

THE IRRELEVANCE OF THE NETHERLANDS CONSTITUTION, AND THE IMPOSSIBILITY OF CHANGING IT

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The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It

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Abstract

Although the bicentennial anniversary of the Netherlands Constitution was exuberantly celebrated in 2014, the document itself appears to be of increasingly little practical and symbolic value. Many efforts have been made over the past two decades to change this, but thus far none of these has been successful. This article aims to explain the apparent irrelevance of the Netherlands Constitution, and it probes into the feasibility of changing this situation.

1. Introduction

In many states, the constitution is a living instrument. Principles of interpretation are discussed in legal scholarship, critical analyses are made of the development of fundamental rights by a supreme or constitutional court, and important matters of separation of powers or federalism are debated from the perspective of the constitution. In the Netherlands, this is all very different. Naturally, the Netherlands has its own Constitution (the « Grondwet »), which is old and revered, although it has been amended several times¹. In 2014, the Constitution's bicentennial anniversary was celebrated, with exhibitions, a festival, a wide variety of dedicated books and articles, and even a set of postal stamps². Many of these activities were

¹ The last major revision took place in 1983. For an overview of all versions, see the website of the Parliamentary documentation centre, https://www.denederlandsegrondwet.nl > « versies Grondwet » (last visited 2 August 2016).

² See the overview of activities at https://www.huygens.knaw.nl/viering-tweehonderd-jaar-nederlandse-grondwet-tijdens-de-finale-van-de-grondwetstrijd/ (last visited 2 August 2016); the online exposition of the National Archive at https://www.google.com/culturalinstitute/beta/exhibit/200-jaar-grondwet/wR0nxk42 (last visited 2 August 2016); and the presentation of the postal stamps, see http://www.postnl.nl/over-postnl/pers-nieuws/nieuws/2014/maart/nederland-viert-200-jaar-grondwet-met-nieuwe-postzegels.html (last visited 2 August 2016). The timing of the celebrations shows that the Constitution is not easy to handle. Several constitutional scholars argued that the bicentennial ought to be celebrated in 2014,

organised by the government with the explicit aim of promoting the Constitution and boosting its popularity with the Dutch population. Apparently, the need was felt to do so. This appears to be a recurring theme, too. Over the past decade, the government has undertaken or supported many similar popularising activities, varying from drafting a simplified version of the Constitution³ to creating educational materials to be used in schools⁴. Regardless of all these efforts, however, most Dutch people hardly know their Constitution⁵. This is true even for those for whom the document would

since it was then 200 years ago that the first constitution for the Kingdom of the Netherlands was created. Others have contended that the appropriate year for celebrations would be 2015, since it was in 1815 that Belgium became part of the Netherlands (until its secession in 1830) (see A. ALEN et al. (eds.), De Grondwet van het Verenigd Koninkrijk der Nederlanden van 1815. Staatkundige en historische beschouwingen uit België en Nederland [The Constitution of the United Kingdom of the Netherlands of 1815. Constitutional and Historical Considerations from Belgium and the Netherlands], The Hague, Bju 2016, forthcoming. The solution was a typically Dutch one, in that it was utterly pragmatic. It was decided to have celebrations for two years on end, starting in 2013 - when it was 200 years ago that the Kingdom of the Netherlands was established - and ending in 2015 (for an celebrations. overview of all activities for these https://www.riiksoverheid.nl/actueel/nieuws/2016/01/22/eindrapport-nationaal-comite-200-jaar-koninkrijk (last visited 2 August 2016). Interestingly, moreover, only in 1998 a special event had been celebrated under the title « 150 Years Constitution of the Netherlands » (again with all kinds of activities, varying from the inevitable post stamps to a ballet performance and a festival; see e.g. Agenda, NRC Handelsblad, 13 March 1998 and the special edition of the Nederlands Juristenblad [Netherlands Law Journal], 1998, 73) – at that time, the changes made to the Constitution in 1848 were apparently considered so important that this year should be regarded as the « year of birth » of the current Constitution, rather than 1814.

³ K. Heij and W. Visser, *De Grondwet in eenvoudig Nederlands* [The Constitution in Simple Dutch], The Hague, Sdu, 2007.

⁵ In 2008, a large survey showed that 64% of the Dutch population admitted not to know the Constitution very well, while 20% said they did not know it at all; even less people managed to correctly answer a number of questions about the contents of the document. Interestingly, about 69% said they considered it of great importance that

For a review, see the report of the Commissie UITDRAGEN KERNWAARDEN RECHTSSTAAT [Commission on the dissemination of the core values of the rule of law], Onverschilligheid is geen optie: de rechtsstaat maken wij samen [Indifference Is not an Option: Together We Make a State Governed by the Rule of Law], The Hague, Ministry of Justice and Ministry of the Interior and Kingdom Relations, 2009. Particularly important was the establishment in 2010 of ProDemos – House for Democracy and the Rule of Law. A great amount of educational material and information about the Netherlands Constitution can be accessed through ProDemos' website; ProDemos also provides for guided tours, courses, activities and exhibitions. See www.prodemos.nl (last accessed 2 August 2016).

seem to be of immediate relevance, such as members of parliament and judges⁶. In interviews conducted for a study on the evaluation of the Constitution in 2009, many of them mentioned that the Constitution « of course » was of great importance, yet they knew little about it, nor did they really use the document with any considerable frequency. An important characteristic of the Netherlands Constitution therefore seems to be that it is taken for granted. People think highly of the document, yet it is not in any way playing a role in their daily or professional lives.

This is not the only particularity of the Dutch attitude towards the Constitution, however. One of the events organised at the bicentennial celebrations in 2014 illustrated yet another aspect of the Dutch constitutional debate. The event was a widely advertised competition to submit the best proposal to amend the Constitution⁷. Such proposals could be submitted by anyone – students and constitutional scholars, as well as interested and involved citizens – and about a 100 persons participated. The organisation of such competition can be understood in different ways. It might of course be seen as an expression of a continuous desire for improvement, of wanting to keep the document up-to-date, of trying to get everyone involved in constitutional change. But the very organisation of such a competition could also be seen as reflecting a certain degree of dissatisfaction. It seems to imply/suggest that after 200 years, the Constitution is in dear need of revision in order to give it real meaning and impact.

There is probably some truth in both explanations. Yet, the 2009 study on the Constitution discloses that many Dutch scholars and professionals are unhappy about the document⁸. They find the Constitution to be too long

there is a Constitution, and 20% found this fairly important. See further B. Oomen, « Constitutioneel bewustzijn in Nederland: van burgerzin, burgerschap en de onzichtbare grondwet » [Constitutional Awareness in the Netherlands: About Sense of Civic Responsibility, Citizenship and the Invisible Constitution], *Recht der Werkelijkheid* 2009, n° 2, p. 55-79; B. Oomen and H.T. Lelieveldt, « Onbekend maar niet onbemind. Wat weet en vindt de Nederlander van de Grondwet? » [Unknown yet not Unloved. What Does the Dutchman Know and Think of the Constitution?], *Nederlands Juristenblad* 2008, n° 10, p. 577-578. An English language summary of the findings of the survey can be found in B. Oomen, « The Rights for Others: The Contested Homecoming of Human Rights in the Netherlands », *Netherlands Quarterly of Human Rights*, vol. 31, 2013, n° 1, p. 41-73 at p. 64-65.

⁶ T. BARKHUYSEN *et al.*, *De Nederlandse Grondwet geëvalueerd: anker of verdwijnpunt* [The Dutch Constitution Evaluated: Anchor or Vanishing Point?], Alphen aan den Rijn, Kluwer, 2009, p. 74.

See e.g. http://academievoorwetgeving.nl/newsitem/grondwetstrijd-zelf-een-deel-van-de-grondwet-schrijven-1 (last visited 3 August 2016).

⁸ T. BARKHUYSEN *et al.* 2009, *op. cit.*, note 6, p. 81ff.

and its language too old-fashioned, it is held to leave important problematic gaps, it is considered too rigid, its list of constitutional rights is incomplete, it is said not to have any practical value, and so on. Characterisations in scholarly literature even show a certain disdain or ridicule – the Constitution has been described as an « insignificant, characterless building where citizens have no reason to be » 9 , as « invisible » 10 , as « faded » and « archaic » 11 , as a « wall flower » 12 , and even as a « pathetic little tree » 13 . There is a shared understanding that in many other states, in particular the United States, constitutions really are symbols for what the State stands for. It is widely agreed that that, indeed, is how it should be. The Constitution ought to be a document in which the most precious assets of the constitutional system are expressed, in a way that is understandable and important to everyone 14 . However, there is also a consensus that the Dutch Constitution does not meet those expectations.

Politicians and scholars alike thus seem to feel that the Netherlands Constitution urgently needs attending to. This is not only because the Constitution is seen to have little symbolic value, but also because of its perceived lack of legal and normative significance¹⁵. For that reason, efforts have reached much further than organising celebrations and public events. Especially over the past 20 years, many initiatives have been taken to

⁹ A.F.M. Brenninkmeijer, « Rechtszekerheid », *Nederlands Juristenblad* 1998 (5) p. 209.

¹⁰ В. Оомен 2008, *ор. cit.*, note 5.

¹¹ G. TER HORST, « De Grondwet moet binden, niet scheiden » [The Constitution Should Bind Together, not Divide], contribution to the seminar *De onzichtbare Grondwet* [The Invisible Constitution], 27 February 2008.

¹² S.W. Couwenberg, « De Grondwet als bron van normativiteit en identiteit » [The Constitution As Source of Normativity and Identity], *Civis Mundi* 2003, p. 127-134, at p. 127.

¹³ J.A. PETERS, *Wie beschermt onze Grondwet?* [Who Protects Our Constitution?], Amsterdam, Vossiuspers, 2003, p. 1.

¹⁴ The example of the US Constitution is often mentioned to show the shortcomings of the Dutch one – see *e.g.* G.F.M. VAN DER TANG, « Een Grondwet voor de politieke samenleving » [A Constitution for the Political Society], *in De Grondwet herzien. 25 Jaar later* [The Constitution Revised. 25 Years on], The Hague, Ministery of the Interior and Kingdom Relations, 2008, p. 85-110.

¹⁵ See the findings of T. Barkhuysen *et al.*, *op. cit.*, note 6, p. 75 and of the State commission on revision of the Constitution, *Kamerstukken II* 2010/11, 31570, n° 17, annex, p. 24-25. For analyses of the different functions of the Dutch constitution, see, amongst others, B. Oomen 2009, *op. cit.*, note 5, p. 64-65 and H.M. Grifficen, « Wankelmoedige kolos: een functionele analyse van de Grondwet » [Fickle Colossus: a Functional Analysis of the Constitution], *Tijdschrift voor Constitutioneel Recht*, 2010, n° 4, p. 362-375.

improve the normative value of the Constitution. In 1999, a State commission was instituted in order to investigate the need for changes to the fundamental rights chapter in the light of technological developments ¹⁶. In 2005, a National Convention was established to make proposals for improving the constitutional and institutional set-up of the Netherlands ¹⁷. In 2009, another State commission was instituted to advise the Government on the feasibility and desirability of a number of fundamental changes to the Constitution ¹⁸. This Commission was asked to investigate, amongst others, the need for an overhaul of the chapter on fundamental rights and of the way in which the Constitution allows for international law to have effect in Dutch law. Even more recently, in 2015, it was decided to institute yet another State commission, which will have the task of drafting proposals on a number of political constitutional issues, such as the parliamentary and bicameral systems ¹⁹.

Against this background of continuous efforts to revitalise the Constitution, this article aims to answer how the apparent irrelevance of the Netherlands Constitution can be explained. It also wants to probe into the feasibility of changing this situation. To do so, it first addresses a number of elements particular to the Netherlands Constitution that could help explaining the current situation. Attention is thereby paid to the lack of a power of constitutional review for the courts, combined to an obligation to review the compatibility of legislation with treaty law and an inadequate formulation of constitutional fundamental rights provisions (section 2), as well as to the procedure for revision and the concomitant rigidity of the Constitution (section 3). Secondly, it sheds some light on the changes that would be needed to alter the current situation, as well as on their potential for success (section 4).

The constitutional protection of fundamental rights, such as the freedom of expression, the freedom of religion, and privacy rights, serves as a case-study to illustrate the above. No attention is therefore paid to matters related to the political system (such as the organisation of the Parliament and the legislative process), decentralisation, organisation of the judicial system, or organisation of the monarchy. It is further important to emphasise

 $^{^{16}}$ This commission bore the name Commissie Grondrechten in het digitale tijdperk [Commission for Fundamental Rights in the Digital Era]; it was established by Royal decree of 23 February 1999, Stb. 1999, no 101. For its report, see Kamerstukken II 2000/01, 27460, no 1, annex 1.

¹⁷ Established by Ministerial decree of 22 December 2005, Stcrt. 2005, n° 251.

¹⁸ Established by Royal decree of 3 July 2009, *Stcrt.* 2009, n° 10354.

¹⁹ See the letter of 12 July 2016 of the chairpersons of the Lower and Upper Houses to the Prime Minister on the topic, *Kamerstukken I* 2015/16, 34430 and 34000, n° A.

that this article takes a primarily legal-constitutional perspective. There is no intention to provide for a historical review, nor to present and discuss insights from political science. Instead, the objective is to look at the legal characteristics of the Constitution and the system in which it is embedded, and find explanations and solutions for its irrelevance there.

2. Explanations – the Prohibition of Constitutional Review and the Phrasing of Constitutional Rights

A. Lack of Possibilities For Constitutional Review By the Courts

The first explanation for the marginal legal significance of the Dutch Constitution can be found in the lack of possibilities for constitutional review. Article 120 of the Constitution expressly states that « the courts shall not review the constitutionality of Acts of Parliament and treaties »²⁰. This prohibition of constitutional review by the courts can be found already in the 1848 version of the Constitution²¹. It can be explained by the strong adherence in the Dutch constitutional system to notions of representative democracy and sovereignty of Parliament. Great trust is traditionally placed in the legislative process²². The presumption seems to be that the legislative procedure will ensure that Acts of Parliament are of high quality and they are in conformity with the Constitution²³. In addition, it is argued that the prohibition of constitutional review is warranted by the need to guarantee democratic legitimacy of norms having impact on citizens²⁴. Many deeply

²⁰ In English, on this provision see e.g M. DE VISSER, *Constitutional Review in Europe.* A Comparative Analysis, Oxford, Hart, 2013, Chapter IV.A.; L.F.M. BESSELINK, Constitutional Law of the Netherlands, Nijmegen, Ars Aequi, 2004, Chapter V.

²¹ A forerunner can be found in the 1814 constitution. See further G. BOOGAARD and J. UZMAN, « Artikel 120 – Toetsingsverbod», January 2016, at www.nederlandrechtsstaat.nl.

Although it has been shown that the original provision – which did not so much prohibit constitutional review as well as state that all acts of parliament are inviolable – also was introduced to make sure the King would respect the inviolability of legislation; see G. Boogaard and J. Uzman, *op. cit.*, note 21.

²³ See the discussion of this argument by M. VAN HOUTEN, *Meer zicht op wetgeving:* rechterlijke toetsing van wetgeving aan de Grondwet en fundamentele rechtsbeginselen [A Better View on Legislation: Judicial Review of Legislation for its Compatibility with the Constitution and Fundamental Principles of Law], Diss. Tilburg University, 1997; she mentions that it has been particularly supported by older scholars, such as VAN DER BURGH and JEUKENS; see e.g. p. 126, 132 and 137.

²⁴ E.g. R.J.B. SCHUTGENS, « Constitutionele toetsing in Nederland » [Constitutional Review in the Netherlands], in Functie en betekenis van de Grondwet: Een dialogisch perspectief [Function and Meaning of the Constitution: A Dialogical Perspective], A. Kristic *et al.* (eds.), Nijmegen, WLP, 2010, p. 31-51, at p. 36.

feel that it would not be acceptable if a court could set aside such legislation because of its incompatibility with the Constitution²⁵. It is thereby considered important that the courts lack any kind of democratic mandate, and they are therefore not in a proper position to review Acts of Parliament²⁶. These presumptions and ideas have been rebutted and criticised by many constitutional scholars, and concrete proposals for change have been presented as early as 1966²⁷. It has been pointed out, for example, that the legislature cannot foresee all concrete effects of legislation. Also, judicial review could be considered necessary to guarantee that the parliament does not rashly adopt legislation which is incompatible with the Constitution²⁸. These opposing views have given rise to a lively debate in legal scholarship as well as politics. The arguments of proponents and opponents of the prohibition seem to be well-balanced, which may explain that, as yet, it still has its place in the Constitution²⁹.

Arguably, it is difficult to bring a constitution to life when there is no possibility for *ex post* constitutional review by the judiciary³⁰. This is true in particular for fundamental rights matters, where the past decades have shown a gradual shift of attention from political bodies to the judiciary³¹. Important emancipation and human rights movements no longer (only) make their plea by means of demonstrations and by lobbying or petitioning, but

 $^{^{25}}$ E.g. J.J.J. SILLEN, « Tegen het toetsingsrecht » [Against Constitutional Review], Nederlands Juristenblad, 2010 no 2231.

For the 1966 proposal, see the report of a working group of experts in constitutional law: *Proeve van een nieuwe grondwet* [Suggestion for a New Constitution], The Hague, Ministry of the Interior, 1966. For a review of the various proposals, see G. BOOGAARD and J. UZMAN, *op. cit.*, note 21.

²⁸ See the overview of arguments given by M. VAN HOUTEN, op. cit., note 23.

See e.g. C. Zoethout et al., Een grondwet voor de 21ste eeuw. Voorstudie van de werkgroep Grondwet van de Nationale Conventie [A Constitution for the 21st Century. Preliminary Study by the Working Group on the Constitution for the National Convention], The Hague, 2006; also in *Kamerstukken II*, 2006/07, 30184, n° 12, annex 3. For a detailed review of all arguments that have been exchanged until 1997 (and not much seems to have changed after that), see M. VAN HOUTEN 1997, op. cit., note 23, chapter 3.

³⁰ For an analysis of the political and constitutional role that is played by courts, see in particular A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, especially p. 113ff.

See e.g. S. Halliday and P. Schmidt, Human Rights Brought Home. Socio-Legal Studies of Human Rights in the National Context, Oxford, Hart, 2004; T. Koopmans, Courts and Political Institutions. A Comparative View, Cambridge, Cambridge University Press, 2003, p. 260ff; see also Stone Sweet 2000, op. cit., note 30, p. 140ff and 197ff.

they do so increasingly by means of litigation and test trials³². They try to have discriminatory legislation or decisions declared null and void or, by contrast, request for legal gaps to be filled. In the end, this might lead to political and legislative consideration of the matter and, possibly, legal change³³.

In the Netherlands, given the prohibition of constitutional review, public interest litigation based on constitutional arguments makes little sense. Litigants hardly could use arguments based on the fundamental rights provisions of the Constitution to ask a court to set aside Acts of Parliament or order the legislature to regulate a certain matter³⁴. Would they try to do so, the court simply could not use the Constitution as a basis for its judgment.

Interestingly, however, the Dutch courts appear to play just as important a role in deciding on matters of general interest as many constitutional courts do, and their judgments may have a great impact on legislative and policy debates³⁵. At the turn of the century, for example, important breakthroughs were achieved in the legalisation of euthanasia as a result of court judgments; the current legislation even could be regarded as a codification of this case-law³⁶. In the 2000s, in a procedure instigated by

³² Cf. e.g. J.K. Krishnan, « Public Interest Litigation in a Comparative Context», *Buffalo Public Interest Litigation Journal*, vol. 20, 2002, p. 19-99; B.A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Policies*, Cambridge, Cambridge University Press, 2009, p. 131ff; P. Bouwen and M. McCown, « Lobbying Versus Litigation: Political and Legal Strategies of Interest Representation in the European Union », *Journal of European Public Policy*, vol. 14, 2007, n° 3, p. 422-443.

³³ For other factors determining the potential success of strategic litigation, see e.g. P. Bouwen and M. McCown, *op. cit.*, note 32, p. 427ff.

³⁴ On the prohibition of court orders to the state in connection to Article 120 Constitution, see elaborately G. Boogaard, *Het wetgevingsbevel. Over constitutionele verhoudingen en manieren om een wetgever tot regelgeving aan te zetten* [The Order to Legislate. About Constitutional Relations and Ways to Stimulate the Legislature to Regulate], Nijmegen, WLP, 2013.

³⁵ Although this is debated; see e.g. B. Oomen 2013, op. cit., note 5.

³⁶ Cf. W. VAN DER BURG, « De rol van de rechter rond levensbeëindigend handelen » [The Role of Courts in Relation to End-Of-Life Issues], *in De rechter als rechtsvormer* [Courts As Lawmakers], E.J. Broers and B. van Klink (eds.), The Hague, Bju, 2000, p. 221-240; J. Griffiths *et al.*, *Euthanasia and Law in the Netherlands*, Amsterdam, Amsterdam University Press, 1998; K. ROZEMOND, « De voortdurende invloed van de Hoge Raad op het euthanasierecht » [The Continuing Impact of the Supreme Court on Regulation of Euthanasia], *Ars Aequi*, 2015, p. 231-237. Particularly important were the *Chabot* and *Brongersma* cases – Supreme Court 21 June 1994,

women's rights groups, a judgment of the Netherlands Supreme Court effectively ended the possibility for a political party to ban women from representative functions³⁷. More recently, political and societal debates have been initiated by litigation on the rights of asylum seekers³⁸ and the State's obligations in response to climate change³⁹. In 2014, the Dutch section of

ECLI:NL:HR:1994:AD2122 and Supreme Court HR 24 December 2002, ECLI:NL:HR:2002:AE8772.

³⁷ See Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549. The Government left it to the political party concerned (the *Staatkundig Gereformeerde Partij* [Reformed Christian Party] or SGP) to decide how it wanted to implement the judgment, but it promised to monitor its compliance (see most recently a letter of the Minister of the Interior and Kingdom Relations to the Lower House of 12 October 2012, *Kamerstukken II* 2012/13, 28481, n° 19). The party decided in 2013 to change its statute to allow women to stand for elections. In the 2014 municipal elections, a female candidate was indeed accepted and, eventually, elected in the municipal council for the city of Vlissingen (see *e.g.* « SGP-vrouw schrijft geschiedenis in Vlissingen» [SGP Woman Makes History in Vlissingen], *de Volkskrant*, 19 March 2014).

The debates on rights of asylum seekers partly were the result of a set of procedures brought before the European Committee for Social Rights (specifically ECSR, decision of 20 October 2009, no 47/2008 (Defence for Children International v. the Netherlands) and ECSR, decisions of 1 July 2014, no 86/2012 (European Federation of National Organisations Working with the Homeless (FEANTSA) v. The Netherlands) and no 90/2013 (Conference of European Churches (CEC) v. the Netherlands); in turn, the decisions of the ECSR had great impact on national judgments, which eventually and necessarily also influenced national politics. On this series of events, see in particular J.H. GERARDS, « De rechtskracht van niet-bindende uitspraken van verdragscomités op het terrein215 van de grondrechten » [The Legal Effect of Non-Binding Decisions of Treaty Committees in the Field of Fundamental Rights], in Hybride bestuursrecht [Hybrid Administrative Law], The Hague, Bju, 2016, p. 13-85; Y. Donders, « Europa's voorvechter van economische en sociale rechten -Het Europees Comité voor Sociale Rechten » [Europe's Champion of Economic and Social Rights – The European Committee for Social Rights], Ars Aegui, 2014, no 4, p. 253-261; D. MOHAMMADI, « Opvang van uitgeprocedeerde vreemdelingen: waarom we het voorbeeld van de gemeenten moeten opvolgen » [Care for Illegal Aliens: Why We Should Follow the Example of the Municipalities], Ars Aequi, 2015, no 10, p. 749-

³⁹ Much attention has been paid in the media to the *Urgenda* case, in which a regional court held that the State had to make a strong regulative and policy effort to reduce carbo-dioxide (Regional Court The Hague, judgment of 24 June 2015, ECLI:NL:RBDHA:2015:7145); for an analysis in English, see K.J. DE GRAAFF and J.H. JANS, « The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change », *Journal of Environmental Law*, vol. 27, 2015, p. 517-527. Although the judgment has been appealed, it seems to have set an example – another case has been brought more recently in which a court is requested to order the State to improve air quality and reduce emission of particulate matter (see

the International Commission of Jurists even started the Public Interest Litigation Project to further explore the possibilities of strategic litigation in fundamental rights matters⁴⁰.

This creates a paradox: on the one hand, there is a prohibition of constitutional review for the courts; on the other hand, the courts manage to bring important legal changes through their judgments. The explanation for this paradox can be found in a second characteristic of the Dutch constitutional system, which is its traditional openness to international law⁴¹. It often has been said that this openness is due to the small size of the Netherlands, its closeness to the sea, and its history of international trading⁴². This combination accounts for a strong orientation to foreign countries as well as a great interest in international regulation of trade matters and peaceful international relations⁴³. The Netherlands see a strong role for themselves in international law, and supporting the development of the international legal order forms an important part of its foreign policy⁴⁴. This orientation even finds its expression in the Constitution, which explicitly states that the Dutch Government « shall promote the international legal order »⁴⁵.

A rather famous legal expression of the openness to international law is the (modified) monist system for the implementation of international law in Dutch law 46 . Article 93 of the Constitution stipulates that as soon as a

[«] Milieudefensie spelt staat voor rechter om schone lucht » [Milieudefensie Sues State About Clean Air], de Volkskrant, 2 August 2016).

⁴⁰ See www.pilpnjcm.nl/about-pilp (last visited 3 August 2016).

⁴¹ B. Oomen 2013, *op. cit.*, note 5, p. 56; B.A. SIMMONS 2009, *op. cit.*, note 32, at p. 130.

 $^{^{42}}$ See *e.g.* the work by Van Vollenhoven, cited in B. Oomen 2013, *op. cit.*, note 5, p. 46.

^{46. &}lt;sup>43</sup> B. Oomen 2013, *op. cit.*, note 5, p. 48; see elaborately also N. Schrijver, « A Missionary Burden or Enlightened Self-Interest? International Law in Dutch Foreign Policy », *Netherlands International Law Review*, vol. 57, 2010, p. 209-244.

⁴⁴ Cf. B. Oomen 2013, *op. cit.*, note 5, p. 46.

⁴⁵ Article 90 of the Netherlands Constitution. On this provision, see in more detail L.F.M. Besselink, « The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution », *Netherlands Yearbook of International Law*, vol. 34, 2003, p. 89-138.

⁴⁶ See in particular J.W.A. FLEUREN, « The Application of Public International Law by Dutch Courts », *Netherlands International Law Review*, vol. 57, 2010, p. 245-266. The monist system is modified in that direct effect and priority are given only to self-executing provisions (or, according to the English translation of the Constitution, « provisions which can bind everyone by virtue of their contents »). See also J.H. Gerards and J.W.A. Fleuren, « The Netherlands », *in Implementation of the*

provision of international law is self-executing (*i.e.*, when it is sufficiently clear that this provision can have direct effect by virtue of its contents), such a provision can be invoked before the Dutch courts in much the same way as provisions of Dutch legislation can. Even more importantly, Article 94 implies that self-executing provisions have a legal status which is higher than that of the Constitution, and it is up to the courts to see whether the hierarchy of norms is respected. When any Dutch court (whether it is the Supreme Court of the Netherlands or a regional court) finds that an Act of Parliament or even a provision of the Constitution is incompatible with a Treaty provision that is self-executing, it may not apply the national provision⁴⁷.

In effect, the combination of Articles 93, 94 and 120 means that Dutch courts may not review the constitutionality of Acts of Parliament, but they are required to review their treaty-compatibility⁴⁸. Courts even are prohibited from applying national law when there is a conflict with a self-executing international treaty provision. It is this rather paradoxical⁴⁹ situation which may help to explain why the Constitution is of such limited practical importance to fundamental rights issues in the Netherlands, yet the courts still play a significant role in this area⁵⁰. Given that review against important fundamental rights treaties, such as the European Convention on Human Rights, is possible and even mandatory, courts almost standardly refer to such international treaties in cases concerning fundamental rights issues, while the constitutional provisions cannot be used for this⁵¹. The upshot of

European Convention on Human Rights and of the Judgments of the EctHR in National Case Law. A Comparative Analysis, J.H. Gerards and J.W.A. Fleuren (eds.), Antwerp, Intersentia, 2014, p. 217-260, at p. 220ff.

⁴⁷ See Article 94 of the Netherlands Constitution.

⁴⁸ See also B. Oomen 2013, *op. cit.*, note 5, p. 61.

⁴⁹ See, however, L.F.M. Besselink, « Constitutionale toetsing in international perspectief » [Constitutional Review in International Perspective], *Ars Aequi*, 2003, n° 2, p. 89-95 and G. VAN DER SCHYFF, « Waarom het wetsvoorstel-Halsema tekortschiet. Mythes rondom het verdragsargument » [Why the Halsema-Proposal Shows Shortcomings. Myths About the Argument of Treaty Review], *Nederlands Juristenblad*, 2008, n° 1852.

⁵⁰ Cf. B. Oomen 2013, *op. cit.*, note 5, p. 59; M. De Visser 2013, *op. cit.*, note 20.

J.H. GERARDS, « Oordelen over grondrechten – rechtsvinding door de drie hoogste rechters in Nederland » [Judging on Fundamental Rights – Interpretation by Three Highest Courts in the Netherlands], *in Rechtsvinding op veertien terreinen* [Interpretation in Fourteen Areas of Law], H. den Tonkelaar and L. de Groot (eds.), Deventer, Kluwer, 2012, p. 9-51; see also J.A. Peters 2013, *op. cit.*, note 13, p. 19.

this is that the international treaties are much more relevant to Dutch legal practice than the Constitution is ⁵².

B. Phrasing of the Constitutional Fundamental Rights Provisions

As discussed in section 2.A, the prohibition of constitutional review of Article 120 seems to go a long way to explaining the invisibility and legal irrelevance of the Netherlands Constitution. There is an interesting nuance to this, however, to the extent that Articles 93, 94 and 120 cannot fully account for the lack of references to constitutional fundamental rights. Importantly, Article 120 only refers to the inviolability of Acts of Parliaments and treaties. It therefore does not cover judicial review of other types of legislation (e.g., government decrees, ministerial decrees, provincial and municipal decrees) nor does it relate to administrative by-laws and decisions. When cases deal with such lower legislation or with the exercise of discretion by an administrative body, the Dutch courts are clearly allowed to review their compatibility with the fundamental rights provisions of the Constitution⁵³. There is a catch, however, that does not make it very attractive for the courts to do so in practice: The phrasing of most of the constitutional provisions is not particularly well-suited to judicial review⁵⁴. To illustrate, Article 13 of the Netherlands Constitution provides as follows:

See further e.g. L.F.M. VERHEY, « Het grondwettelijk beschermingssysteem: handhaving of herbezinning? » [The Constitutional System of Protection: Preservation or Reconsideration?], NJCM-Bulletin, 2003, p. 229; T. BARKHUYSEN et al. 2008, op. cit., note 6, p. 78; P. VAN DIJK, « Constitutionele toetsing in toekomstig perspectief » [Constitutional Review in Future Perspective], in Rol en betekenis van de Grondwet. Verslag van het symposium van de Raad van State op 25 mei 2010 IRole and Meaning of the Constitution. Report of the seminar of the Council of State on 25 May 2010], The Hague, Council of State, 2010, p. 48. For a recent case-law analysis showing the impact of international treaty law as compared to the Constitution, see J.H GERARDS 2012, op. cit., note 51. An analysis of the influence of the ECHR as compared to the Constitution on the legisprudence of the Council of State can be found in J.H. GERARDS, W.J.M. VOERMANS et al., Juridische betekenis en reikwijdte van het begrip « rechtsstaat » in de legisprudentie & jurisprudentie van de Raad van State [Legal Meaning and Scope of the Notion of « Rechtsstaat » in the Legisprudence & Jurisprudence of the Council of State], The Hague, Council of State, 2011.

⁵³ Cf. J.H. GERARDS, *op. cit.*, note 52, p. 31.

⁵⁴ E.g. L.F.M. VERHEY, *op. cit.*, note 52; G. VAN DER SCHYFF, « De beperkingssystematiek van de Nederlandse grondrechten: kanttekeningen bij het rapport van de Staatscommissie Grondwet » [The System for Limitations of Dutch Fundamental Rights: Critical Comments on the Report of the State Commission on Constitutional Revision], *Tijdschrift voor Constitutioneel Recht*, 2011, n° 2, p. 186-194; H.R.B.M. KUMMELING, « Proliferatie van proportionaliteit. Over een beginsel dat ook in de Nederlandse Grondwet niet zou misstaan » [Proliferation of Proportionality.

- 1. The privacy of correspondence shall not be violated except in the cases laid down by Act of Parliament, by order of the courts.
- 2. The privacy of the telephone and telegraph shall not be violated except, in the cases laid down by Act of Parliament, by or with the authorisation of those designated for the purpose by Act of Parliament.

This provision indicates which body (the legislature) is competent to regulate the fundamental right to communication, mentioning only a few rather formal requirements. It is fully left to the discretion of the legislature when and under which substantive conditions the right could be restricted and which quarantees should be offered against arbitrary application. The provision does not, for example, contain a requirement of legitimate aim, a proportionality requirement or a core rights provision. Article 13 can easily be understood from the perspective discussed in section 2.A. As it was explained there, great trust is traditionally placed in the political bodies to take wise and well-considered decisions and to respect the Constitution. For a court, however, such a provision is difficult to apply. For example, one of the Dutch courts could be asked to review a decision taken by the security services to tap someone's telephone, which is based on the relevant legislation, yet clearly in an exercise of discretion. The court would not be stopped from reviewing such a discretionary decision by Article 120, but it is clear that Article 13 would not offer it a very practical tool. It would be fully up to the court itself to devise standards and criteria it could use to decide on the reasonableness of the exercise of discretion.

Article 13 also illustrates another problem of the Netherlands Constitution, which is that many provisions are narrowly phrased and rather archaic. The second paragraph of this provision protects the freedom to use a telegraph, though this instrument is hardly used anymore and most young people will not even know what it looks like⁵⁵. This is not only a cosmetic problem, as the provision makes a clear distinction in the competences to regulate communication by either letter or telephone. This makes life very hard in times of What's App, SMS and other social messaging devices, where the question arises if such means of communication should be held to fall within the strict regime for letters or rather within the more lenient one for

About a Principle That Would Look not At All Unbecoming in the Constitution] in Grensverleggend staatsrecht [Constitutional Law Breaking Fresh Ground], P.P.T. Bovend'Eert et al. (eds.), Deventer, Kluwer, 2001, p. 247ff; J.H. Gerards and C. Sieburgh (eds.), De invloed van fundamentele rechten op het materiële recht [The Impact of Fundamental Rights on Substantive Law], Deventer, Kluwer, 2013; J.H. GERARDS and J.W.A. FLEUREN, op. cit., note 46, at p. 237.

⁵⁵ See also the report of the STATE COMMISSION ON CONSTITUTIONAL REVISION 2010, *op. cit.*, note 13, p. 85.

telephone communication⁵⁶? Dutch courts mostly do not feel inclined to enter such difficult debates, and prefer a different solution.

That solution is, once again, the application of international fundamental rights treaties, in particular the European Convention on Human Rights. This Convention contains a number of rather clearly drafted provisions with a set of relatively transparent requirements for limitation. Both the provisions and the conditions for restriction are well-suited to judicial review. The additional advantage is that on each of the substantive rights, the European Court of Human Rights has developed an extensive case-law in which the relevant provisions are explained and which contain even more readily applicable standards and principles for judicial review. As it is very easy to directly apply these standards in Dutch law, it is hardly surprising that all Dutch courts tend to favour the application of the European Convention of Human Rights over the application of the Constitution, even in cases where the prohibition of constitutional review does not apply⁵⁷. Recent analyses have shown that the same is increasingly true for the EU Charter of Fundamental Rights, and in areas such as migration law, health law or family law, for more specific international treaties containing human rights provisions⁵⁸.

Hence, over the past few decades, litigation in fundamental rights cases has not been based on constitutional arguments, but on the self-executing provisions of the European Convention as explained in the Strasbourg Court's case-law and of other European and international treaties. Hardly ever do the courts rely on constitutional fundamental rights, and even where this is the case, they usually interpret them in line with the international case-law⁵⁹. It is for that reason that in relation to fundamental rights matters, the European Convention even has been said to function as a kind of substitute Constitution⁶⁰.

⁵⁶ See also the report of the State Commission on fundamental rights in the digital ERA 2000, *op. cit.*, note 16, p. 147.

⁵⁷ See in particular J.H. GERARDS, *op. cit.*, note 52; J.H. GERARDS and J.W.A. FLEUREN 2014, *op. cit.*, note 46, p. 237; see also J.A. PETERS 2003, *op. cit.*, note 13, p. 22

p. 22. ⁵⁸ See e.g. J.H. GERARDS, H.C.F.J.A. de Waele and K. Zwaan (eds.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven* [Five Years Binding EU Charter of Fundamental Rights. Implementation, Consequences, Perspectives], Deventer, Kluwer, 2015 and J.H. GERARDS and C. SIEBURGH, *op. cit.*, note 54.

⁵⁹ See GERARDS, *op. cit.*, note 52; J.A. PETERS 2003, *op. cit.*, note 13, p. 22.

⁶⁰ J.H. GERARDS and M.C. CLAES, « National report – The Netherlands », in The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human

C. Conclusion

The prohibition of constitutional review, the practical value and legal status of treaties such as the European Convention of Human Rights, and the awkward phrasing of the constitutional rights, have the combined effect that international human rights provisions are the main standard for fundamental rights review in the Netherlands. This also influences the way fundamental rights issues are framed outside the courthouse. Legal scholars discuss judgments on fundamental rights in articles, case-notes and lectures, and their audiences thereby quickly learn that the Convention and the Charter are more important than the Constitution. This message is also picked up by civil servants preparing draft legislation and by politicians in parliamentary debates. Indeed, the Government strives to present bills to Parliament, and Parliament may accept them, only when they consider them to be fundamental rights proof⁶¹. In practice this means that the Government tries to ensure that a bill contains restrictions of fundamental rights that will be accepted by the courts⁶². Since the courts mainly apply the European Convention, the EU Charter and some other international documents, it is understandable that the Government, too, bases its explanatory memoranda as much as possible on the Convention standards⁶³. Consequently, there seems to be ever less reason to use the Constitution as a legal document⁶⁴.

Rights and National Constitutions, J. Laffranque (ed.), Reports of the XXV FIDE Congress, Vol. 1, Tallinn, Estonian Lawyers Association, 2012, p. 613-677, section 1.2; M. DE VISSER 2013, op. cit., note 20.

⁶¹ Indeed, the Government is obliged to do so by the *Aanwijzingen voor de regelgeving* [Directions for Legislation], especially Direction 18 on compatibility of legislation with higher order law; the most recent and consolidated version of these can be found at http://wettenoteoverheid.nl/BWBR0005730/2011-05-11 (last visited 3 August 2016)

August 2016).

62 For this process, see *e.g.* J.H. GERARDS, « De EHRM-rechtspraak als richtsnoer bij het opstellen van wetgeving » [ECtHR Case-Law As Guidance in Drafting Legislation], *Nederlands Tijdschrift voor Mensenrechten*, vol. 40, 2015, n° 3, p. 296-315.

The integral checklist for legislative and policy proposals (« Integral afwegingskader ») also contains checklists for compatibility with fundamental rights. Although the checklist also refers to the Constitution, it is striking that most of the standards are directly copied from the European Convention (such as the requirement that a restriction of fundamental rights is necessary in a democratic society); see https://www.kcwj.nl/sites/default/files/iak_checklist_grondrechten_0.pdf (last visited 3 August 2016).

⁶⁴ Even in respect to the right to education, which has a very special position in the Dutch Constitution and finds no clear parallel in international treaties, it has been shown that international treaties are of increasing importance to political and policy debates; see P. Huisman, « Verwezenlijking en doorwerking van het (internationale)

Therefore, the Constitution has gradually become a rather insignificant document for the development of fundamental rights in the Dutch legal system ⁶⁵.

3. Explanations – the Rigidity of the Dutch Constitution

A. The Slow Pace of Constitutional Amendment

Over the past decades, significant efforts have been made to revitalise the Netherlands Constitution. In particular, a great deal of political attention has been devoted to opening up a possibility for constitutional review, an issue which has been debated since the 1960s⁶⁶. Also many other amendments have been proposed⁶⁷, which culminated in a major revision of the Constitution in 1983. Amongst others, the various fundamental rights provisions were brought together in one chapter (albeit without significant rephrasing) and a number of provisions on socioeconomic rights were added. The 1983 revision of the Constitution did not, however, change anything in the prohibition of constitutional review or the

grondrecht op onderwijs » [Realisation and Effect of the (International) Fundamental Right to Education], *in* J.H. GERARDS and C. SIEBURGH 2013, *op. cit.*, note 54, p. 349-373.

⁶⁵ See critically on this development, J.A. Peters 2003, *op. cit.*, note 13, p. 22ff.

⁶⁶ See *supra*, section 2.A.

⁶⁷ The last changes to the Constitution had been made in 1948, 1953, 1956 and 1963, when, amongst others, the chapter on the role of international law in the Dutch legal order was amended and some changes in the relations to overseas territories were implemented. Many of the more far-reaching changes proposed by the State commission chaired by Van Schaik, however, did not find their place in the amendments (this State commission was established in 1950, Stb. n° 25; STAATSCOMMISSIE-VAN SCHAIK, Eindrapport van de Staatscommissie tot herziening van de Grondwet [Final Report of the State Commission on Revision of the Constitution], The Hague, Staatsdrukkerij, 1954. New activities to promote constitutional innovation were soon taken. Particularly important in this regard was the Proeve van een nieuwe Grondwet, prepared by a working group of constitutional law experts (Proeve van een nieuwe grondwet [Suggestion for a New Constitution], The Hague, Ministry of the Interior, 1966), just like the report presented by a State commission chaired by Cals and Donner, which had been established in 1967 (Stb. 1967, n^o 1). In 1971, this State commission presented a large number of proposals for a major revision of the Constitution (STAATSCOMMISSIE CALS/DONNER, Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet [Final Report of the State Commission on Advice Regarding the Constitution and the Elections Act], The Hague, Staatsuitgeverij, 1971). The results reached were however limited; the eventual revision of the Constitution of 1983 did not reflect most of the proposals made.

provisions on the parliamentary system. For that reason it is not regarded as a fundamental revision, but rather as a « facelift » – most of the really radical proposals were simply rejected⁶⁸.

More recent activities have met a similar fate. As mentioned in this article's introduction, at the beginning of the 2000s, a State commission had advised the Government on the meaning of the constitutional fundamental rights in light of developments in technology⁶⁹. The State commission had expressed deep concern regarding the lack of clarity and the insufficiency of the guarantees offered by Article 13 of the Constitution⁷⁰. It also made a number of proposals to update the Constitution's provisions on privacy rights, data protection and the freedom of expression. Although the Government initially embraced most proposals, upon a negative advice by its highest advisory organ, the Council of State, it decided to postpone a number of the thornier issues until further notice – including the reformulation of Article 13⁷¹.

When the proposals made by the National Convention in 2006 did not have any tangible results either 12, the Government set up in 2009 another State commission on the revision of the Constitution, now chaired by Wilhelmina Thomassen⁷³, This State commission was to advise the Government on, amongst others, modernisation of the phrasing of the fundamental rights chapter (in particular in the light of technological developments), the need to supplement it by a number of rights which were currently lacking (such as a right to a fair trial), the need to add a preamble

⁶⁸ A.W. Heringa and T. Zwart, « Facelift van een oude dame? De grondwet van 1983 » [Facelift of an Old Lady? The Constitution of 1983], Nederlands Juristenblad 1983, p. 233-247.

STAATSCOMMISSIE GRONDRECHTEN IN HET DIGITALE TIJDPERK [State Commission Fundamental Rights in the Digital Era], Kamerstukken II 2000/01, 27460, no 1, annex

<sup>1.
70</sup> On Article 13, see *supra*, section 2.B. 71 For the positive Cabinet response to the report of the State commission on fundamental rights in the digital era, see Kamerstukken 2000/01, 27460, no 1. Based on this response, the Government drafted a number of new provisions, but upon a highly critical advice by the Government's highest advisory body, the Council of State, it was decided to drop the proposals; see « De grondwetsherziening 2006 », in Naar een nieuwe grondwet, part 39, The Hague, Sdu, 2006, p. 429ff. On the slowness of the pace of these changes, see also L.F.M. VERHEY, « Grondrechten in het digitale tijdperk: driemaal is scheepsrecht? » [Fundamental Rights in the Digital Era: Third Time Lucky?], Tijdschrift voor Constitutioneel Recht, 2011, n° 1, p. 152-167.

See *supra*, section 1.

⁷³ Established by Royal decree of 3 July 2009, Stcrt. 2009, n° 10354.

or a general clause to the Convention, and the need to change the provisions on the effect of international law in national law⁷⁴. In 2010, the State commission presented its report, which contained concrete proposals on all matters mentioned above⁷⁵. However, the Government refused to take up most of the recommendations, with the exception of the proposals to change Article 13⁷⁶. In its formal response, the Government explained that the urgency of the proposals for all the other topics was lacking. Almost all of the problems noted by the State commission could easily be solved by applying international law, such as the European Convention of Human Rights, so there was no real need to change the Constitution⁷⁷. Only reluctantly, upon an urgent request made by the Upper House⁷⁸, the Government has since acted upon two other recommendations. In July 2016 almost six years after the report by the State commission was presented – two bills were sent to the Lower House, one proposing to add a general clause to the Constitution, the other proposing to introduce a right to a fair trial and to an effective remedy⁷⁹. The deliberations on the bill to amend Article 13 have, however, been put on hold 80. Thus, the pace of changing the Constitution is, vet again, extremely slow. If ever the bills obtain sufficient

⁷⁴ Letter of the minister of the Interior and Kingdom Affairs to the Lower House of 26 January 2009, *Kamerstukken* 2008/09, 31570, n° 8. In the end, a number of smaller constitutional topics were added; for a list, see the State commission's report, *Kamerstukken II* 2010/11, 31570, n° 17, annex.

⁷⁵ Kamerstukken II 2010/11, op. cit., annex.

Cabinet's response to the report of the State commission on revision of the Constitution, *Kamerstukken II* 2010/11, 31570, n° 20. A bill to amend Article 13 was presented to the Lower House in 2014; *Kamerstukken II* 2013/14, 33989, n° 4.

⁷⁷ This response may be surprising, as it was the Government which made up the list of issues to be dealt with by the State Commission. An explanation may be found in the fact that in the period between establishment of the State Commission and its reporting, elections had taken place and a new Cabinet was formed, with a clearly different composition and a different disposition vis-a-vis constitutional change.

⁷⁸ Request by Linear House member Leving Cabinet was formed.

⁷⁸ Request by Upper House member LOKIN-SASSEN *c.s.* to add a provision to the Constitution on the right to a fair trial and access to court, 7 February 2012, *Kamerstukken I* 31570, n° C and request by Upper House member ENGELS *c.s.* to add a general provision to the Constitution, 7 February 2012, *Kamerstukken I* 31570, n° B.

n° B.

79 Bill on a general provision in the Constitution, presented to the Lower House on 8 July 2016, *Kamerstukken II* 2015/16, 34516, n° 1-4; bill on a fair trial and access to court in the Constitution, presented to the Lower House on 8 July 2016, *Kamerstukken II* 2015/16, 34517, n° 1-4.

The minister of the Interior and Kingdom Relations wanted to synchronise the deliberations on the bill with those on a bill regarding the security services; see the letter to the Lower House of 29 September 2015, *Kamerstukken II* 2015/16, 33989, n° 8.

political support, it will probably take many more years for the three clauses to be included in the Constitution⁸¹.

B. The Rigidity of the Netherlands Constitution

Since the modest revision of the Constitution in 1983, hardly any amendments to the Constitution have been made. Moreover, to the extent that the Constitution was changed, most amendments concern only minor issues, such as the possibility for temporary replacement of a member of Parliament who is on pregnancy and maternity leave⁸². The main legal explanation for this is that it is extremely difficult to revise the Netherlands Constitution⁸³. According to Article 137 of the Constitution, which dates back to 1848, any bill to change the Constitution has to be accepted by a majority in both Houses of Parliament⁸⁴. Subsequently, the Lower House is dissolved and elections take place (although in practice, this is always combined with the regular dissolution of the Lower House and elections)85. After the elections, both Houses of Parliament deliberate again on the bill and each House has to vote in favour of the constitutional changes with a two-thirds majority.

Perhaps this procedure seems relatively straightforward, but its effects have to be viewed in the context of the Dutch political system⁸⁶. The Netherlands election system of proportionate representation unavoidably

⁸¹ In its advisory opinions to the bills, the Council of State already showed itself highly critical of the (text of) the bills (see Kamerstukken II 2015/16, 34516, no 4 and 34517, n^o 4 respectively). If that is predictive for the deliberations and votes in the Lower and Upper House, it remains to be seen whether the bills will ever obtain sufficient support.

Article 57a Dutch Constitution, Stb. 2002, no 172. For a list of all constitutional amendments.

http://www.parlement.com/id/vh8lnhrqszxn/grondwetsherzieningen_1815_heden (visited 3 August 2016).

Cf. J.A PETERS 2003, op. cit., note 13, p. 6.

⁸⁴ For more detail on the background and rationale of Article 137, see e.g. J. KIEWIET and G.F.M. VAN DER TANG, « Artikel 137 - Grondwetswijziging » [Article 137 -Constitutional Revision], December 2015, at www.nederlandrechtsstaat.nl; see also the memorandum prepared by the minister of the Interior of 1 May 1997, Kamerstukken II 1996/97, 21427, n° 164, p. 18.

 $^{^{85}}$ This has been heavily criticised; see e.g. H.R.B.M. KUMMELING and T. ZWART, « Constitutioneel lapwerk: over de lotgevallen van voorstellen tot grondwetsherziening in de periode 1997 tot 2000 » [Constitutional Patchwork: About the Fate of Proposals to Amend the Constitution in the Period 1997-2000], in De aard van grondwetsherzieningen [The Nature of Constitutional Revisions], H.R.B.M. Kummeling et al. (eds.), Deventer, W.E.J. Tjeenk Willink, 2000, p. 1-39.

⁸⁶ In more detail, see J.A. PETERS 2003, *op. cit.*, note 13.

results in representation of many different political parties (with many different views on constitutional change) in the Houses of Parliament⁸⁷. More often than not, after the elections the composition of the Houses has changed in such a way that there is no longer a majority for a bill to change the constitution (let alone a two-thirds majority). Moreover, it rather frequently occurs that a political party changes its opinion over time and no longer wants to vote in favour of a revision. The likelihood of a proposal ever being accepted thereby seems to decrease proportionately with its importance, as there will usually be insufficient support for controversial proposals, especially in the second reading, where a two-thirds majority in both Houses is needed. Knowing this, the Government has indicated that it will only initiate proposals for constitutional change if it is evident that there is a widely accepted sense of urgency and the proposal has sufficient « constitutional ripeness » - which basically means that there must be a broad and consistent (political) consensus on the proposals⁸⁸. Over the past few years, it has seldom considered this to be the case, as is borne out by the examples discussed in section 3.A. The number of Government bills to revise the Constitution is very limited, and mostly they either concern minor (less controversial) issues, or the Government has been urged to present a bill by means of a parliamentary request. By far the most proposals on constitutional change presented to the Parliament are therefore private member's proposals⁸⁹. The chances of such proposals to be successful are generally slim⁹⁰.

⁸⁷ The members of the Lower House are directly elected by the Dutch citizens; the members of the Upper House are elected by the Parliaments of the 12 Provinces. The system of proportionate representation is the same for both Houses, which means that a variety of political parties are represented in them. The political composition of the Lower and Upper Houses can differ, however, as the Houses are elected at different moments in time and according to different systems.

⁸⁸ On these requirements, see the memorandum of the minister of the Interior and Kingdom Relations, *Kamerstukken II* 2014/15, 31570, n° 25, p. 4; see earlier also the Cabinet's response to the report of the State commission on constitutional revision, *Kamerstukken II* 2011/12, 31570, n° 20, and an advice in the same vein of the Council of State, *Kamerstukken II* 1995/96, 24431, n° A, p. 1. See further e.g. C.A.J.M. KORTMANN, « Weg met de Grondwet! » [Down with the Constitution!], in H.R.B.M. KUMMELING et al. 2000, op. cit., note 85, p. 45.

⁸⁹ H.C.K. BROEKSTEEG, « Aanhangige voorstellen tot grondwetsherziening: voorbodes van staatkundige vernieuwing? » [Pending Proposals to Revise the Constitution: Harbingers of Constitutional Innovation?], *Tijdschrift voor Constitutioneel Recht*, 2014, no 1, p. 45-54, at p. 45.

⁹⁰ See H.M.B. Breunese, « Grondwetsherziening op initiatief van de Tweede Kamer » [Constitutional Revision on the Initiative of the Lower House], *RegelMaat* vol. 24, 2009, n° 2, p. 107-117.

The progress of the so-called HALSEMA-bill on constitutional review may help to illustrate the effects of Article 137 of the Constitution, seen in its political context. Lower House member Femke HALSEMA presented this proposal as a private member's bill to the Lower House in 2002⁹¹. Her bill proposed that all Dutch courts (higher as well as lower courts) should be competent to review the compatibility of Acts of Parliament with the fundamental rights provisions included in the Constitution. After about six years, it gained sufficient support to be adopted in the first round by the Lower and Upper Houses⁹². After regular elections took place in 2010, deliberations had to start on the second reading of the bill. Given the new composition of the Lower House, however, it was clear that there would be no two-third majority for it. The Liberal Party (VVD), which in the first reading had supported the act⁹³, had now changed its opinion. Given that it had obtained a large part of the popular vote in the elections⁹⁴, this had a major impact on the bill's prospects. The populist Party for Freedom (PVV), led by Geert WILDERS, had also gained a large number of seats in the 2010 elections. Although WILDERS had voted in favour of the proposal in 2004, in the meantime he, too, had changed his mind. The Party for Freedom was now fiercely opposed to giving a greater role to the courts and it would be certain to vote against the proposal⁹⁵. Given the lack of political support it was therefore decided to postpone the deliberations and to await another round of elections⁹⁶. The 2012 elections, however, again did not result in a composition that would guarantee a two-thirds majority in the Lower House⁹⁷. Even if the proposal would pass that hurdle, moreover, it would still

 $^{^{91}}$ Kamerstukken 2001/02, 28331, n os 1-3. The defence of the bill is currently in the hands of Lower House member VAN TONGEREN; see Kamerstukken II 2013/14, 32334, n $^{\circ}$ 7.

⁹² The proposal was accepted on 14 October 2004 by the Lower House (*Handelingen II* 2004/05, n° 12, p. 643); the Upper House accepted it (with 37 votes in favour and 36 against it) on 2 December 2008 (*Handelingen I* 2008/09, n° 11, p. 541-543).

⁹³ Interestingly, the Liberal party VVD in 2004 voted in favour of the proposal in the Lower House, yet voted against it in the Upper House in 2008 (see the voting lists, *supra*, note 92).

supra, note 92).
 With 20.5% of the popular vote and 31 seats in the Lower House (which counts 150 seats in total), it was the biggest political party.

⁹⁵ This is readily apparent from the contribution by Lower House member BOSMA for the Party for Freedom in 2015 to a parliamentary debate on the topic; *Handelingen II* 2016, n° 60, item 11.

⁹⁶ See the letter of Lower House member SAP about the bill of 5 July 2012, *Kamerstukken II* 2011/12, 32334, no 6.

 $^{^{97}}$ This is clear from a debate in the Lower House in 2015; *Handelingen II* 2016, n $^{\circ}$ 60, item 11.

need a two-third majority in the Upper House. In the current political composition, this would seem to be unachievable too. After 14 years, it is now considered highly unlikely that the proposal will ever be accepted ⁹⁸. Indeed, this seems to show that constitutional change is really impossible.

C. Conclusion

Rigidity of constitutions serves important purposes⁹⁹. Constitutions can only maintain their essential roles of protecting the foundations of the constitutional system and our most precious fundamental rights if it is not too easy to make changes for any political party which happens to have obtained a simple majority in Parliament¹⁰⁰. Stability and continuity are served well by a constitution that is not changed too often¹⁰¹. However, when the aim is to look for explanations for the relative lack of legal value of the Netherlands Constitution, it is clear that its rigidity is one of them¹⁰². It should

Possibly for that reason, it seems that ideas are now moving in a different direction, such as the introduction of a parliamentary committee dedicated to the constitutionality of legislative proposals; see the brief summary of a symposium the Lower House organised on this topic on 3 June 2016: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-derechtspraak/Nieuws/Paginas/Nieuwe-Kamercommissie-voor-constitutionele-zakenoteaspx (last visited 2 August 2016).

Prof. the characteristics of rigid versus flexible constitutions, see, classically, J. BRYCE, « Flexible and rigid constitutions », reprinted *in* J. BRYCE, *Constitutions*, New York, Oxford University Press, 1905, p. 3-94, at p. 10, where he explains that rigid constitutions rank above the ordinary law, and they cannot be changed by the ordinary legislative authority. The arguments of democracy and sovereignty, which are also often mentioned in relation to rigid constitutions, are not further addressed here; on such arguments, see *e.g. ibid.*, at p. 49ff and H.G. HOOGERS, « De herziening herzien: over de (on)vanzelfsprekendheid van het wijzigen van hoofdstuk 8 van de Grondwet » [The Revision Revised: About the (Lack) of Obviousness of the Amendment of Chapter 8 of the Constitution], *RegelMaat*, 2007, n° 3, p. 99-114.

¹⁰⁰ Cf. J.Th.J. VAN DEN BERG, « Grondwettelijk geknutsel » [Constitutional Pottering], Parlement & Politiek, 8 March 2013, at www.parlement.com.

J. BRYCE 1905, *op. cit.*, note 99, p. 66. See also C. RIJKELIJKHUIZEN, « Grondwetsherziening tussen eenvoud en ideaal » [Constitutional Amendment Between Simplicity and Ideal], *Nederlands Juristenblad*, 2008, n° 2013.

¹⁰² See critically J.A. Peters 2003, *op. cit.*, note 13, p. 6. Others have pointed out that the Constitution still has a degree of flexibility, in that many of its provisions provide for further elaboration and regulation in legislation (e.g. P.P.T. Bovend'Eert and C.A.J.M. Kortmann, *Constitutional Law in the Netherlands*, 2nd ed., Alphen aan den Rijn, Kluwer, 2012, p. 33. However, the fact remains that, in J. Bryce's terms, such acts may be qualified as « Flexible parasites growing upon a Rigid stem », or perhaps as a « mass of quasi-constitutional matter » – the possibility for legislation

be added to this that the Netherlands Constitution is very detailed and precise – it contains 142 clauses that are often highly specific. If a constitution only provides for rather generally worded provisions, it is relatively easy to interpret them in « the light of present day conditions », *i.e.*, to bend and flex them in such a way that they still fit in with practical reality ¹⁰³. By lack of such rather open provisions, however, the rigidity of a constitution may become rather burdensome ¹⁰⁴. This is the case especially if it turns out that a constitution no longer reflects important constitutional and societal developments ¹⁰⁵. Indeed, this appears to be exactly what is happening to the Netherlands Constitution. As a result of its rigidity and precision, the Constitution slowly sinks away in irrelevance, becoming a relic of old-day times rather than a living instrument that may provide guidance and inspiration ¹⁰⁶.

4. Conclusions: Are Changes Possible, and Are They Necessary?

The explanations provided in sections 2 and 3 above demonstrate that the Netherlands Constitution will only gain in legal and practical relevance when it is rigorously changed and modernised. First and foremost, this would require changing the system for constitutional revision under Article 137. Many proposals have been presented to do so, not in the least the winning proposal for the competition mentioned in the introduction of this article 107. Nevertheless, such proposals would need to pass the very same high hurdles for constitutional revision they set out to change. History has shown

may exist, but it leaves the rigidity of the constitution as such unaffected (J. BRYCE 1905, op. cit., note 99, p. 66).

¹⁰³ Cf. J. BRYCE 1905, *op. cit.*, note 99, p. 72ff, where he also discusses the concomitant risks of extensive interpretation.

concomitant risks of extensive interpretation.

104 Cf. K. Haan *et al.*, « De "kiss of life" voor de Grondwet. Een voorstel tot wijziging van de wijzigingsprocedure van de Grondwet » [The « Kiss of Life » for the Constitution. A Proposal to Revise the Procedure of the Constitution's Revision], Nederlands Juristenblad, 2014, n° 1228

Nederlands Juristenblad, 2014, $\rm n^{\circ}$ 1228. NATIONAL CONVENTION, Hart voor de publieke zaak [Having a Heart for Public Affairs], The Hague, 2006, Kamerstukken II 2006/07, 30184, $\rm n^{\circ}$ 12, annex 1, p. 48. lbid.

See http://academievoorwetgeving.nl/newsitem/winnaar-grondwetstrijd-flexibelere-herzieningsprocedure-met-volk and see K. Haan et al., op. cit., note 104. For other proposals, see the report of the National Convention, op. cit., note 105, p. 48-49 and the preliminary study to this report by C. ZOETHOUT et al., op. cit., note 29, p. 36ff; C. RIJKELIJKHUIZEN 2008, op. cit., note 101. A review of earlier proposals and modalities (which have been presented as early as 1946) is provided by J. KIEWIET and G.F.M. Van der Tang, op. cit., note 84 and in a memorandum prepared by the minister of the Interior, 1 May 1997, Kamerstukken II 1996/97, 21427, no 164, p. 20ff.

that there is hardly a sense of urgency to support this kind of proposals in Parliament, so chances of success are slim 108.

If ever it becomes easier to amend the Constitution, it is clear that its relevance could be increased only by addressing all of the abovementioned issues, and preferably a few more. As mentioned before, over the past decades, strong and persuasive arguments have been made in favour of a drastic overhaul of the Constitution, both in reports of State Committees and by constitutional scholars¹⁰⁹. It seems to be widely agreed that the Constitution's structure should be changed, the number of provisions should be reduced, and their formulation should be updated¹¹⁰. Topics that no

¹⁰⁸ Admittedly, in the 1990s a constitutional amendment was accepted that related to the procedure for constitutional revision (*Stb.* 1995, n° 403), yet this amendment related to a minor issue: abolishing the duty to dissolve not only the Lower House, but also the Upper House after the first reading. Political support for more radical changes has been considerably lower. In 1993, for example, the Lower House decided not to support a request to the government, proposed by Lower House member Jurgens, to abolish the system of two readings (*Kamerstukken II* 1993/94, 21427 n° 96). When in 1997 the minister of the Interior presented a memorandum to the Lower House to open the debate on constitutional amendment, this also failed to have any political impact (memorandum prepared by the minister of the Interior of 1 May 1997, *Kamerstukken II* 1996/97, 21427, n° 164, p. 23-24 and report of the deliberations in the Lower House, *Kamerstukken II* 1996/97, 21427, n° 166).

¹⁰⁹ See e.g. H.R.B.M. KUMMELING and T. ZWART 2000, op. cit., note 85, p. 38; C.A.J.M. KORTMANN, op. cit., note 88; J.W. SAP, Een Nederlandse Ontwerp-Grondwet [A Dutch Draft Constitution], Amstelveen, EON Pers, 2006; C.A.J.M. KORTMANN, « Wegwerprecht, oude dame of frisse juf? » [Throw-Away Right, Old Lady or Fresh Miss?], in De Grondwet herzien. 25 Yaar later [The Constitution Revised. 25 Years on], The Hague, Ministery of the Interior and Kingdom Relations, 2008, p. 7-24; D.J. ELZINGA, « Saevis tranquillus in Undis. Zeven vuistregels voor de grondwetgever » [Saevis Tranquillus in Undis. Seven Rules of Thumb for the Constitutional Legislator], in De Grondwetsherziening van 1983: 30 jaar oud of 30 jaar jong? [The Constitutional Revision of 1983: 30 Years Old or 30 Years Young?], The Hague, Ministry of the Interior and Kingdom Relations, 2013, p. 26-39. P. SCHOLTEN, « Nederland leeft voort, maar zijn Grondwet staat stil » [The Netherlands Moves on, but Its Constitution Stands Still], Nederlands Juristenblad, 2015, nº 2006. For a review of different opinions, see also R. VAN DEN DIKKENBERG, « Deskundigen: Grondwet is aan "algehele revisie" toe » [Experts: The Constitution Could Do with an Overall Revision], SCOnline, 3 October 2013.

See e.g. C. ZOETHOUT *et al.* 2006, *op. cit.*, note 29, p. 26-27. Most professionals using the Constitution, such as members of Parliament and judges, support the idea of reducing the number of provisions, making it more representative by adding provisions on important topics and restructuring it – yet most of them also indicate that none of these changes are really necessary; see T. BARKHUYSEN *et al.* 2008, *op.*

longer fit in a constitution - because they are too specific - should be regulated elsewhere ¹¹¹. A general provision should be added to provide for interpretive support and the fundamental rights chapter should be redrafted 112. In particular, that chapter should be supplemented with some fundamental rights which are currently lacking, as well as substantive criteria for restrictions 113. And perhaps most importantly, constitutional review should be opened up. This could be done in a variety of ways, for example by giving all courts the competence to review Acts of Parliament for their compatibility with the Constitution (as the HALSEMA-bill proposes), but also by means of the introduction of a constitutional court, or by vesting a grand chamber composed of judges of the highest courts with the final power to explain the Constitution's meaning 114. Indeed, it seems that it is this suggestion which would have the most impact on the normative and legal value of the Constitution. After all, if there were to be a possibility of ex post

cit., note 6, p. 82. For a concrete proposal to shorten the Constitution and restrict it to its very core, see e.g. C.A.J.M. KORTMANN 2008, op. cit., note 109.

E.g.D.J. ELZINGA 2013, op. cit., note 109, p. 36.

¹¹² See *e.g.* T. BARKHUYSEN *et al.* 2008, *op. cit.*, note 6, p. 78.

This proposal has been supported by many scholars. See e.g. A.E. Schilder, « Regeling van de grondrechten » [Regulation of Fundamental Rights], in Brieven aan de staatscommissie [Letters to the State Commission], Nijmegen, WLP, 2009, p. 39 at p. 43; A.J. NIEUWENHUIS, « Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet » [Extension of the National Fundamental Rights 'canon'? About the Inclusion of New Fundamental Rights in the Constitution], Tijdschrift voor Constitutioneel Recht, 2011, no 3, p. 254-264; R. NEHMELMAN, « Een algemene periodieke keuring van de nationale grondrechten. Korte analyse van de grondrechtenparagraaf van de Staatscommissie Grondwet 2009/2010 » [A Periodic Review of the National Fundamental Rights. A Short Analysis of the Fundamental Rights Chapter of the State Commission 2009/2010], RegelMaat, 2011, nº 2, p. 84-98; G. VAN DER SCHYFF, « Nederland aan de vooravond rechterlijke grondwettigheidstoetsing? Een evaluatie beperkingssystematiek », in A. KRISTIC et al. 2010, op. cit., note 24, p. 62.

The Government identified a number of modalities in a memorandum on constitutional review, Kamerstukken II 2001/02, 28355, nº 2. The NATIONAL CONVENTION has also made a number of suggestions in its report, op. cit., note 105, p. 46-47, relying on the more elaborate preliminary study made by C. ZOETHOUT et al., op. cit., note 29, p. 31ff. For the last suggestion, see J.C.A. DE POORTER and H.J.Th.M. VAN ROOSMALEN, Rol en betekenis van de Grondwet [Role and Meaning of the Constitution], The Hague, Council of State, 2010, p. 158 and VAN DIJK, op. cit., note 52, p. 51; See further e.g. J. VAN DER HOEVEN, « Toetsen aan de Grondwet. Hoe en door wie? » [Constitutional Review. How and by Whom?], Nederlands Juristenblad, 1991, p. 784; E.A. ALKEMA, « Repliek: Toetsing door een speciaal constitutioneel hof » [Reply: Review by a Special Constitutional Court], NJCM-Bulletin, 2007, p. 792ff. See much more critically G. VAN DER SCHYFF, op. cit., note 49.

judicial constitutional review¹¹⁵, especially if it were combined with a set of fundamental rights provisions with transparent justification clauses, legal practitioners might be tempted to try out these new instruments. This could bring about a stronger reliance on the Constitution in national litigation and, consequently, further constitutional development by the courts. It would allow the court(s) to provide further clarification and standards of review, supplementing and refining the criteria defined by international courts such as the European Court of Human Rights. In turn, this could also increase the practical significance for the legislative process.

If all this would be done, perhaps, in the long run, the Netherlands Constitution could be brought to life and could turn into a useful legal and normative document. Realistically, however, it must be admitted that this is not very likely to happen. Not only do the difficulties in changing the system of revision constitute a formidable impediment, as mentioned above, but also there seems to be hardly any support for radically changing the Constitution 116. Even if some politicians have backed the idea of a full revision 117, this is unlikely to be enough to overcome the « Dutch paradox » of admitting that the Constitution is weak and irrelevant, yet not seeing any real need for change. Additionally, in recent years, the wisdom of revising a constitution, in times of strong political and social volatility and international instability, has been questioned. In such times, a rigid Constitution is considered to offer sound protection of the country against rash and ill-

¹¹⁵ Rather than by a parliamentary committee or another body that is part of the legislature, as it is sometimes also suggested; see *e.g.* R. SCHUTGENS, « Toetsing in het wetgevingsproces versterkt » [Strengthening Review During the Procedure of Legislation], *RegelMaat*, 2012, n^o 4, p. 196-210.

¹¹⁶ This is readily apparent from the Government's response to the 2010 report of the State commission on revision of the Constitution, where it was clearly stated that there was no urgency to make any of the suggested changes; see *Kamerstukken II* 2011/12, 31570, n° 20. The Council of State, the highest advisory body for the Government and the legislature, had already given the same advice when responding to the proposal of establishing such commission; see *Kamerstukken II* 2007/08, 31570, n° 3. See also T. BARKHUYSEN *et al.* 2008, *op. cit.*, note 6, p. 82ff. Constitutional scholars have also expressed their hesitation as to the need for a constitutional overhaul; see e.g. W. VAN DER WOUDE and E. HIRSCH BALLIN in *SCOnline*, 25 March 2014 (www.sconline.nl/achtergrond/de-vereiste-van-twee-lezingen-te-rigide) (last visited 3 August 2016).

¹¹⁷ Request by Upper House members ENGELS c.s. of 11 March 2014, n° J. This request was made after an expert meeting in the Upper House on the protection of the rule of law, where several experts also expressed their concerns about the irrelevance of the Constitution; see *Kamerstukken I*, 2013/14, 33750 VI, n° O, at p. 5 and 33.

considered political decisions, and there is a strong inclination to keep the document as it is ¹¹⁸.

Moreover, it can be argued that even without any real change, the Netherlands is a fairly well-functioning democracy. In terms of compatibility with rule of law requirements, there also does not seem to be any great difference between the Netherlands and systems where national constitutions play a much more important role. The European Convention and other treaties function quite well as substitute fundamental rights chapters to our Constitution. As long as there is a possibility for effective judicial treaty review, it does not matter much if the constitutional provisions are old-fashioned or if certain rights are lacking. Surely, the Netherlands may not seem to have a strong and living constitution, but then again, perhaps its constitutional colourlessness and its openness to international treaties may be said to be its constitutional identity. There is nothing really wrong with that, and perhaps the Netherlands should simply be proud of this.

¹¹⁸ T. BARKHUYSEN *et al.* 2008, *op. cit.*, note 6, p. 83.