan*.[74]

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[69] The present Article 89, first and second paragraph, of the Constitution.
[70] HR 22 juni 1973, NJ 73, 386 (*Fluoridering*).
[71] HR 19 November 1999, C98/096HR (*municipality of Tegelen*)on an alleged infringement of a procedural rule contained in an act of parliament, which affects the merger by act of parliament of two municipalities; HR 21 March 2003, Nr. C01/327HR, < www.rechtspraak.nl >LJN-number: AE8462 (*Waterpakt*), see CMLRev 41(2004): 1429-1455; this approach was confirmed as regards an injunction to a provincial council to pass a provincial byelaw in order to comply with an EC Directive, HR 1 October 2003, C03/118HR, < www.rechtspraak.nl > LJN: AO8913, (*Frisian Fauna Protection*).
[72] HR 21 December 2001, nr. C99/355HR, NJ 2002, 217.
[73] HR 29 November 2002, C01/027HR, <www.rechtspraak.nl>, LJN-number: AE5164.
[74] HR 6 February 2004, C02/217HR, <www.rechtspraak.nl>, LJN-number: AN8071.

The reasoning in these cases followed a common pattern. First the *HogeRaad* states that foreign policy decisions highly depend on political considerations related to the circumstances of the moment; next it holds that courts must show a large measure of restraint in adjudicating claims which aim at declaring unlawful and forbidden certain acts implementing political decisions in the field of foreign policy and defence; and finally it concludes that 'it is not up to civil courts to come to such political decisions.' Extending this to the interpretation of Article 90 of the Constitution, it stated that this provision does not give any clues as to how it should be implemented by the government, and leaves considerable political discretion with which courts cannot interfere.

This political question doctrine has also been extended to later case law of lower courts.[75]

5. *The role of personalities in constitutional development*

Doctrinal writings have a merely subsidiary role and are rarely referred to for instance in the case law, and have a minor role as source of constitutional law in the Netherlands. We refer to the relevant study in the third volume of this Handbuch. Here we limit ourselves to the main personalities who were instrumental in shaping the constitution by their contribution as scholar as well as politician. The historical outline in the first part highlighted the role of most of these, whom we here briefly remember chronologically.

It concerned firstly *Gijsbert Karel Van Hogendorp* (1762-1834), who had a prominent place in political practice only during a short period in 1813 when arrogating temporary leadership together with two other prominent persons awaiting the return of new Sovereign Prince, and also during subsequent phase of the actual framing of the Constitution of 1814. His *Schets eener Constitutie* [Sketch of a Constitution], on which he had been working during the entire period of political instability from the end of the Republic to the end of the French occupation, was officially to be taken as the basis for drafting that Constitution, and most of its main proposals were incorporated in it.

The next personality to put his stamp and seal on the liberal reforms of the 19th century was *Johan Rudolf Thorbecke* (1798-1872). Like Hogendorp, he was first active through the ideas he published and was subsequentely in the position to put them into practice in active politics, as we already discussed in some detail. Different from Hogendorp, he was much longer actively involved in the forefront of politics in the period 1840 until 1872, as a member of the Lower House and prime minister.

It is no coincidence that Thorbecke was the first to publish Hogendorp's *Schets*, which had been circulating in fairly broad circles but was never published. It appeared an appendix to Thorbecke's *Aanteekening op de Grondwet* [Annotation to the Constitution] of 1839. He thus placed himself on a par with the founding father – and in many respects he may well be considered such.

After these two authors *cum* politicians, it becomes more difficult to point to personalities whose work were as instrumental in constitution making. There are some politicians, but their contribution is to political thought and 'normal' politics rather than to constitutional reform and politics (for instance the protestants Abraham Kuyper and De Savornin Lohman).

Among the recurring names after the Second World War is that of P.J. Oud (1886-1968), a prominent liberal politician, who was member of the Lower House (1917-1933, 1937-1938, 1948-1963), minister of finance (1933-1937), mayor of Rotterdam (1938-1941, 1945-1952), professor of constitutional and administrative law in Rotterdam (1952-1957) and

[75] E.g. Rb Den Haag 4 May 2005, < www.rechtspraak.nl >, under LJN: AT5152, refusing a request to arrest President Bush upon his entry into the Netherlands.

a member of a number of *staatscommissies*, such as the Commission led by Van Schaik on a general revision of the Constitution (1950-'53). He did not have the domineering, towering status of the 19th century examples, although had influence due to his combination of constitutional scholarship and political activity. He authored a number of books on contemporary political and constitutional history, and a two-volume treatise on constitutional law, *Het constitutionele recht van het Koninkrijk der Nederlanden*, which still stands as an important and authoritative book (of which the last edition appeared in 1970). He acted during his long years as active member of the Lower House often as the 'constitutional conscience' of the House.

Another person who was a professor of constitutional law and whom we have mentioned several times is A.M. Donner (1918-1992). He was exceptionally influential as having been a member of all previous post-war *staatscommissies* and consultant to the group who drew up the *Proeve.* This and his co-chairmanship of the *Cals-Donner* commission makes him something of the father of the 1983 Constitution. To his authority as constitutionalist has also contributed his many editions of Van der Pot's *Handboek van het Nederlands Staatsrecht*, on which he put his very strong personal stamp, and which was the leading textbook for decades. Interestingly, Donner was never in the forefront as an active politician, although his work bears the mark of the Calvinist Protestant and he was a life-long prominent member of the so-called Anti-Revolutionary Party[76] [*Anti-Revolutionare Partij*], which merged with another Protestant party and the Catholic Party in the Christian-Democrat Party, *CDA*, in the early 1970s.

6. *The role of foreign constitutional law*

Although in the Netherlands it is commonly received that norms of constitutional law can originate at the international level, foreign constitutional law – that is the national constitutional law of other states – has, of course, no legal status within the national legal order. Little reference has so far been made in the case law to common principles of constitutional law of civilized, Western or European states. Nevertheless, in the context of constitutional development foreign constitutional law has been used heuristically, though altogether the role of foreign examples has throughout Dutch constitutional history been limited.

The Republic of the United Provinces followed no clear contemporary or ancient example consciously.[77] The French influence at the end of the 18th century was effective only in the Constitutions of the Batavian Republic (1798, 1801 and 1805), but after 1798 the subsequent constitutional experience became to a large extent an example by contrast: throughout the 19th century the French Revolution and its aftermath formed a dreaded example, which gave its name to the first modern political party, the protestant Anti-Revolutionary Party.

Hogendorp had visited both England and the United States, so some influence may be suspected. In practice the constitution developed in many ways in the manner of the British parliamentary model, but this was not noticeably by design. In fact, the parliamentary system ended up being of the Westminster model. Even the plenary assembly hall of the Lower House used to have its interior modelled on the British Lower House, existing of two sets of rows opposite each other with the Speaker in the middle. (Unlike England, the government was sitting in the middle in between the benches.)

[76] 'Anti-revolutionary' in the sense of being opposed to the principles of the French revolution.

[77] This notwithstanding the fact that in 17th century literature references to such examples were made, in the early years particularly to Ancient Israel, Greece and Rome; later on references to the Venetian republic and the Helvetian confederation abound.

Even during the general revision leading to the Constitution of 1983, no direct comparative exercises of any substantive scope were undertaken. Yet, it is obvious that some of the ideas of *D66*, particularly concerning the electoral system, seemed to look at the British example or some variation thereof, whereas ideas about the directly elected prime minister looked eclectically at French rationalized parliamentarism. The codification of a catalogue of fundamental rights as a first chapter to the Constitution of 1983 was obviously inspired by the German example. Traces thereof, without explicit reference to German constitutional law, can be found in the parliamentary documents from the government.[78]

Since 1983, comparative constitutional law has become more important. Discussions on constitutional change are now often accompanied by explicit comparisons with other countries, mainly for informing the discussion, but also heuristically. This has been the case for instance in the report by the *staatscommissie Biesheuvel/Prakke* on introducing a corrective referendum. Also more recent discussions, for instance on adapting the electoral system are partly based on and informed by explicit discussions of foreign examples; the German electoral system is often praised for combining proportional representation with clear constituency preferences, while also the fact that it has often – though not always – generated a clear winner of the elections, thus facilitating the forming of a government is looked at with some jealousy.[79] Another example is the present discussion of possibilities for introducing a directly elected prime minister, which has given rise to the government commissioning a study into some foreign examples.[80]

In 1992, a new assembly hall for the Lower House was built, and its interior was changed from the British oppositional to the German Bundestag hemisphere model. This change to a continental orientation may be symbolic.

III. Fundamental Structures and Concepts

In this part we discuss the structure and major substantive principles of the Netherlands constitutional law, to which we have already alluded in previous sections. We submit that the Constitution provides the political system with little more than a framework which is largely dominated by the political system itself. Courts have no role to play in this regard. The Constitution is an epiphenomenon: it is more the reflection of the political system than that the political system is the reflection of the Constitution.

It is a common trait of European constitutionalism, that a shift has occurred from focussing on the political system, in which rights of citizens were mainly electoral rights, towards individual fundamental rights beyond political rights in a strict sense, which are enforced in courts of law. In the Netherlands this occurs to a large extent in a quite different manner from most other European countries: its substance is to a considerable extent located outside the Constitution itself.

We first describe the place of the Constitution in the broader context of the Netherlands constitutional system and constitutional law, through a brief analysis of its place in the hierarchy of (constitutional) norms. We highlight its relation to the legal order and to the political system.

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[78] On the history of the chapter on fundamental rights of the 1983 Constitution in general, see *J.J. Pelle*, In de staatsrechtsgeleerde wereld: de politieke geschiedenis van hoofdstuk 1 van de Grondwet van 1983. 1998.

[79] *J.A. Van Schagen/ H.R.B.M. Kummeling* , Proeve van een nieuw kiesstelsel, 1998.

[80] *J.L.W. Broeksteeg/ E.T.C. Knippenberg/ L.F.M. Verhey*, De minister-president in vergelijkend perspectief, 2004.

In further sections we briefly discuss the idea of the *rechtsstaat*, whose content and meaning within discourse in the Netherlands is much more diverse than might be expected by constitutionalists. A more helpful and prominent related notion is that of fundamental rights.

Finally we discuss the basic features of the horizontal and vertical division of powers and the absence of the notion of the nation or another encompassing equivalent.

1. *The relation of the constitution to the legal and political order; hierarchy of norms and constitutional law's relative place towards other parts of the legal order*

The Constitution and the constitution

1.1 Within the complex of norms of constitutional nature, the Constitution, *Grondwet*, is one nucleus of the broader constitution, but not the only one. The totality of legal norms making up constitutional law (the substantive *bloc de constitutionnalité*) is larger than the total of the provisions of the Constitution alone. As we shall see, it extends figuratively speaking both 'upwards' and 'downwards'.

This state of affairs is intimately connected with the nature of the formal constitution as a textual instrument which registers and articulates a state of affairs in a legally binding manner as it normatively operates in a wider political reality. The Constitution (*Grondwet*) is, so to say, an epiphenomenon of the principles which political society embodies. When we discuss the hierarchy of written constitutional norms, we should be aware that there is also unwritten constitutional law. As mentioned, the main constitutional rule of the parliamentary system, the rule of confidence, has not been codified into the text of the Constitution. This is another expression of the particular character of the Netherlands Constitution, which does not even contain some of the most important constitutional norms.

We also argue that to the extent that there is a certain 'constitutionalisation' of private law in the Netherlands, this may be explained from the place of international human rights treaties, rather than from the position of the Constitution.

1.2 In order to determine the relation of the Constitution to the *legal order*, it is necessary to establish its hierarchical position.

It is beyond doubt that the Constitution, *Grondwet*, has a superior rank vis-à-vis ordinary legislation, that is to say acts of parliament and delegated legislation.

The fact that courts cannot review the constitutionality of acts of parliament does not change the hierarchical order between Constitution and acts of parliament. There can be no doubt that parliament and government, together acting as legislature,[81] are bound by and subjected to the Constitution. Unlike the situation in the United Kingdom, parliament is not sovereign. In the context of the debate among lawyers on the prohibition of the judicial review of the constitutionality of acts of parliament some have argued from a certain equivalence in effect to the existence of sovereignty of parliament, but this is a misunderstanding both of the British doctrine and of the legal position in the Netherlands.

1.3 Although the Constitution has higher rank than acts of parliament, it does not have highest rank. There are two sets of norms which can have higher rank than the *Grondwet*. At least some of these can also substantively be considered constitutional norms of higher rank than the Constitution – the 'upward' extension of the constitutional law.

1.4 The first is the Charter for the Kingdom, *Statuut voor het Koninkrijk* of 1954, which governs the relations between the three countries which make up the Kingdom: the

[81] Article 81 Constitution: 'Acts of Parliament shall be enacted jointly by the Government and the States General.'

Netherland (approximately 16.2 million inhabitants), the Netherlands Antilles and Aruba (together six islands situated in the Caribbean, with an estimated total of 280 000 inhabitants).

The *Statuut* basically reserves a series of issues to the Kingdom as matters for the whole realm, of which the most important are foreign affairs and defence. Legislation on such matters which is to be apply in more than one country is adopted by a special procedure which grants a consultative role to the parliaments of the overseas countries and their plenipotentiary ministers representing their government at The Hague. All matters which the *Statuut* does not declare matters for the whole realm are left to the autonomy of each country.

The *Statuut* provides that it is of higher rank than the Constitution: 'The Constitution shall have regard to the provisions of the Charter.'[82] As a consequence, Article 142 of the Constitution provides that '[t]he Constitution may be brought into line with the Charter for the Kingdom of the Netherlands by act of parliament.'

However, in as far as matters of the kingdom concerning legislative and executive powers, the organs of the kingdom, kingship and the succession to the Throne, have not been provided for in the Charter, the relevant provisions of the Constitution apply.[83]

1.5 The second, more significant exception to the superior rank of the Constitution is a consequence of Article 94 of the Constitution: 'legislative provisions', *wettelijke voorschriften*, in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties and of decisions of international organisations which 'are binding on every one', i.e. directly effective self-executing provisions.

It is generally assumed that the expression 'legislative provisions' includes the provisions of the Constitution itself, and this was also the opinion of the government during the leading to the Constitution of 1983.[84]

The relation of this proposition to the requirement that a treaty which diverges from the Constitution be approved with a majority of two thirds of the vote in both Houses of Parliament (Article 91 (3) of the Constitution), has rarely been considered. As a consequence of the rule that courts are not able to adjudicate the compatibility of treaties with the Constitution under Article 120 of the Constitution, it has been argued that courts, are only allowed to leave provisions of the Constitution unapplied because of a conflict with a directly effective provision of a treaty under Article 94 of the Constitution if the relevant treaty has been approved with at least two thirds of the vote in both Houses in accordance with Article 91(3) of the Constitution.[85]

The penal chamber of the *Hoge Raad*, however, has recently held that EC Regulations do not derive their validity in any manner via Articles 93 and 94 of the Constitution. This is at odds with the intention of the constitution-making powers, as these have explicitly held that Articles 93 and 94 of the Constitution also apply to EC law.[86] In other words, the *Hoge Raad* seems to hold that EC law may diverge from the Constitution, although the approval of the constitutive treaties have not explicitly been based on Article 91 (3) of the Constitution.[87]

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[82] Article 5 (2) Charter.

[83] Article (5 (1) Charter: 'The Kingship and the succession to the Throne, the Organs of the Kingdom referred to in the Charter, and the exercise of royal and legislative power in affairs of the Realm shall be governed, if not provided for by the Charter, by the Constitution of the Kingdom.'

[84] TK 1977-1978, nr 15 049, nr 3, S. 13.

[85] *Camilo B. Schutte*, De stille kracht van de Nederlandse Grondwet. Beschouwingen rond het verbod aan de rechter om verdragen aan de Grondwet te toetsen, in: RM Themis 2003-1, S. 26-40.

[86] HR 2 November 2004, nr 00156/04 E, < www.rechtspraak.nl >, under LJN: AR1797.

[87] Although they have been approved with more than two thirds of the vote, the legislature is assumed to have held that the Treaties do not diverge from the Constitution at least when the issue was discussed at the time of the approval of the Treaty of Maastricht.

Constitutional importance of human rights treaties

1.6 The consequence of Articles 93 and 94 of the Constitution is that directly effective self-executing provisions of treaties prevail. To the extent that they are substantially of a constitutional nature they are mostly considered to have superior status. Such provisions are typically the provisions on classic human rights provisions. As these primarily aim to regulate the relations between the state organs and individuals, they are sources of constitutional law of the Netherlands. This is particularly (but not exclusively) true of the provisions of the European Convention for Protection of Human Rights and Fundamental Freedoms and of its Protocols to which the Kingdom is a party, and the provisions of the International Covenant on Civil and Political Rights.

Precisely because courts have to give priority to these provisions over conflicting norms, the constitutional importance of these treaties is very great, all the more because courts cannot review acts of parliament for their compatibility with the fundamental rights contained in the Constitution itself.

Hierarchical superiority of international law

1.7 The status of directly effective provisions of treaties and of decisions of international organisations is usually taken in an hierarchical sense. They are hierarchically 'higher' than conflicting national norms. Also at the time of the constitutional amendments of 1953 an 1956, public international law, either in general or the specific provisions intended here, was taken to be 'higher' law. The alternative view, in which Article 94 of the Constitution is taken to regard only the priority of applying certain international law in the context of a collision with a national norm if this were to be applied (*Anwendungsvorrang*), which would make Article 94 a conflict-rule and not a rule on hierarchy of norms, is not often considered. In the standard literature, only one authoritative writer who seems to take this view can be found, and even here this has gone largely unnoticed.[88]

1.8 The totality of constitutional norms (*bloc de constitutionnalité* in a substantive sense) also extends, figuratively speaking, downwards to norms which are established in instruments which take the form of an act which is usually of 'lower' rank than the Constitution. In the general revision of 1983, many matters which were previously regulated in detail in the Constitution, have then been delegated to the legislature. For instance, the manner of approval of treaties and the exceptions to the principle that the Kingdom cannot become a party unless parliament has approved the treaty, was regulated in detail from 1953 until 1983.[89] Since 1983, the Constitution provides in Article 91 that the manner of and the exceptions to the requirement of prior approval shall be laid down by act of parliament. The subsequent Act regulating this matter must be considered organic law. Several other examples could be given.

Status of organic acts of parliament

There is in the Netherlands no hierarchical consequence attached to the *acts of parliament which are organic law*, i.e. acts which elaborate norms provided for in the Constitution. Their rank remains that of an act of parliament like any other act of parliament.

Status of lower organic instruments

More complicated is the status of *organic law created by other instruments* than acts of parliament. These are usually considered to be of lower rank than acts of parliament, like royal decrees and ministerial decrees. The assumption used to be that their rank was not changed due their material status of organic law. However, the fact that these instruments have a direct basis in the Constitution, however, may puts them

[88] *C.A.J.M. Kortmann*, Constitutioneel Recht, Deventer 2005, S.... That his view has gone unnoticed, may be due to the fact that in this same work the author also gives an schematic account of the hierarchy of norms, in which he places directly effective provisions of treaties and of decisions of international organisations at the top of the ladder, see ibidem S. ….

[89] Articles 60 to 64 of the Constitutions of 1953-1972.

on a par with acts of parliament or even at a higher level than normal acts of parliament. Recent case law suggest that this view is correct.
The relevant judgment concerned an act of parliament which named the Minister of one ministerial department (Welfare, Public Health and Culture) as the competent minister under whose responsibility asylum seekers were to be provided with certain facilities. In 1994, after a reshuffle of tasks among ministries, this matter was made the competence of the Minister of Justice by a royal decree which was based on Article 44 of the Constitution.[90] The *Afdeling bestuursrechtspraak Raad van State* [Administrative Law (Judicial) Division of the Council of State] decided in highest instance that the royal decree could change the internal division of tasks within the executive between ministries and ministers, because if this were to require an amendment of all relevant legislation, this would obviate the purpose of Article 44 of the Constitution. It held that an act of parliament cannot detract from the power of the government under the Constitution, although the exercise of such power remains subject to the normal principles of the parliamentary system – and thus a royal decree based directly on a constitutional provision has priority over a normal act of parliament.[91] It is debateable, however, whether the mere fact of having a basis in the Constitution makes the royal decree an organic act; all acts of parliament are based on the competence conferred in Article 81 of the Constitution, but not all acts of parliament are organic acts.[92] The matter has not been sufficiently clarified yet.

Constitutional norms in non-constitutional parts of the legal order

1.9 The relation of the Constitution to the legal order can also be viewed from the perspective of the manner in which constitutional norms permeate the rest of the legal order which itself is not of a constitutional nature – so here it concerns 'constitutionalisation' in a form which does not render the relevant areas of law into constitutional law.

There is a certain tendency in the literature, particularly on private law, to speak of 'constitutionalisation'. The precise nature of this 'constitutionalisation' process, however, is ambiguous and sometimes unclear. It usually focuses especially on the role of fundamental rights in the relevant field of the law, such as the role of fundamental rights and principles in criminal procedure, the rights of the defence in administrative proceedings, but also in private law.

Constitutionali-zation of private law

The modern literature on the constitutionalisation of private law does not primarily intend to refer to the 19th century view of fundamental rights as establishing civil society. In this somewhat old-fashioned liberal 19th century view fundamental rights are rights which citizens can uphold against state authorities on the basis of the Constitution. Thus it essentially constitutes a sphere of freedom (as against the State), while subsequently the civil code regulates that freedom among citizens. Hence, the view that fundamental rights and freedoms make civil law possible.

It is much rather the very penetration of those constitutional fundamental rights and freedoms of citizens as in principle something that can be upheld also *within* the civil relations regulated by private law, which gives rise to the 'constitutionalisation' discourse in private law. As a matter of fact, much of the relevant literature concentrates on the direct or indirect 'horizontal' effect which can be attributed to constitutional fundamental rights in relations between citizens *inter se*.

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[90] Article 44 Constitution: 1. Ministries shall be established by Royal Decree. They shall be headed by a Minister.
[91] ABRvS, 10 October 2004, case number 200101904/1, < www.rechtspraak.nl >, under LJN number : AD4637.
[92] Article 81 of the Constitution: 'Acts of Parliament shall be made by the government and States General jointly.'

In fact, the case law of the *Hoge Raad* suggests that it is possible to rely on rights such as the right to privacy, freedom of religion or that of freedom of expression also in relations between citizens, or at any rate invoke them in cases between citizens before a court of law. Although it is very hard to distil from the language of the relevant judgments whether the effect of fundamental rights – in the Netherlands context, both those found in the Constitution and those found in for instance the ECHR and ICCPR – is direct, i.e. the relevant fundamental rights work *per se* in relations between citizens *inter se*, or whether these fundamental rights have only indirect effect, i.e. are mediated through the proper terms, concepts and norms of private law, some horizontal effect seems to be accepted both in the case law of lower courts, particularly courts of first instance hearing cases on interim injunctions, and of the *Hoge Raad*. We mention briefly some cases of the latter to illustrate the point.

1.10 The first case, *Goeree and Van Manschot* v *Van Zijl*,[93] concerned a couple of self-styled 'evangelicals' who published an article under the heading 'Sodom in the Netherlands'. In it statements were made to the effect that aids is the result of sin, that homosexuality comes with aids which results inevitably in deserved death, and similar utterances. Van Zijl, a homosexual, sued them and asked the court for a series of interim injunctions, among which the prohibition to distribute the relevant publication any further, a prohibition to express themselves incorrectly and needlessly offensively towards homosexuals, and a prohibition to state the responsibility of homosexuals for the existence of AIDS, and furthermore an order to publish a rectification in the periodical for homosexuals on pain of astreinte. In highest instance 'evangelicals' invoked the freedom of religion as protected by the Constitution, the European Convention on human rights, and the International Convention on civil and political rights. The *Hoge Raad* held the complaint to be unsuccessful,

> "because it ignores that Article 6 paragraph 1 Constitution, Article 9 paragraph 2 European Convention on Human Rights and Article 18 paragraph 3 of the International Convention on Civil and Political Rights permit certain restrictions imposed on the exercise of the freedom of religion, and that Article 1401 *Burgerlijk Wetboek* [Civil Code],[94] which protects against utterances which are offensive, unnecessarily aggrieving or which invite discrimination, must be considered to provide such a justified restriction."

1.11 The second case by the *Hoge Raad* which we cite here, the *Aidstest* case,[95] concerned a civil case of a woman who had been raped twice under threat with a pistol, against her rapist, X. In highest instance is was an established fact that X, through his rape had created the considerable risk of an infection of the woman with the HIV-virus as a consequence of the rape. She desired certainty on the question whether she was infected. For this certainty a blood test was necessary. Given the state of the medical art at the time, certainty could be attained only by having a blood test six months after the rape in one of two manners: by testing the blood of the victim or the blood of X. If X's blood test were to demonstrate that he was not seropositive, the woman could be assumed not to be infected. The test meant a very severe emotional burden for the victim, which she could not bear. She submitted that under the circumstances X was under the obligation to take the blood test, both in order to limit the damage she suffers as a consequence of the rape and to spare her a further traumatic experience. The legal basis adduced for this is reparation in kind. The *Hoge Raad* held that

[93] HR 2 February 1990, nr. 13 727, NJ 1991, 298.
[94] At the time this was the article covered all major forms of tort, stating that damage due to wrongful acts must be compensated.
[95] Hoge Raad 18 June 1993, nr. 15015, *Y v. X* [*Aidstest*] (interim injunction proceedings), NJ 1994, 347.

> "[o]n the basis of the rules under Article 1401 *Burgerlijk Wetboek* [Civil Code] [the victim] has a right to the consequences being limited as much as possible by the offender, and that these are relieved as much as possible by a suitable form of compensation. […] [She] has a right to cooperation by X in the form of him taking a blood test. In this respect, X cannot successfully rely on his right to physical integrity derived from Article 11 of the Constitution, as this right has its limits in restrictions by or pursuant to an act of parliament. At any rate between citizens *inter se*, such a restriction can in principle be founded on Article 1401 [of the Civil Code], this also in connection with the norms of propriety which must be respected in social intercourse which inhere in this article.
> In the light of the [established facts], such a restriction must here be assumed. The interest of plaintiff in X having to take a blood test is of sufficient weight in relation to X's interest protected by his fundamental right, to justify this restriction. Moreover, this restriction, which is obvious in the framework of the relevant norms, can be deduced with sufficient clarity form these norms."

1.11 How can we explain this 'constitutionalisation' of private law? Particularly, does this process not presume the hierarchical superiority of the Constitution, which seems somewhat at odds with a central thesis of this contribution to the effect that this superiority is somehow limited?

First of all, it is true that in the two cases cited above, the *Hoge Raad* refers in both cases also to clauses in constitutional fundamental rights provisions which restrict the exercise of such fundamental rights, and seems to be applying them directly in the private law context of the case. This suggests that those provisions have a direct effect and applicability in private relations of citizens *inter se*, so grants them direct horizontal effect. This would imply that the constitutional provisions actually govern private law, and suggests that the Constitution is an overarching superior legal instrument of such fundamental importance that it governs the whole of the legal order.

The context of at least the *Aidstest* judgment, however, is the civil law duty to limiting the damage caused by an unlawful act. Also, the interpretation of the restriction clause is entirely specific to the private law context. It is one element in the balancing of a number of interests in a private law context which works with 'open' norms. This may lead one to conclude that the fundamental right is given indirect effect only, in as much as the effect is mediated by principles of private law.[96]

The exemplary cases cited above may mislead one into thinking that this 'constitutionalisation' is mainly steered by the Constitution. It may be argued, however, that this is at least as much dominated by the ECHR and similar human rights treaties, which have according to the dominant doctrine supra-constitutional rank.

2. *The relation between Constitution to Politics and Democracy*

2.1 The relation of the Constitution to *politics* is mainly considered to be one of providing the framework for the political system. Substantive notions of democracy are implicit in the provisions of the Constitution. The term 'democracy' does not occur in the text of the Constitution. Democracy has been taken to refer not only to the political institutions, but also to the manifold varieties of citizens' participation in the public domain through the institutions of civil society and direct participation. We make a few remarks first about the relation between the Constitution and politics, second about the representational nature of the political institutions and finally about the broader concept of democracy of civil society's and citizens' participation within public law.

[96] This was the conclusion of Advocate General Koopmans in his opinion to the *Hoge Raad* in the *Aidstest* case, *loc. cit.*.

Constitution mere framework for politics

2.2 The Constitution must be considered as providing primarily a framework for politics to function – a fairly sketchy framework for that matter, which on purpose has not codified the fundamental rule of the parliamentary system, the rule of no confidence, which exists only as a rule of customary constitutional law. This has consciously been done in order to retain the system flexible. Should there arise new political relations, the system can adapt to that and does not require constitutional amendment, so the reasoning goes.

Although many other elements of the political system which are related to the parliamentary system have been codified in the Constitution, such as accountability through ministerial responsibility,[97] and the system of proportional representation within the limits set by act of parliament,[98] there are some examples of political conventions which are so closely involved with the functioning of the system of government that they may have constitutional status; and moreover, they exhibit potentialities of change and development which confirm the relative flexibility of the system.

2.3 There are several examples of this flexibility. One of them was sketched above, where the development of the governmental right to dissolution of the Lower House in the direction of a right of 'self-dissolution' was sketched (paragraph II.3.1).

Another example is the increased profile of the prime minister. His position has in practice gradually developed from one among equals towards one above equals (though not unambiguously), in a manner which has also left traces in the the *Reglement van Orde van de ministerraad* [Rules of Procedure of the Council of Ministers]. The prime minister is not merely chairing a meeting of equals, but has – usually in coordination with ministers concerned but sometimes without his cooperation – certain agenda setting powers.[99] In this manner he can push decision-making in the council of ministers against the wishes of individual ministers.

Perhaps more significant is a recent development in the practice of large political parties during elections. The prime minister is not directly chosen, the elections are elections for the members of the Lower House only. Since 1922 cabinets offer their resignation on the eve of elections for the Lower House, thus both necessitating and freeing the way for the forming of a new cabinet after the elections. This means that elections for the Lower House imply the forming of a new cabinet, based on the results of the elections. Nowadays we see that in electoral campaigns of political parties the name of their candidate for the post of prime-minister, should the party win in the elections, is put forward. The *Partij van de Arbeid* [Labour Party] failed to do so in the elections of 2003, but under huge pressure from other parties, who ridiculed the unclarity and unforthcoming position of the *PvdA*, was forced to reveal to the electorate who their candidate was if they were to get in the position of leading a cabinet. Should one persist in this practice, the Lower House elections informally become also elections on prime ministerial candidates, without having included any rule on elections for

[97] Article 42(2): 2. The King is inviolable; the Ministers shall be responsible.
Artikel 42: 2. Der König ist unverletzlich; die Minister sind verantwortlich.

[98] Article 129(2): The members [of parliament] shall be elected by proportional representation within the boundaries to be laid down by act of parliament.
Artikel 129: 2. Die Mitglieder [des Parlaments] werden auf der Grundlage des Verhältniswahlrechts innerhalb der durch Gesetz festzulegenden Grenzen gewählt.

[99] E.g. Article 6, 'In cases in which it is unclear which minister is primarily responsible for a certain affair, the prime minister shall decide on this responsibility'; Article 7: 'If a matter is not submitted to the council by the primarily responsible minister, the prime minister can do so in accordance with the opinion of the council'; Article 16: '1. The prime minister shall supervise the realisation of a coherent governmental policy. 2. He shall supervise the execution of the council's decisions.'

the prime minister in the text of the Constitution as for instance proposed by the *Cals-Donner* commission.[100]

No role for courts

2.3 This 'framework' nature of the Constitution, according to which the Constitution provides guidelines only for the political system, is confirmed by the fact that courts have no role to play in the political process. It is inconceivable that a member of parliament goes to court to complain of an alleged infringement of the Constitution by another actor in the political or decision-making process.

No binding referenda

2.4 Within the general political institutions, democracy has been taken in a strictly representative manner; democracy is representative democracy. Until recently, referenda have been considered undesirable and not fitting in a constitutional system based on representative democracy.

At the national level the Constitution locates the legislative power in parliament and government acting together. A binding referendum is considered an interference with this clear attribution of legislative power. Hence, it is argued, the introduction of a binding referendum on legislative acts requires a constitutional amendment. The same reasoning applies *mutatis mutandis* for provincial and municipal referenda, because the Constitution locates the legislative power at provincial and municipal level in the provincial and municipal councils.[101]

As mentioned above, the *staatscommissie Biesheuvel/Prakke* proposed the introduction of a corrective and binding legislative referendum at the national level in 1985,[102] but this was not followed up at the time. Fourteen years later, a first attempt to introduce such a referendum in the Constitution failed in second reading. A second attempt at introducing the same constitutional amendment failed in June 2004. In both proposals the thresholds for holding a referendum were very high. After an initial request (40 000 signatures), the definitive request required 600 000 voters' signatures; an act passed by parliament submitted to referendum could only be rejected with a majority comprising at least 30% of the total electorate (which is about 12 million, so rejection needed about 3 600 000 negative votes). The turn out for elections for the Lower House is about 9 500 000, which made it unlikely that an Act would ever be rejected.

In 2001 a Temporary Referendum Act, *Tijdelijke referendumwet*, made the organisation of a consultative referendum possible. In case of a negative from the electorate, the government must decide whether to initiate a bill to withdraw the original Act involved, or to let it enter into effect nevertheless. The thresholds were identical to those of the then pending constitutional amendment, and has never led to a referendum. The Temporary Referendum Act expired on 1 January 2005.

The infamous national referendum on the EU Constitutional Treaty of 1 June 2005, was made possible by the adoption of a special act at the initiative of the Lower House. It was consultative, and hence preceded the political decision-making, and non-binding. The

Consultative referenda

[100] Cf. paragraph II.4.2.

[101] Article 127 Constitution. Some municipalities have a bye-law on the basis of which a consultative, non-binding referendum can be called. Also, it deserves mention that the *Gemeentewet* [Municipality Act] makes it possible for municipal councils to hold a consultative, non-binding referendum on the candidates for the office of mayor of the municipality, which in the end is appointed by the government at the proposal of the municipality; Article 61 and 61e of the *Gemeentewet*.

[102] Eindrapport van de staatscommissie van advies inzake de relatie kiezers–beleidsvorming: Referendum en volksinitiatief, 1985; under reference to this report later on a committee established by the Lower House endorsed the earlier commission's proposals on the referendum: Rapport Tweede Kamer externe commissie vraagpunten staatkundige, bestuurlijke en staatsrechtelijke vernieuwing «Het bestel bijgesteld», Kamerstukken TK 1992/1993, 21 427, nrs. 36–37, en het vervolgrapport, Kamerstukken TK 1993/1994, 21 427,nrs. 64–65.

high turn-out (63 %) and the clear negative of some 62 % of the voters made any further consideration of ratification impossible.

In the aftermath of this referendum, a new bill has been initiated within the Lower House to amend the Constitution and introduce a binding referendum. This bill proposes not to fix the thresholds in terms of signatures for initiating and holding a referendum in the Constitution itself, but leaving this to an Act of Parliament to be passed with a majority of at least two thirds of the votes cast in each House.[103]

2.5 As we discussed above (paragraph II.1.2.), the dissolution of the Lower House with a view to amendment of the Constitution is not a referendum in disguise, nor does it introduce a plebiscitarian element in the constitutional system. Quite to the contrary, the election of a new Lower House guarantees the *representative* nature of the constitution-making power which is to decide on the amendment proposed by the legislature in 'first reading'.

Reason for representative democracy in NL

The explanation for this emphasis on the representative nature of democracy in the political institutions is historical. Before secularisation struck, the Netherlands society was composed of minorities of political and religious denominations, which acted in the political system through their political elites in a strictly representative manner. Precisely this representative nature enhanced the respect for minority positions in a electoral system based on proportional representation in which no particular political group could claim a majority position. Since denominational politics waned, the floating vote has increased and so has the request for introducing features of direct democracy within the political system at national level.

Extra-parliamentary democracy

2.6 The historic background of the social composition of the Netherlands also explains the constitutional status granted to what are essentially institutions of civil society, like the public bodies of professions, trade and industry under Article 134 of the Constitution.[104] These have been given powers to legislate and carry out executive tasks; for instance those public industrial bodies involved in agriculture have an important role to play in implementing EC legislation.[105]

So, as already pointed out,[106] in the Dutch context representative democracy is not the same as parliamentary democracy. It is consociationalist, and was expressed by reference to the public bodies we just mentioned in 1938, not because of quasi-fascist corporatist thought (which had little support in those days in the Netherlands), but because of the historical situation in which denominational and political minorities were not only organized in political parties, but organized the whole of their social and religious life in 'pillars' of own

[103] Kamerstukken TK 2004-2005, 30 174, nrs. 1-3.

[104] Article 134: 1. Public bodies for the professions and trades and other public bodies may be established and dissolved by or pursuant to Act of Parliament.
Artikel 134: 1. Durch Gesetz oder kraft Gesetzes können öffentliche Berufs- und Gewerbeverbände und andere öffentliche Körperschaften gegründet und aufgelöst werden.

[105] Article 134: 2. The duties and organization of such bodies, the composition and powers of their administrative organs and public access to their meetings shall be regulated by Act of Parliament. Legislative powers may be granted to their administrative organs by or pursuant to Act of Parliament.
3. Supervision of the administrative organs shall be regulated by Act of Parliament. Decisions by the administrative organs may be quashed only if they are in conflict with the law or the public interest.
Artikel 134: 2. Die Aufgaben und die Organisation dieser öffentlichen Körperschaften, die Zusammensetzung und Zuständigkeit ihrer Verwaltungen sowie die Öffentlichkeit ihrer Sitzungen regelt das Gesetz. Durch Gesetz oder kraft Gesetzes können ihren Verwaltungen Verordnungsbefugnisse übertragen werden.
3. Das Gesetz regelt die Aufsicht über diese Verwaltungen. Beschlüsse dieser Verwaltungen können nur aufgehoben werden, wenn sie im Widerspruch zum geltenden Recht oder zum Allgemeininteresse stehen.

[106] See paragraph I.4.1.

organisations, some of which in relation to the economy were given a status under public law for which a constitutional basis was created.

One important symptom of the nature and form of public society in the Netherlands is the system of broadcasting. It has from the very beginnings of radio and later television always been based on associations of citizens. They are private law associations; citizens are members from one (or nowadays sometimes more or increasingly none) of these; they function internally as any private association might. They are – somewhat simplified – given the licence to broadcast on the four public radio stations and three public television channels. These associations were – and to a very large extent still are – denominational (that is, protestant, catholic, socialist, liberal, neutral and since some decades also popular and youth oriented), but under the pressure of secularisation there is a drift towards a stronger state controlled form of broadcasting. This is politically so controversial that at present it is uncertain in which direction the broadcasting system is developing.

It should be emphasized that the 'pillarized' society almost by definition had to be representative in nature, as their structure each represented their own denominational constituency.

2.7 In the late 1960s the idea of participation of social groups evolved towards citizens' participation. The idea of *medezeggenschap* in companies and universities took shape as of those years.

At the central level there had developed over the years an enormous culture of consultation. Usually (but not exclusively) this consultation was through a very large number of official advisory bodies in nearly every field of government activity in relation to any topic; some say over a hundred of such bodies existed. In those advisory commissions and committees most social interests and experts were represented, thus creating a firm basis of social consensus and support for government measures in the field.

In 1995 (significantly when the Christian Democrats were outside the government coalition), an act was passed by which most of the consultative commissions of experts and social actors at national level were abolished and channeled into a limited set of advisory commissions, in principle one per ministerial department. This Act was referred to in popular parlance as the 'Desert Act' [*woestijnwet*].[107] Simultaneously, an Act was passed streamlining whatever advisory committee was left, and determining that their members could only be experts and not civil society's representation[108] – thus effectively reducing social input in the early stages of the decision-making process. Recent studies suggest that the exercise has not been successful. There are still many ad hoc commissions and committees, but now mostly manned with politically selected persons. They do not function to create social support but they function more politically as a smoothing mechanism for potentially divisive issues, taking them out of the political arena into the backrooms of political advisory committees.[109]

2.8 Also individual citizens were consulted in decision-making at decentralized levels. This was often based on municipal and provincial byelaws. This was later codified in the *Algemene wet bestuursrecht* [General Administrative Law Act], which entered into force in 1994. In its chapter on dealings between citizens and administrative authorities, it included two procedures of citizen participation in decision-making, a simplified one and an a (very) extensive one. They regulate the manner in which citizens are informed of applications for decisions, the publication of draft decisions and the moments and manners in which citizens can state their views on all these to the relevant public authorities, and how public authorities have to take these into account. A public authority can decide if and which of these

[107] Act of 3 July 1996, *Stb.* 377.
[108] Act of 3 July 1996, *Stb.* 378.
[109] *W. Duyvendak/ M. van Schendelen*, Schaduwmacht in de schijnwerpers, 2005.

procedures to apply, unless its application has been prescribed by statutory regulation as was done in legislation on decision-making in the fields of urban and rural planning and concerning the environment.

In July 2005 these two procedures were simplified into one uniform procedure for the preparation of decisions.[110]

Popular sovereignty as democracy in a broad sense

2.9 In conclusion, we submit that because democracy is a broad concept which is not restricted to the political system in the narrower sense of the term, it is also difficult to develop or maintain any articulated theory of sovereignty and where it would reside.

In the literature, several traces of early ideas of popular sovereignty have been identified.[111] After the definitive demise of French revolutionary ideas after the ousting of the French in 1813, however, a theory of sovereignty of the people was impossible to sustain, if only because protestant political thought in a principled manner rejected the French Revolution for its alleged denial of God's sovereignty. This was so for the two major protestant christian-democrat parties, the *Christelijk-Historische Unie* and the oldest political party in the Netherlands the *Anti-Revolutionaire Partij*, both of which merged with the catholic party into the Christian-Democrat Party, *CDA*, in the early 1970s.

In other words, neither sovereignty nor popular sovereignty has been a clearly articulated constitutional theory. Much rather, if there is any conception of popular sovereignty then this has been understood as little else than influence of the people or democracy, and this concept taken in a much broader sense than in, for instance, German constitutional theory (and practice).

3. *Rechtsstaat: fundamental rights and legality*

The idea of the *rechtsstaat* – the Dutch is borrowed from the German – is part of the vocabulary of political and sometimes popular discourse. Its content and meaning within discourse is much more diverse than could perhaps be expected by constitutionalists, as we shall presently see.

A legally clearer notion associated with the *rechtsstaat* is that of the protection of fundamental rights. This has become in many ways the main core of the constitutional system. It is so, however, in an entirely different manner from other European countries: its substance is to a considerable extent located outside the Constitution itself. We will deal with this after discussing the uses made of the concept of the *rechtsstaat*.

3.1 The concept of the *rechtsstaat* has various connotations in the Dutch context. In the constitutionalist sense the term refers to the public legal order being governed by the rule of law. In the literature it is often associated and taken to comprise democracy as well as legality, division of powers and last but not least the protection of fundamental rights.[112] It thus becomes a quite broad concept even in the constitutional law literature.

In popular and political discourse the concept becomes even more stretched. It often becomes shorthand for a desired material content of legal norms or the political order. It is a normative concept which does not refer to a present state of law, but a desired state of law. This was criticized by the present Minister of Justice in several statements in which he

[110] Articles 3:10 to 3:17 of the *Algemene wet bestuursrecht*.

[111] See for instance *Martin van Gelderen*, The Political Thought of the Dutch Revolt 1555-1590, Cambridge, 1992. Some of the sources are published in *Martin van Gelderen* (ed. and transl.), The Dutch Revolt, [Cambridge Texts in the History of Political Thought], 1993.

[112] Thus for instance *M.C. Burkens/ H.R.B.M. Kummeling/ B.P. Vermeulen/ R. Widdershoven*, Beginselen van de democratische rechtsstaat, 2001[5], particularly pp. 39-48; this is a textbook which is used in several law faculties as a first year textbook introduction to constitutional law.

objected to some of the terms in which debates on combating terrorism were couched by the opposition to some of those measures.[113]

Also one can notice that the concept of *rechtsstaat* is frequently not used for indicating the limits to which public authorities are bound, but to the contrary as the principle that citizens must be bound to legal norms. That this turns the concept upside down, has often gone unnoticed.

This very loose sense of the notion of the *rechtsstaat* is also reflected in the case law of some lower courts. It should be pointed out that relatively few judgments can be found which uses the notion in any significant manner. When they do, it is sometimes used to indicate the particular position which an independent court of law or a judge takes within the legal order, sometimes to restrict his competence[114] but sometimes also to enhance the importance of his public office. This may also turn itself against citizens, when the *rechtsstaat* is used in a defensive manner to protect the dignity of public authorities and offices.[115] Once, in the context of an immediate expulsion of an imam for reasons of national security, a court noticed that each of the parties to the conflict accused the other of acting in a manner which fundamentally infringes the *rechtsstaat*.[116] Again, this seems to acknowledge that the notion is not merely relevant to the behaviour of public authorities, but as much to citizens' behaviour.

We must conclude from this that the notion of the *rechtsstaat* is taken to be much broader than the notion of the rule of law which binds public authorities. From a liberal concept which aims to protect citizens against infringement of his liberty by the state, it has become a (neo-)republican concept in which it is assumed to bind the citizen as much as state organs to the major principles and norms of political society.

Constitutional fundamental rights

3.2 A much more helpful notion associated with the *rechtsstaat* is that of the protection of fundamental rights. This has become in many ways the main core of the constitutional system. It does so, however, in an entirely different manner from

Fundamental rights are part of the Constitution and are enshrined mainly in its first chapter, but some, like the right to vote and stand for parliamentary elections and the prohibition of the death penalty, elsewhere. They include as classic rights

- the prohibition of discrimination and the right to equal treatment,
- the right to leave the country,
- the equal right of Dutch nationals to appointment in the public service,
- the right to vote and stand for election,
- the right to petition,
- freedom of religion
- freedom of expression,

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[113] See interview with P.H. Donner in *Ars Aequi*, 2004 …..

[114] For instance Gerechtshof 's-Hertogenbosch, 5 Augus 2003, LJN: AI0847: the fact that courts are bound to acts of parliament and cannot adjudicate their inherent merits or their fairness is 'one of the pillars of the democratic *rechtsstaat*, in which the judicial and legislative power are separate'.

[115] For instance in Rb Alkmaar, 15 June 2005 < www.rechtspraak.nl > under LJN: AT7611, to qualify the seriousness of a punishable delict of stalking and threatening of a judge; Rb Alkmaar (interim injunctions), 19 May 2005, LJN: AT5806, holding that 'it is not in accordance with modern ideas of the *rechtsstaat* to publicly put to shame a person in an *ad hominem* manner' by publishing a person's photograph on a public website, accompanied by derogatory text; Rb Arnhem, 26 April 2005, LJN: AT4651: 'To try to escape from detention by taking a public prosecutor and an interpreter hostage, is a flagrant infringement of the principles of the *rechtsstaat*'; Gerechtshof Arnhem 7 June 2002, LJN: AN8937 and LJN: AN 8932, political motives 'cannot within the *rechtsstaat* be a justification of proven cases of arson'.

[116] Rb Amsterdam, 15 July 2005, LJN: AT9532. The case concerned an immediate expulsion which did not allow the person involved to await the outcome of a complaints procedure, and which was based on an intelligence report concerning this person which had not be verified by the Minister of Justice.

- right of association, assembly and demonstration,
- the right to privacy
- the right to physical integrity,
- protection of the home,
- privacy of correspondence, telephone and telegraph,
- the right to compensation for expropriation in the public interest,
- personal liberty and *habeas corpus*,
- *nulla poena sine lege praevia*,
- access to courts according to the law,
- legal representation,
- the right to free choice of work,
- the right to provide education,
- the right to equal public financial support of public and private education,
- prohibition of imposing capital punishment.

Also a number of social, economic and cultural rights are included, to wit:

- the promoting 'sufficient' employment,
- minimum subsistence and division of wealth,
- protection of the environment,
- public health,
- sufficient living accommodation,
- social and cultural development and leisure activities,
- education and the right to sufficient primary education.

Restriction of constitutional rights

3.4 Many, but not all, fundamental rights provisions in the Constitution contain a clause regulating the restriction of their exercise, particularly regarding the classic fundamental rights. [117] Mainly, they use as a criterion the public authority which can legitimately restrict the exercise of a right, and nearly always this is the legislature which by act of parliament can restrict the exercise of a right. Often this power can also be delegated to lower powers of regulation by act of parliament. Sometimes it is reserved to the legislature itself, as is the case with

- the right to leave the country (Art. 2 (4) Constitution),
- electoral rights (Article 4 Constitution),
- the right to profess one's religion of belief (except the right to do so outside buildings or delimited spaces, which refers in particular to religious processions) (Article 6 Constitution),
- freedom of expression with regard to the content of the thought expressed (Article 7 Constitution),
- the right to associate (Article 8 Constitution), the right to assemble and demonstrate except with regard to restrictions aiming at the protection at health, or in the interest of the combat or prevention of disorder which may be delegated by act of parliament (Article 9 Constitution),
- the privacy of correspondence (Article 13 Constitution).

Only occasionally limitations to be imposed must be in the interest of certain specified objectives (this is the case with the freedom of religion professed outside buildings and delimited premises, the right of association, and the right to assemble and demonstrate). Otherwise there are no substantive criteria.

No proportionality principle comparable to those in Articles 8-11 ECHR can be found in the Netherlands Constitution. Worse, the *Hoge Raad* has confirmed the view that a

[117] Z.B. Artikel 1: Alle, die sich in den Niederlanden aufhalten, werden in gleichen Fällen gleich behandelt. Niemand darf wegen seiner religiösen, weltanschaulichen oder politischen Anschauungen, seiner Rasse, seines Geschlechtes oder aus anderen Gründen diskriminiert werden. Other examples are the right to petition (Art. 5 Constitution) and the prohibition to impose the death penalty (Art. 114).

restriction imposed is not subject to the principle of necessity (and therefore of proportionality).[118] This is controversial because it implies that the makers of the Constitution must be supposed to have allowed unnecessary (and therefore disproportional) restrictions to be imposed.

Justiciability

3.5 In principle the classic rights are justiciable, while many of the social, economic and cultural rights are framed in such general terms as policy objectives that they cannot easily be invoked in court.[119] This is not to say that they have no legal value. The literature submits that under certain circumstances these can be considered to be standstill-provisions, which would prohibit acts of public authorities which aim to reach objectives which are the contrary to the objectives formulated in these provisions.[120] And in some cases courts have referred to them as an additional element in construction of other legal norms.[121]

3.6 One barrier to review against constitutional fundamental rights is the prohibition for courts to review the constitutionality of acts of parliament (Article 120 of the Constitution). This has two important consequences.

Firstly, a number of fundamental rights provisions delegate the protection of fundamental rights[122] and also their restriction to acts of parliament. The constitutionality of such acts and restrictions cannot be reviewed. Also the constitutionality of delegated measures which restrict the exercise of a fundamental right cannot be reviewed to the extent that the restriction by delegated instrument is determined by the act of parliament; in this case, reviewing the constitutionality of the delegated instrument implies the review of the act of parliament on which it depends.

Secondly, the prohibition for courts to review the constitutionality of acts of parliament under Article 120 of the Constitution shifts judicial review towards review against

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[118] HR 2 mei 2003, www.rechtspraak.nl, LJN number: AF3416, paragraph 4.3.4, where it states that Article 7 of the Constitution 'does not require a restriction of the freedom of expression to be necessary in a democratic society'.

[119] For instance Article 19 (1): It shall be the concern of the authorities to promote the provision of sufficient employment; Article 20 (1): It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth; Article 21: It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment; Article 22: 1. The authorities shall take steps to promote the health of the population. 2. It shall be the concern of the authorities to provide sufficient living accomodation . 3. The authorities shall promote social and cultural development and leisure activities; Article 23 (1): Education shall be the constant concern of the Government.

[120] A.W. Heringa, Sociale grondrechten - hun plaats in de gereedschapskist van de rechter, diss. RULeiden 1989. Grondrechten en de taak van de overheid in het licht van zelfregulering, in: H.R.B.M. Kummeling en S. Van Bijsterveld, Grondrechten en zelfregulering, 1997, pp. 31-50; F.M.C. Vlemminx, Het juridisch tekort van de sociale grondrechten in de Grondwet. In: NJB 1996, p. 1201 e.v.; Vlemminx en Kummeling, Algemene situering van sociale grondrechten in de Nederlandse rechtsorde, in: Hubeau en De Lange, Het grondrecht op wonen, 1995. As to the equivalent provisions in international treaties, G.J.H. van Hoof, The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of some Traditional Views, in: P. Alston, K. Tomasevski (eds.), The Right to Food, 1984, p. 97-111.

[121] Thus in one case concerning a seriously ill mother and her three children, of which one had psychiatric problems, who had no housing and which the municipality of Utrecht had refused to provide a dwelling, the concern of public authorities to provide sufficient living accommodation under Article 22 (2) of the Constitution was taken as the key starting point for interpreting other legal instruments and the duty of the municipality to act lawfully; Pres. Rb Utrecht18 juni 1991, NJ 1992, 370. Another case concerned the access to a special primary school for handicapped persons, which had been refused due to lack of sufficient staffing, in which the President of the *Afdeling Rechtspraak Raad van State* found an additional argument to nullify this refusal in the principle behind the duty of public authorities to provide sufficient primary education in all municipalities (Article 22 (4) Constitution), President Afdeling Rechtspraak Raad van State, 10 May 1989, AB 1989, 481.

[122] E.g. Artikel 10(2).

human rights contained in treaties under Article 94 of the Constitution. This is the only possibility as regards an alleged infringement by an act of parliament.

Fundamental treaty rights

3.7 Given the fact that Article 94 of the Constitution implies the priority of self-executing provisions of human rights treaties, human rights treaties are of enormous constitutional importance in the Netherlands legal order.

The human rights treaties to which the Netherlands is a party comprise among others the European Convention for the protection of Human Rights and Fundamental Freedoms and its Protocols except Protocol nr. 7, European Social Charter (the Netherlands is not a party to the Revised European Social Charter), ICCPR and its two Protocols, ICESCR, International Convention on the Elimination of all Forms of Racial Discrimination (CERD), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its optional protocol, the Convention on the Rights of the Child and its two protocols, and the Convention on the Political Rights of Women, a number of ILO treaties and several treaties in the framework of the Council of Europe which have a fundamental rights dimension, such as the European Convention on the Prevention of Torture and its Protocols, the Framework Convention for the Protection of National Minorities.

As a general guideline, the provisions on classic human rights tend to be 'binding on all persons' in the sense of Article 94 of the Constitution, that is to say they are directly effective, self-executing provisions against which courts can review all public acts under, whereas provisions on social and cultural rights tend not to have that character and complaints of their infringement are therefore not justiciable.

4. *Horizontal and vertical division of powers*

Horizontal division of powers

4.1 The horizontal division of powers is no longer apparent from the text of the Constitution. Until 1983 the Constitution used the language of the *trias politica*. The fifth part of chapter V of the Constitution was entitled 'On the legislative power', '*Van de wetgevende macht*', and its first article read:

'The legislative power is exercised jointly by King and States General'.[123]

The executive power was also mentioned:

'The executive power is vested in the King.'[124]

The matter with the judiciary was more subtle. One provision stated that 'the judicial power is to be exercised by judges, which an act of parliament indicates',[125] while another provision attributed the settlement of disputes over property and related issues to 'the judicial power'.[126]

We notice that the substantive power was distinguished and attributed to three different institutions, although as regards the judicial power, it is hard to say whether the institution preceded the substantive power or the other way around.

However that may be, the Constitution of 1983 brought change in as much as the most omnipresent of modern governmental power, the executive power was no longer mentioned in the Constitution, while the legislative power was no longer called legislative power:

'Acts of Parliament shall be enacted jointly by the Government and the States General.'

[123] Article 119 Constitution 1972: 'Legislative power is exercised by the King and States General jointly.'.
[124] Article 56 Constitution 1972: 'Executive powers shall lie with the King.'
[125] Article 169 Constitution 1972: 'Judicial power shall be exercised only by the judges indicated by act of parliament.'
[126] Article 167 Constitution 1972.

So in 1983 the executive power was hidden both institutionally and substantively, while the legislative power was robbed of its substance, reduced to an institution whose competence was turned into a circular formality. The provisions on the judicial power were not changed radically, and retained its institutional, formal character.

Primacy of the legislature over the executive

4.2 One can say that despite the fact that in the Constitution the king and the government are treated before the parliament, the legislative power has dominated the executive power. This was fully affirmed in the 19th century process of the liberal constitutional reforms, culminating in the *Meerenberg* case of the *Hoge Raad* (see II.4.4). The primacy of the legislature over the executive[127] is thus the reigning principle. Although a minor area of executive action is allowed for without a basis in an act of parliament as long as it does not affect citizens adversely, the executive is thus subjected to the laws enacted by the legislative power, that is the power whose exercised requires the cooperation of parliament.

However, as everywhere else in Europe, legislative power has become delegated to a large extent to the executive. More than in some other countries, the executive dominates the legislature in the sense that in practice it is the one who takes the legislative initiative.[128] In the parliamentary system of the Netherlands there is of course a great sense of not imperilling coalition relations, which mediates and dampens this executive predominance. In its turn, the deliberative moderation of executive dominance is limited by the practice of settling the more divisive issues between coalition partners outside the assembly hall, in informal meetings between the leaders and the spokesmen on relevant affairs of political groups and in meetings of leaders with the prime minister and other relevant members of the cabinet.

Increased role of judicial review of executive action

4.3 The growth of executive dominance in government has been compensated by forms of judicial control beyond what was usual before the 1960s, which is also a European wide development. This has taken two forms in the Netherlands.

First of all, judicial review of administrative action was introduced and took full shape with the *Algemene wet bestuursrecht*, which opens an appeal to the administrative section of the district courts (*rechtbank*) against individual decisions of administrative organs after a reconsideration by the administrative organ on complaint. The administrative courts review the disputed decision against the law and general principles of proper administration. Usually, appeal in higher instance lies with the *Afdeling Bestuursrechtspraak* of the *Raad van State* [Administrative Law (Judicial) Division of the Council of State], but in social security affairs and civil servants' matters lies with the *Centrale Raad van Beroep* [Central Appeals Council], whereas certain economic law cases are appealed to the *College van Beroep voor het Bedrijfsleven* [Regulatory Industrial Organization Appeals Court].

Parallel to the expansion of administrative litigation, the civil courts have become quite active in reviewing cases against public bodies whenever administrative courts had no competence to hear the case. In fact, they have in some respects as broad and intensive in their review and scrutiny of administrative action as administrative courts tend to be, but possibly

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[127] In political parlance this has sometimes been inappropriately translated as the 'primacy of politics'. The concern for the 'primacy of politics' was one of the major drives in the early 1990s to do away with what was remaining of the strong civil society structures of the period of pillarization. Paradoxically, this did away with what in other European states was considered to be post-modern governance, and 'third way' approaches in between ideological schemes which the fall of the Wall had made redundant. The sudden growth of Pim Fortuyn's movement and its aftermath, from which the country has not recovered in 2005, may be considered the populist backlash of this conception of the 'primacy of politics'.

[128] From 2001-2004 in total 1074 bills were introduced in the Lower House, of which only 41 were at the initiative of a member of the Lower House, which is less than four per cent; source *De Tweede Kamer in 2004*, published at the website of the *Tweede Kamer*, at < www.tweedekamer.nl >, via 'voorlichting', 'lijsten, historische overzichten', 'jaarcijfers'.

sometimes more so. Thus, the review of regulations issued by the executive has become a full review not only on points of *vires* and legality, but also substantively against principles such as reasonableness and proportionality.

Relation judicial and legislative power

4.4 While the relation between judiciary and executive has seen a steady increase of the role of the judiciary and administrative courts,[129] no very fundamental change has occurred in the relation between the legislative power and the judiciary since 1848, or at least since the power to review the compatibility with self-executing treaty provisions was introduced.

We briefly indicated above (paragraph II.4.5 and II.4.6) that the prohibition under Article 120 of the Constitution concerns primarily the division of powers between legislative and judicial power. For a clear understanding of this, we now briefly outline the scope of the prohibition according to the case law.

It is standing case law that regulatory acts can be reviewed for their compatibility with higher law,[130] including both the Constitution and unwritten general principles of law; but such review does not extend to acts of parliament.

This was confirmed in the important *Harmonisatiewet* judgment of the *Hoge Raad*, in which the scope of the prohibition of Article 120 of the Constitution regarding acts of parliament was reassessed.[131] The case concerned the allegation that an act of parliament which aimed at reducing the number of years during which students could receive a grant, was in conflict with the principle of legal certainty, because it also affected students who had already begun their studies under the assumption that they would profit from such grants for the full duration of their studies. One of the central questions was whether Article 120 of the Constitution, which in its 1983 reading speaks only of review of the 'constitutionality' of acts of parliament, should be understood as also prohibiting review against unwritten fundamental legal principles. This question arose all the more because *before* 1983 the provision spoke of the 'inviolability' of acts of parliament, which was taken to cover any form of judicial review.

The question was answered in the negative: however much the act infringed the principle of legal certainty, and although there are many reasons why the prohibition of Article 120 of the Constitution might have to be read as narrowly as possible, the *Hoge Raad* deduced from the history of the provision of 1983 that it had not been the intention to narrow the prohibition's scope, so that review against unwritten legal principles would be allowed.

In passing, the *Hoge Raad* indicated that the relevant Act was indeed considered to infringe the principle of legal certainty.[132] It may be inferred from this that courts are only unable to attach to a judgment of infringement any legal consequence in terms of the

129 In the Netherlands, with the exception of the administrative law sections in district courts, and the tax chamber at the Hoge Raad, the members of other administrative courts are not constitutionally members of the judiciary in the sense of Article 116 (1) and 112 (2) of the Constitution; Art. 116 '1. The courts which form part of the judiciary shall be specified by Act of Parliament'; Artikel 112: '2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament.' Judges and the procedure in administrative courts live up to all requirements for judges who formally are part of the judiciary.

130 HR 16 May 1986, AB 1986, 574.

131 HR 14 April 1989, nr. 13 822, AB 1989, 207.

132 Ibid: '3.1. The first part of the grounds adduced in this appeal, raises the question whether Article 120 of the Constitution leaves courts the freedom to review the conformity of acts of parliament with fundamental principles of law. In the judgment of 16 May 1986, NJ 1987, 251, it has been implied that according to the Supreme Court this question ought to be answered in the negative. In that judgment the Supreme Court wishes to persist – however strongly it considers the provisions of the so-called Harmonisation Act (Act of 7 July 1987, *Stb.* 334) to be in conflict with the justified expectations of the students involved and hence with the principle of legal certainty.'

inapplicability or unbindingness of an act of parliament, but that they can indeed pass judgment on the compatibility with unwritten fundamental principles. As such unwritten principles are covered by the prohibition of Article 120 of the Constitution, one may assume that also a judgment of incompatibility with a provision of the Constitution could be made by a court, as long as the court does not disapply the relevant act of parliament. This would bring the situation very close to the situation in the UK under the Human Rights Act 1998, where such declarations of incompatibility have been formalized. It should be emphasized, however, that the *Hoge Raad* has never since repeated a similar statement of incompatibility.

Injunctions against legislatures

4.5 When we look at the case law on injunctions against legislative acts, the separating line between the judicial and legislative power is thin but quite clear.

As we pointed out in paragraphs II.4.5-6, the *Hoge Raad* has confirmed that injunctions to legislate directed at the legislature are impossible, even when it regards legislative acts of territorially decentralized legislatures.[133] They would form an infringement of the separation between the legislative and the judicial powers.

The *Hoge Raad* does admit injunctions *not* to apply executive legislation (so any regulations issued by another instrument than an act of parliament) and legislation by territorially decentralized bodies, when this legislation is in conflict with higher norms. Such an injunction cannot, of course, apply to acts of parliament if it concerns an alleged infringement of provisions of the Constitution or unwritten general legal principles, since this is the very essence of the prohibition of Article 120 Constitution, as explained in the *Harmonisatiewet* judgment. The exception remains Article 94: a conflict with provisions of treaties and of decisions of international organizations which are binding on all persons. In this case also acts of parliament can be reviewed, and an injunction not to apply them is conceivable.

Also, there is the possibility of damages for acts of executive legislation (other than acts of parliament) which infringes unwritten principles of law or other higher norms including constitutional norms.[134] It is certain that also *Francovich* damages can be awarded under the law of the Netherlands without any infringement of the separation of powers, while this may without problems extend to acts of parliament (*Factortame* liability), although a case has not yet occurred in practice – this fits well with the delineated separation of powers and with the intention Article 94 of the Constitution.

Vertical division of powers

4.5 As far as the country of the Netherlands in Europe is concerned, the vertical division of powers is based on a model of decentralization within a unitary state. At the level of the Kingdom itself, comprising the country of the Netherlands in Europe and the two countries of the Netherlands Antilles and Aruba in the Caribbean, the relation is much rather characterized as federal in nature.

The federal character resides in the fact that the *Statuut voor het Koninkrijk* [Charter for the Kingdom] reserves certain matters concerning the whole realm to the Kingdom, while leaving the rest to the autonomy of each of the countries. It does, however, exhibit also a confederal trait inasmuch as it grants the right of unilateral withdrawal from the Kingdom to Aruba (Articles 58-60 *Statuut*). On the other hand it provides for supervisory mechanisms which suggests more unitary elements, although these have hardly been used (Article 49-53 *Statuut*).

As regards territorial decentralization *within* the Netherlands (in Europe), the Constitution uses language which somehow may suggest something more federal. It speaks of the powers of provinces and municipalities to regulate and administer their domestic affairs,

[133] See paragraph II.4.5 above.
[134] HR 24 January 1969, NL 1969, 316 (*Pocketbooks II*).

which 'shall be left' to their administrative organs.[135] This constitutionally guaranteed 'autonomy' has the flavour of federalism. But this is misleading. In fact, the tasks which municipalities and provinces carry out in practice are mainly tasks which have been required by higher legislation.[136] Also the constitutionally founded mechanisms of supervision, which may extend also over autonomous decision-making,[137] highlight the unitary guarantee of the exercise of decentralized powers. Thus, not only may the government quash provincial and municipal decisions for being in conflict with law, but also with the general interest; and obviously the government determines what is in the general interest.

Most effectively, the unitary element is retained through controlling the financial position of municipalities (which is the more important of the two territorially decentralized bodies, the other being provinces). Although municipalities have autonomous taxation powers, regulated by act of parliament, and the most important of autonomous taxes (the tax on immovable property) accounts for over 80 % (2004) of the municipal taxes and levies, these in turn form less than 9 % of the total municipal income.[138]

5. *The absence of an overarching concept of political unity*

The Netherlands Constitution nor the constitutional system of which it forms part is based on an explicit overarching foundational concept. Neither sovereignty, the people, the nation, the constitution or citizenship play that role. About sovereignty we made enough remarks already. The history of provincialism during the Republic also made a unified concept of 'the people' difficult, while in the 19th century protestant circles rejected the concept of popular sovereignty of the French Revolution – though rooted in proto-Calvinist ideas of the Dutch revolt as popular revolt against a tyrant. The nation was for similar reasons never a strong unifying concept, although patriotism was triggered during the German occupation (1940-1945), but obviously not in pseudo-mythical foundational sense.

The Constitution is in character not foundational, as we pointed out above at several places, although recently, in the context of the dispute about religious fundamentalism some politicians suggested that immigrants should be taught 'the principles and values of the Constitution'. But this suggestion is conspicuous for its strangeness to the constitutional culture.

Citizenship has in the past not had a strong connotation either. The notion was virtually absent. Thus one may notice that the EC and EU Treaties, which introduced the notion of EU citizens in the Treaty of Maastricht, in the Dutch translation quickly shift the concept of 'citizens', *burgers*, to 'subjects', *onderdanen*. As a consequence, the Dutch legislation curiously but consistently speaks not of 'citizens', *burgers*, or 'nationals' of Member States, but of 'subjects', *onderdanen*, of Member States also those who are nationals of countries without a king (or Grand-duke).

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[135] Article 124 Constitution: 1. The powers of provinces and municipalities to regulate and administer their domestic affairs shall be left to their administrative organs.

[136] Article 124 Constitution: 2. Provincial and municipal administrative organs may be required by or pursuant to an act of parliament to provide regulation and administration.

[137] Article 132 of the Constitution: 2. Supervision of the administrative organs shall be regulated by Act of Parliament. 3. Decisions by the administrative organs shall be subject to prior supervision only in cases specified by or pursuant to Act of Parliament. 4. Decisions by the administrative organs may be quashed only by Royal Decree and on the grounds that they conflict with the law or the public interest. 5. Provisions in the event of non-compliance in matters of regulation and administration required under Article 124, paragraph 2, shall be regulated by Act of Parliament. Provisions may be made by Act of Parliament notwithstanding Articles 125 and 127 in cases of gross neglect of duty by the administrative organs of a province or municipality.

[138] For a critical analysis of recent tendencies, see the Council of Europe Report: Local and regional democracy in Netherlands, Kathryn Smith/ Odd Arild Kvaloy/ Schefold, Dian (rapp.), CG(12)16 PART2 Conseil de l'Europe. Congrès des Pouvoirs locaux et régionaux de l' Europe. Strasbourg.

Some inklings of a stronger concept of citizenship have become discernable though. Since the debate on the 'multicultural society' and the 'failed integration' of minorities took shape nearly synchronous with the successful campaign of the unfortunate Pim Fortuyn,[139] official government policy has shifted the meaning of citizenship. Whereas previously the principle seemed to be that citizenship was a consequence of or at least attendant to long term residence and nationality, now this relation has reversed: first one has to show that one can be a citizen, which must be shown through the passing of exams in 'integration', *inburgeringsexamens*, which guarantee a certain knowledge of the language and society of the Netherlands, as a condition for long term residence, citizenship rights and nationality. Although there has been little reflection on this, it would seem that again this shows a tendential inversion towards a (neo-)republican view, this time of citizenship.

It is hard to predict whether this new tendency diminishes the pragmatic approach the Netherlands has shown over the past centuries towards the constitutional concept of citizenship.

IV **Constitutional identity inherent in the fundamental political and constitutional structures of the Netherlands**

In comparison with other European constitutions, the most distinctive features of the Netherlands Constitution are an openness to international law and international society, the absence of constitutional review of acts of parliaments by courts without sovereignty of parliament, the lack of an explicit constitutionally relevant concept of sovereignty, and an overall low degree of ideology in the text of the Constitution: it lacks a preamble with its attendant rhetoric, while terms like 'democracy', 'people' or 'nation' are absent.

These characteristics can be explained on the one hand from the geographic and geo-political position of the Netherlands within Europe, and from historical developments on the other. The geographic and geo-political position of a relatively small country in the delta of great rivers, its location at cross-roads between the United Kingdom to the West, Germany to the East and (with Belgium as a buffer in between) France to the South, explains to a large extent the political and economic orientation, and the openness towards the outside world. Historically, the country had its *floruit* in the 17th century, when it was a confederation of provinces which claimed sovereignty – a confederation which functioned for over two centuries. The period immediately after the French Revolution was in a sense an interim period of centralism, ushering into French rule. This was abandoned in the 19th century, when the country made the Prince of Orange into the monarch.

The great constitutional transformations which have stamped the development of the present Constitution, are the liberal revolution of 1848, which led to the introduction of a full-fledged parliamentary system, which survives to this day. It was perfected into a more truly democratic system with the introduction of the general franchise at the beginning of the 20th century. The social make up of the country at the time, consisting as it did from denominational and social minorities, urged a system of proportional representation which was introduced simultaneously to the democratic reforms.

With secularisation, the tenability of this system of government became more controversial since the end of the 1960s, when reforms towards a majoritarian system with more quasi-presidential features were proposed. None of these proposals proved successful,

[139] This was not merely Pim Fortuyn's work; in the conservative liberal party it was Frits Bolkestein, the later EU Commissioner, who had already repeatedly insisted on more actie integration policies, while from Labour circles, it was Paul Scheffer who in January 2000 published an influential essay on the new 'social question' which was posed by lax and failed integration policies.

but the constitutional debates did lead to an overall revision, leading to a modernized Constitution in 1983 – a Constitution which was novel mainly in placing a fuller catalogue of fundamental rights at the opening of its text (Chapter I of the Constitution).

The quest for reform has, however, not stopped. All the proposals for electoral reform, strengthening the position of the prime-minister or the government, and introduction of the referendum in an effort at breaking through the politics of compromise towards a system which is perceived as more efficient and effective, have returned again and again. Partly, this was because of the presence in a number of coalitions of a party for constitutional reform D66, which as a small but needed coalition partner had a leverage on the agenda which is greater than its size. Partly, the discussions have recurred because of secularization's effect on homogenizing society and politics. What was a 'pillarized' society of denominational minorities in the second half of the 19th and first half of the 20th century, is no more. This also has meant that the conditions for exercising political power have changed, on the one hand opening the way to reforms which no longer require mediation and moderation towards all major minorities. On the other hand, the perception is that it has led to a relative estrangement of the public from politics and the political system, which is translated by political actors into a call of effective, output oriented government.

The occurrence of 'new' minorities which find themselves in different circumstances than the denominational minorities of the 19th and 20th century, on the whole socially much more disadvantaged, adhering to a more 'strange' religion which organizes itself in other manners than the 'old' religious and secular denominations did, with weak structures of social and political representation, has created problems of accommodation which at the turn of the millennium one has equally wanted to deal with through more effective and powerful measures. Hence, also, the quest for political and constitutional reform.

An important feature of the Netherlands Constitution is its very relative meaning to political and legal practice. In this respect it can be characterized as an incremental constitution which reflects rather than steers developments in public society. It is accompanied by such features as the prohibition for courts to review the constitutionality of acts of parliament and of treaties, and a relatively weak constitutional culture. It is 'not done' to win an argument in parliament on the basis of considerations of (un-)constitutionality, which are considered to be 'unpolitical' considerations.

Another basic and distinct feature of the Netherlands constitutional system is its openness towards international legal developments. The priority of directly effective, self-executing provisions of international origin is pivotal in this. This provides compensation for prohibition for courts to review constitutionality of acts of parliament. Also, it confirms the 'relative' status of the Constitution within the broader notion of constitutional law.

This place of international provisions has reinforced the role of the human rights treaties, particularly the ECHR, which have not merely constitutional status, but have thus acquired supra-constitutional status.

All these features together provide the constitutional system with a great flexibility in view of national, European and international developments as they occur. The question may arise whether the identity which thus transpires, can ever set a substantive limit to European integration in the framework of the European Union.

Formal limits seem not to fit in well with the priority which (self-executing) international law enjoys in the national constitutional order. Yet, there are two substantive points of constitutional law which can play a role.

The first is the role of the ECHR. Precisely because of its supra-constitutional importance in the Netherlands, the fact that the European Union is not formally a party to this human rights instrument is viewed as a disadvantage. For that very reason, in an advisory opinion to the government the *Raad van State* was exceedingly critical of the (then: draft-)EU Charter of Fundamental Rights. It 'strongly advised' not to make it a binding text because of possible divergences with the ECHR.[140] This view found broad support in the Lower House.

Secondly, the *Hoge Raad* has drawn a line on the role of the national judiciary in enforcing EC law in the prohibition of courts to enjoin the legislature to pass legislation, even when it concerns the implementation of EC law. Thus looking at the 'deep structure' of the relevant issues, the separation of powers between the judiciary and the legislature seems to be the battleground for a principle of democracy to be enforced in the face of EC law – even though such a principle of democracy is not made explicit in the relevant case law.

These are the specificities of the constitutional law of the Netherlands. There are also many things it holds in common with other European countries. The historical background to the great transformations of the 19th and early 20th century are largely shared between these countries and the Netherlands. Also, we can notice that the Constitution has shifted in emphasis on the 'political' constitution in 19th century, relating as it did to the governmental system, towards a 'rights' constitution by the end of the 20th century, with full emphasis on the protection of individual fundamental rights beyond political rights in the strict sense. While in respect of governmental and executive structures there is no great common law of Europe emerging, this may be different with regard to the protection of individual fundamental rights. It is here that both the commonality and specificity of constitutional systems in Europe will emerge.

[140] Kamerstukken TK, 2000–2001, 21 501-20, A, p. 8.