STRENGTHENING CONSTITUTIONAL IDENTITY WHERE THERE IS NONE: THE CASE OF THE NETHERLANDS

Barbara Oomen

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Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands[*]

Barbara OOMEN[**]

Professor in Sociology of Human Rights, Utrecht University, the Netherlands

Abstract

Recently, many European countries have moved towards codification of international human rights law. Aiming for a deeper socio-legal understanding of the rationale behind these processes, this article discusses one country – the Netherlands. It looks at the rationale behind, and the outcomes of the 2009-2010 Constitutional Review Commission, mandated to advise on the relationship between the national and the international legal orders and the inclusion of certain human rights into the Constitution. Both rationale and outcome, it is argued, can be understood by focusing on Rosenfeld's three aspects of constitutional identity: the actual text of the constitution, constitutional culture and the interplay between the constitution and national identity. The Dutch constitution is layered, sober, incomplete and relatively unimportant, with internationalism as its main distinguishing feature. The political rationale for Dutch constitutional revision was, contrary to common understanding, to use the constitution as a bulwark rather than a bridge vis-à-vis the international legal order thus foreseeing a new, more symbolic role for the Constitution. The fact that such strengthening of constitutional identity did not materialise is explained by the culture of pragmatic relativising of the Constitution and, paradoxically, the fact that commitment to internationalism is the only pronounced element of Dutch constitutional identity.

1. Introduction

All across Europe, in recent years, nations have embarked on processes of inclusion of international human rights in national constitutions.

[*] The ideas in this article were first presented at a seminar organised by prof. Sébastien van Drooghenbroeck and Olivier Van der Noot on the Contribution of the Constitution to the Protection of Human Rights at Saint Louis University in Brussels on 26 May 2016. The author thanks those present for their comments.

[**] Barbara Oomen works at the University College Roosevelt, and holds a chair in the sociology of human rights at Utrecht University, both in the Netherlands. She can be contacted via: B.Oomen@ucr.nl

From an empirical, as opposed to normative, point of view, the rationale behind these processes can be understood in two ways, which are essentially two sides of the same coin. Constitutionalisation of international human rights either serves to strengthen and to expand the international legal order, with the constitution as a *bridge*, or, aims at demarcating the constitutional identity of the nation concerned *vis-à-vis* an ever-expanding international legal order, and at keeping out the unwanted effects of this order, with the constitution as a *bulwark*. Whatever side of the coin one considers, it is clear that both approaches involve a response to much wider global processes – hence their simultaneous occurrence in many countries – but are also fuelled by, and limited by national contexts.

Focusing on one particular context, that of the Netherlands, this article seeks to take a closer look at this interplay and the forces that drive it. The Dutch government installed a Constitutional Review Commission in 2009 and asked it whether there was a need to revise the Constitution of the Kingdom of the Netherlands with respect to, amongst others, « the relationship between the fundamental rights in the Constitution and rights in international treaties, like the right to a fair trial and the right to life », « the influence of the international legal order on the national legal order », « the relationship between fundamental Dutch values and decision of international organisations or treaty provisions » and the « codification of the constitutional relationship between the Netherlands and the European Union »[1]. In its final report, presented in November 2010, the Commission indicated that it was not absolutely necessary to revise the Constitution, but did recommend a number of changes, such as the constitutional codification of the right to a fair trial and – supported by half of the Commission – of the right to life, the prohibition to torture and the right to family life[2]. It also recommended a reference to Europe in the Constitution, and a more explicit role for parliament in treaty ratification. By 2016, however, very little had happened with these and other recommendations of the Commission – with the exception of bills proposing a modernisation of the provision on the confidentiality of mails, the constitutional codification of a right to a fair trial that, in contrast to art. 6 ECHR, also covers civil disputes and an *algemene*

[1] HOUSE OF REPRESENTATIVES II, 2008/2009, 31 570, n° 8, p. 1 and *Instellingsbesluiting* (Foundational Decree) 09.001852 of 3 July 2009. These are only the topics in the mandate that directly concern the relationship with the international legal order, the full mandate is discussed in 4B infra. All translations from the Dutch are by the author.

[2] STAATSCOMMISSIE GRONDWET, *Rapport Staatscommissie Grondwet*, Den Haag, Staatscommissie Grondwet, 2010 (Report of the Constitutional Review Commission). Again, this is only a selection of the recommendations, to be discussed at greater length below.

bepaling, a general provision stating the Constitution guarantees « democracy, the rule of law and fundamental rights »[3].

This article analyses the reasons behind the felt need for constitutional revision in the Netherlands and the outcomes of this process, and how the Dutch experience relates to the wider issues discussed in this dossier. Such analysis draws the attention to the interplay between the constitutions and national and international social, economic and political processes. Over the past years, academics have come to analyse this interplay under the heading of constitutional identity, which will be the theoretical framework for this study. In terms of the research methods, the nature of this article is descriptive and analytical rather than normative, and sociological rather than purely legal in its approach. This, for the author, means taking a step back from the practice in which she was actively involved – as an advocate of constitutional revision and as a member of the Commission –, and viewing this process from the socio-legal and anthropological research tradition in which she was trained[4]. Apart from a review of the literature and legislation, the analysis is based upon newspaper reports, parliamentary proceedings, own notes and conversations, and empirical research done at the time of the review process.

In order to discuss Dutch constitutional identity, it is necessary to first discuss three different ways in which the concept has been understood, and the reasons why it came to the fore in the past decades (section 2). The three different understandings – constitutional identity as features of a constitution, as constitutional culture and as the interplay between national identity and the constitution – will subsequently be invoked to describe key features of the Dutch constitution and its place in society as it evolved over the years (section 3). This background is necessary to understand why certain actors in the Netherlands called for constitutional revision (and why others were sceptical), how this call translated into a particular mandate for a Commission of a particular composition, what the advice of the Commission was and how it was received in Dutch politics (section 4). Even though these sections discuss both Dutch constitutional identity and the process of constitutional revision in general terms, the focus – in line with the theme of

[3] HOUSE OF REPRESENTATIVES II, 2015/2016, 34 517, n° 2 and 34 516, n° 2 respectively.

[4] For more normative viewpoints see B. OOMEN, *Wij moeten nodig eens over onze Grondwet praten*, *De Volkskrant*, 27 October 2007, pp. B1 (It Is Time to Start Talking About Our Constitution) and the minority opinion in the Commission report, *supra,* note 4, p. 143 concerning the accessibility of the decision-making process and the final report for Dutch citizens.

the dossier – is on the interplay between international human rights law and the national legal order. A final section will discuss what the Dutch experience teaches us about the factors that underpin discussions on the constitutional codification of international human rights law, and how global and European developments relate to those rooted in domestic politics and history.

2. Theorising Constitutional Identity

A Dutch historian once likened the concept of identity to a jellyfish on the beach – to be observed with interest, but not to be touched[5]. Nevertheless, an ever-increasing amount of legal scholars, but also courts, refer to the concept of « constitutional identity », some of them even claiming that it should be at the heart of constitutional theory[6].

Even if this literature has not lead to one agreed-upon definition of constitutional identity, ROSENFELD sets out how three distinct understandings seem to have emerged, all to be used in this article[7]. First of all, some scholars consider constitutional identity to be the identity of the (document of the) constitution itself – its main features, who is the constituent and who is the constitutional subject, what is included and what is not, what form of government it propagates and what collective identity it conveys. Does it, for instance, emanate from the notion of an *ethnos* (like Germany) or of a *demos* (like France)[8]? This approach has given rise to a whole range of classifications, like ROSENFELD'S distinctions between a German, Spanish, French, British, American, European and transnational model[9].

A second understanding equates constitutional identity with constitutional culture. Culture, in a widely accepted anthropological definition, concerns a « historically transmitted pattern of meaning, embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and

[5] M. VERKUYTEN, *Identiteit en diversiteit: de tegenstellingen voorbij*, Amsterdam, Amsterdam University Press, 2010, p. 26 (Identity and Diversity: Beyond the Opposites).
[6] M. ROSENFELD, « Constitutional identity », *in The Oxford handbook of comparative constitutional law*, M. Rosenfeld and A. Sajó (eds.), Oxford, Oxford University Press, 2012, pp. 756.
[7] *Ibid.*
[8] *Ibid.,* p. 760.
[9] *Ibid.*, pp. 760-764.

develop their knowledge about and attitudes toward life »[10]. Legal culture, in turn, is often understood as « the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away »[11]. In relation to the constitution, the concept seeks to capture how both the legal profession and the public at large relate to and invoke the constitution[12]. What does it mean to lawyers and laymen? What practices and rituals surround it? Is it a cornerstone of legal interpretation, held high by a constitutional court or one law amongst many? Do schoolchildren recite parts of the constitution in the morning, and people at large refer to it in political discussions, or is this hardly the case? In considering constitutional identity as culture, Post states how « Constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture » and states how there is a « specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution »[13]. One term frequently used to point at a thick, meaningful constitutional culture is *Verfassungspattriotismus*, constitutional patriotism[14]. HABERMAS, for instance, considered constitutional patriotism as a mechanism to strengthen cosmopolitanism[15].

A third, even wider understanding of constitutional identity seeks to analyse the interplay between the text of the constitution and national identity. How are collective dreams and aspirations expressed in, or fought out via, the constitution and the culture surrounding it? What are the (dis)congruencies between the nation and its constitution? This type of analysis cannot do without a deep historical understanding[16]. Both the

[10] C. GEERTZ, *The Interpretation of Cultures: Selected Essays*, New York, Basic Books, 1973, p. 89. See also M. SCHIPPER, « Culture, Identity and Interdiscursivity », *Research in African Literatures*, 24, 1993, pp. 39-48.

[11] L. M. FRIEDMAN, « Legal Culture and Social Development », *Law and Society Review*, 4, 1969, p. 34. See A. SARAT, *Studying American Legal Culture: An Assessment of Survey Evidence*, *Law and Society Review*, 11, 1977, pp. 427-488 and D. NELKEN, « Legal Culture », *in Encyclopedia of Law and Society*, D. Clarke (ed.), London, Sage Publications, 2007, pp. 369-374.

[12] See, for instance, B. SCHLINK, « German constitutional culture in transition », *in Constitutionalism, identity, difference, and legitimacy: theoretical perspectives*, M. Rosenfeld (ed.), Durham and London, Duke University Press, 1994, p. 197.

[13] R. C. POST, « Fashioning the Legal Constitution: Culture, Courts, and Law », *Harv. L. Rev.*, 117, 2003, p. 8.

[14] D. ABRAHAM, « Constitutional patriotism, citizenship, and belonging, *International Journal of Constitutional Law*, 137, 2008.

[15] J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Malden, Polity Press, 1996, passim.

[16] G. J. JACOBSOHN, *Constitutional identity*, Boston, Harvard University Press, 2010.

concept of the nation-state, as an « imagined community » and of the constitution as an expression of the popular will and a mechanism to keep the government in check are, after all, 18th century inventions, with layers of national history – both its continuity and disruptures, visible in national constitutions[17]. At the same time, the relationship between constitutional and national identity is complex, and fraught with tensions; national identity can serve as a rationale for progress in constitutional theory – defined by TEITEL as the « expansion in the protection of individual rights and liberties » but can just as easily be invoked to counter such progress[18]. In this sense, constitutional identity can refer both to sameness, in the sense of continuity, and to selfhood, in the sense of expression of key markers of, and ideas about, the collective self[19].

Scholars might have different understandings of what constitutional identity stands for, but they do all consider it an entity that can be known, analysed and compared to other constitutional identities. The jellyfish, to stick with the metaphor, can be picked up. Nevertheless, they also point out the fluid, contested and permanently negotiated character of constitutional identity, in whatever understanding. Identity is always defined *vis-à-vis* something else, it is forged dialectically and thus in permanent flux. As JACOBSOHN puts it « the disharmonies of constitutional law and politics ensure that a nation's constitution – a term that incorporates more than the specific document itself – may come to mean quite different things, even as these alternative possibilities retain identifiable characteristics enabling us to perceive fundamental continuities persisting through any given regime transformation »[20]. The global emphasis on indigenous culture and indigenous rights, to draw an example from another, if not unrelated, topic only came about with the threatening of that culture in combination with the possibility of exchanging experiences via modern media in the global language of rights[21].

Within Europe, one of the most clearly visible « outside » influences prompting nation-states to detail their constitutional identity is the explicit promise introduced by the Lisbon Treaty in art. 4(2) of the Treaty of the

[17] B. ANDERSON, *Imagined communities: reflections on the origin and spread of nationalism*, London, Verso Editions, 1983, passim.
[18] R. G. TEITEL, « Reactionary Constitutional Identity », *in Constitutionalism, identity, difference, and legitimacy: theoretical perspectives*, M. Rosenfeld (ed.), Duke University Press, 1994, p. 234.
[19] M. ROSENFELD, *supra,* note 9, p. 757
[20] *Supra,* note 18, p.4.
[21] C. YOUNG, *The Rising Tide of Cultural Pluralism: the Nation State at Bay?*, Madison, The University of Wisconsin Press, 1993.

European Union that « the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government ». This provision followed up on the insertion in 1992 by the Maastricht Treaty that « the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy ». With these provisions, the concept of constitutional identity has become a recurrent theme in European « constitutional conversations », more or less replacing the notion of sovereignty as a marker of national autonomy[22]. The German constitutional court, for instance, in its *Lisbon Treaty* ruling, explained how the Lisbon Treaty did not open the way for changing the « fundamental structures of the German constitution, on which its identity is based » without constitutional review[23].

Yet the European case, and even the inclusion of the concept of constitutional identity in the Lisbon Treaty, only seem to be manifestations of a much wider process of interplay between globalisation and national and local identities, the simultaneous character of which has been captured by the term « glocalisation »[24]. Globalisation, apart from the travel of people, resources, and information also involves the spread of norms like international human rights as a « global moral lingua franca » and an ever-increasing constitutionalisation of the international legal order, exemplified by developments such as the set-up of the International Criminal Court and the strengthening of human rights monitoring mechanisms[25]. This constitutionalisation also has national manifestations, for instance via the

[22] See, for instance, A. S. ARNAIZ and C. A. LLIVINA, *National Constitutional Identity and European Integration*, Antwerp, Intersentia, 2013; L. F. BESSELINK, « National and constitutional identity before and after Lisbon », *Utrecht L. Rev.*, 6, 2010, pp. 36; M. CLAES (ed.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Antwerp, Intersentia, 2012.

[23] GFCC, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, 240, speaking of a « inviolable core content of the constitutional identity of the basic law » and arguing that the guarantee of national constitutional identity under constitutional law and under Union law go hand in hand in the European legal area. For other examples, see A. S. ARNAIZ and C. A. LLIVINA, *National constitutional identity and European integration*, Antwerp, Intersentia, 2013 and L. BURGORGUE-LARSEN, *L'identité constitutionnelle saisie par les juges en Europe*, Paris, Pedone, 2011.

[24] See, for instance, S. RANDERIA, « Glocalisation of Law: Environmental Justice, World Bank, NGOs and the Cunning State in India », *Current Sociology*, 51, 2003, pp. 305-328 and V. ROUDOMETOF, « Transnationalism, Cosmopolitanism, and Glocalisation », *Current Sociology*, 53, 2005, pp. 113-135.

[25] M. IGNATIEFF, *Whose Universal Values? The Crisis in Human Rights*, Amsterdam, Praemium Erasmianum Foundation, 1999, p. 12.

inclusion of international crimes in national law, and via the rise of national human rights institutions[26]. At the same time, perhaps paradoxically, this « home-coming » of international human rights in the European countries that once stood at their birth also creates resistance – a human rights backlash – and prompts nations to set limits to these processes via an expression of a particularistic, instead of cosmopolitan constitutional identity[27]. In discussing this « dialectic of engagement » ROSENFELD describes how this results in a « multi-level layered and segmented combination of legal regimes that converge at times (…) diverge or conflict, at other times, and frequently overlap and intersect », and argues that a plural, transnational constitutional identity might seem possible, but that the particulars remain unclear[28].

In describing the way in which these processes play out in the Netherlands in general, this article will not single out one understanding of constitutional identity but, successively, discuss all three: constitutional identity as constitutional characteristics, as culture, and as formed in interplay with national identity.

3. Dutch Constitutional Identity

Defining identity is thus slippery business, not only because of the contested definition of the term, but also because identity, in any form, is subject to contestation and negotiation, with processes of identity-formation being as much about change as they are about continuity. This being said, there are certain features of the Dutch constitution widely agreed upon as characteristic and patterns to be discerned in the way in which lawyers and the people at large see the constitution. Similarly, there are recurring themes

[26] J. MERTUS, *Human Rights Matters: Local Politics and National Human Rights Institutions*, Stanford, Stanford University Press, 2008.

[27] The human rights criticisms in countries like the Netherlands, Belgium and the UK have been directed mostly against the ECtHR, see, for instance, A. FOLLESDAL, J. K. SCHAFFER and G. ULFSTEIN, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*, Cambridge, Cambridge University Press, 2014; J. GERARDS and A. TERLOUW, « Solutions for the European Court of Human Rights: the Amicus Curiae project », *in The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, S. Flogaitis, T. Zwart and J. Fraser (eds.), Cheltenham, Edward Elger, 2013, pp. 158-182 and B. OOMEN, « A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands », *International Journal of Human Rights*, 20, 2016.

[28] M. ROSENFELD, *The identity of the constitutional subject: selfhood, citizenship, culture, and community*, Routledge, 2010, quote on pp. 248-249. For other analyses of this constitutional pluralism see N. WALKER, « The Idea of Constitutional Pluralism », *Modern Law Review*, 65, 2002, pp. 317-359.

in the interplay between the Constitution of the Kingdom of the Netherlands, the approximately 16 million people that inhabit the country, its parliamentary democracy, its government that consists of the King as the Head of State and a Council of Ministers headed by a prime minister, and the European and international order that it is part of, all to be discussed below.

A. Constitutional Identity As Features of the Constitution

The Dutch Constitution, that underwent its last major revision in 1983, is foremost a *layered* document[29]. Even if there was a first constitution inspired by the French revolution in 1798, the basis for the current document was laid in 1814[30]. A major revision in 1848 brought the introduction of parliamentary democracy and the current system of governance. Important layers were added in 1917, when both universal suffrage and the right to education were introduced after the Second World War. A few provisions on the relationship with the international legal order were added in the 1950s, but a full revision – for which a State Commission had started preparations after the War – had to wait until 1983. The layered character means that different eras in the history of the Netherlands, as is the case with a tree trunk, are visible in the text: a whole second chapter, for instance, is dedicated to the King and to matters of succession. Former minister Donner, by means of illustration, referred to the constitution as « history coagulated/solidified and political strife fallen silent »[31]. One key feature, pointed out over and over again, is the document's *soberness*[32]. There is nothing left of the grandiose language of the 1798 *Staatsregeling*. The document does not have a preamble, and it is not clear who the *constituents are* – by whom, or on whose behalf the document is written. There is no reference to the Netherlands being a democracy, or the government respecting the rule of law, and neither are there « clarion calls » on the aims

[29] An English-language version of the Constitution can be found on https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

[30] N. C. F. VAN SAS and H. TE VELDE, *De eeuw van de Grondwet: Grondwet en politiek in Nederland, 1798-1917*, Den Haag, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 1998; H. TE VELDE, *Van regentenmentaliteit tot populisme: politieke tradities in Nederland*, Amsterdam, Bert Bakker, 2010.

[31] « Gestold verleden en verstilde politieke strijd ». J. P. H. DONNER, « Grondwet en constitutie in de toekomst », *in Gelet op de Grondwet*, M. C. Burkens (ed.), Deventer, Kluwer, 1998, p. 9.

[32] Two key works on the place of the Constitution in the Dutch legal order are G.F.M. VAN DER TANG, *Grondwetsbegrip en grondwetsidee*, Rotterdam, Gouda Quint/Sanders Instituut ,1998 and J. VAN DER HOEVEN, *De plaats van de grondwet in het constitutionele recht* (Based upon a dissertation), Zwolle, Tjeenk Willink, 1988.

of the Constitution[33]. There are, of course, implicit goals. In general, constitutions can be said to have three different aims and aspirations: the *regulative* and *attributive* function of the constitution that is essentially directed towards organs of state, the *legal-normative* function of creating rights for citizens and the *symbolic-inspirational* function that it has in both voicing and strengthening national identity[34]. The emphasis in the Dutch Constitution classically lies strongly on this regulative function, causing JURGENS, a Dutch constitutionalist, to describe it as a as « soldiers handbook », with its text directed towards the organs of state, and not directly towards citizens or the aspirations of a nation.

More legal-normative elements, however, were introduced with the inclusion of an (*incomplete) Bill of Rights* in the Constitution in 1983. This had taken some time – when the Constitutional Review Commission discussed the possibility of including a right to equal treatment, inspired to do so by the development of international human rights law, just after WWII, chairperson Van Schaik stated that « the international conventions aim to elevate backward [sic] countries » and that it would be embarrassing to include a right that would be realised in the Netherlands anyway in the constitution[35]. The incompleteness lies in the fact that some fundamental rights are not included, like the right to life, the prohibition of torture, the right to family life and the right to a fair trial. Reference to socio-economic issues is only made by stating that providing sufficient employment, securing means of subsistence, improving the environment, promoting the health of

[33] COUNCIL OF STATE, *Advice on the Mandate of the Constitutional Review Commission*, Parliamentary proceedings II 2007/2008, 31570 3, para 2.2.

[34] The key functions of the constitution have been analysed in many different ways. T. KORTMANN, *Constitutioneel Recht*, Deventer, Kluwer, 2005, would merely speak of the constitutive, attributive and regulative functions. The Council of State, *supra,* note 33, distinguished the legal-normative and symbolic-inspirational function, just like J. GERARDS in this volume and H. M. GRIFFIOEN, « Wankelmoedige Kolos: Een Functionele Analyse van de Grondwet », *Tijdschrift voor Constitutioneel Recht*, 2010, pp. 362-375. T. BARKHUYSEN, M. L. V. EMMERIK and W. J. M. VOERMANS, *De Nederlandse Grondwet geëvalueerd: anker- of verdwijnpunt*, Deventer, Kluwer, 2009, in turn, distinguish a social function, a legal-normative function and a political-stabilising function. All authors agree, however, that the symbolic-inspirational function is notably small. See also B. OOMEN, « Constitutioneel Bewustzijn in Nederland: van burgerschap, burgerzin en de onzichtbare Grondwet », *Recht der Werkelijkheid*, 2, 2009, pp. 55-79.

[35] J. PELLE, *In de staatsrechtgeleerde wereld: de politieke geschiedenis van hoofdstuk 1 van de Grondwet 1983*, Gouda, Gouda Quint, 1998, p. 34. See for a more extensive discussion B. OOMEN, *Rights for others: the slow home-coming of human rights in the Netherlands*, Cambridge, Cambridge University Press, 2014, chapter 2.

the population and education « shall be the concern of the authorities », thus not formulating these issues as justiciable rights[36].

There are other reasons why the Constitution could be characterised as *relatively unimportant* in the legal order. The rights that are included often lack precision, and indication of justifiable grounds for their limitation – these are either incorporated in ordinary laws, or to be found in the European Convention on Human Rights. Additionally, there is the prohibition of constitutional review of Acts of Parliament, described at length by GERARDS in this dossier. The fact that judges are allowed to review these Acts vis-à-vis treaties means that the ECHR, for instance, is much more important than the Constitution in legal practice. The rigidity of the Constitution, with a cumbersome process of constitutional revision, is another reason why legal development has largely taken place outside of the Constitution.

There is one exception, however, to the generally sober and not so inspirational character of the Dutch Constitution: its *internationalism* and support for the international legal order.[37] Art. 90, stating that « the Government shall promote the development of the international legal order » does have the atypical characteristics of a « clarion call »[38]. It is one of the provisions inserted in the 1950s, at the instigation of parliamentarians like J. Serrarens who had lived the war and been part of the founding of the Council of Europe[39]. Other provisions allow for tacit approval of international treaties by Parliament and state that it is even possible to approve international treaties that violate the Constitution (art. 91)[40], allow for the transfer of sovereignty to international organisations (art. 92), introduce the possibility of direct effect of international treaty law for people in the Netherlands (art. 93) and enable revision of Acts of government against treaties only (art. 94). Therefore the provisions on the relationship between

[36] Arts 19-23 of the Constitution. There are differences in phrasing, art. 23 states, for instance, that Education shall be the *constant* concern of the *Government*.

[37] A good English overview of the rather unique Dutch dispensation can be found in J. W. A. FLEUREN, « The Application of Public International Law by Dutch Courts », *Netherlands International Law Review*, 57, 2, 2010, pp. 245-266.

[38] L. 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,* 2003, pp. 89-138.

[39] A. VAN HEERIKHUIZEN, *Pioniers van een Verenigd Europa: Bovennationaal denken in het Nederlandse parlement (1946-1951)*, Amsterdam, University of Amsterdam, 1998.

[40] Albeit under strict conditions, see L. BESSELINK, *De constitutionele bepalingen over verdragen die van de Grondwet afwijken en de opdracht van bevoegdheid aan internationale organisaties*, Utrecht, Utrecht University, 2002.

the national and the international legal order make for a constitution to be proudly heralded and labelled as « one of the most friendly constitutions towards international law in the world »[41].

B. Constitutional Identity As Constitutional Culture

If one looks at the text alone, the Dutch Constitution can thus be characterised as layered, sober, with an incomplete Bill of Rights, and a relatively unimportant position in the legal order at large, with only its far-reaching internationalism as a clearly identifiable characteristic. These features are also visible in the culture surrounding the Constitution, whether it concerns lawyers or the public at large.

Constitutional lawyers tend to compete in their dismissiveness of the document, calling it a « sorry instrument », « a large, empty desert that no politicians dares enter » and speaking of an « invisible » and even an « untrue and unintelligible constitution »[42]. Adams, for instance, characterises Dutch constitution culture as « relativistic, pragmatic and possibly even denigrating (*badinerend)* »[43]. Scholars differ, however, on whether they think this to be problematic. On the one hand, there is a long tradition of expressing regret at the relative lack of importance of the Constitution, focusing mostly on the prohibition of constitutional review and the lack of a constitutional court, which started with the document's main author, Thorbecke[44]. Gerards discusses, in this volume, the calls of some scholars for a more symbolic and meaningful constitution, lamenting the « unbearable lightness of the constitution » and asking for a document that could offer « much-needed support » in times of globalisation[45]. Legal scholars, however,

[41] *supra*, note 39, p. 245. For a more extensive discussion of the articles concerned and their background see Chapter 2 of B. OOMEN, *supra,* note 35 .

[42] J. PETERS, speaks of « een sneu instrument » *in* MINISTERIE VAN BINNENLANDSE ZAKEN EN KONINKRIJKSRELATIES, *De onzichtbare Grondwet: woord- en beeld verslag van het Symposium op 27 februari 2008*, Den Haag, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2008 (« The Invisible Constitution »); L. F. M. BESSELINK of « grote, verlaten woestenij die geen politicus durft te betreden » in « *Constitutionele klimatologie* », *Nederlands Juristen Blad*, 73, 1998, p. 212 and DE MEIJ on the « onwaarachtige en onbegrijpelijke Grondwet » in the same volume, p. 210.

[43] M. ADAMS, « Constitutionele geletterdheid voor de democratische rechtsstaat », *Nederlands Juristen Blad*, 17, 26 April 2013, p. 1111.

[44] J. R. THORBECKE, *Bijdrage tot herziening van de Grondwet*, The Hague, Martinus Nijhoff, 1921, p. 60.

[45] For overviews see T. BARKHUYSEN, M. L. V. EMMERIK and W. J. M. VOERMANS, *supra*, note 36 and MINISTERIE VAN BINNENLANDSE ZAKEN EN KONINKRIJKSRELATIES, *De onzichtbare Grondwet: woord- en beeld verslag van het Symposium op 27 februari*

generally consider the document's soberness and essentially plural, layered character to be one of its strengths, stating that « the constitution is no maizena » and revealing horror at the idea of « the constitution as a *flûte enchantée*, a *zauberflöte* for all of us, Dutch and non-natives to follow dancing and yelling during a yearly constitution-party »[46]. This appreciation applies, in particular, towards the document's layered character and internationalism.

The place of the Constitution in public imagination is slightly different. Survey research conducted in 2008, just before the process of constitutional review, shows how 94 % of the Dutch consider the Constitution to be « rather » or even « very » important. Close to 84 % of the people, however, indicate that they hardly know what the contents of the Constitution are, and respondents do indeed fail to answer even the most basic questions[47]. This is due to the very little attention for the Constitution and for fundamental rights in the Dutch educational curriculum – very little people, for instance, know of the existence of the European Convention on Human Rights and its importance for their daily lives[48]. The paradox is thus that most Dutch people consider the Constitution to be highly important, without a notion of what's inside the document.

There is, again, an exception to the lack of interest in and appreciation for the Constitution, and this concerns a particular sub-set of rights that do have a prominent place in the public imagination, and are evoked in general discussions on Dutch culture. The first of these rights is art. 1 of the Dutch

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2008, Den Haag, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2008. The two quotations above come from NJB, *supra* note 42, p. 213 and 217. See, also, f.i. E. C. M. JURGENS, « Geen eed op de Grondwet! Een pleidooi om de geschreven constitutie sober te houden », *RegelMaat*, 3, 2002, pp. 68-74; M. HERTOGH, « Grondwet is geen maïzena; Drie redenen waarom de Grondwet geen bindmiddel kan zijn », *NRC Handelsblad*, 29 February 2008, p. 7.

[46] For overviews see *supra*, note 47. The last quote comes from MINISTERIE VAN BINNENLANDSE ZAKEN EN KONINKRIJKSRELATIES, *supra* note 45, p. 17.

[47] Research set up by the author and H. LELIEVELDT, conducted via TNS Nipo with its database of 200.000, out of which a representative sample of 1246 people was drawn. For a more extensive report see: B. OOMEN and H. LELIEVELDT, « Onbekend maar niet onbemind: wat weten en vinden Nederlanders van de Grondwet? », *NJB*, 10, 7 March 2009, pp. 577-578.

[48] When asked for sources of fundamental rights only 19.9 % of the people spontaneously names the Constitution and only 3.6 % the ECHR: B. OOMEN and M. PLOEG, « Mensenrechteneducatie in Nederland », *Tijdschrift voor Mensenrechten*, 4, 2010, pp. 7-10; B. OOMEN, « Waving with Treaties? The Politics of Implementing Human Rights Education in the Netherlands », *Journal of Human Rights Practice*, 5, 2013, pp. 291-317.

Constitution, the right to equal treatment, introduced with the constitutional revision in 1983 and considered to be quite a *fremdkörper* (alien insertion) because of its horizontal application. The provision that « all persons in the Netherlands shall be treated equally in equal circumstances » was not only institutionalised via an Equal Treatment Commission and an Equal Treatment Act, but also engraved in stone outside of Parliament, and put up on municipal walls all over the Netherlands[49]. The one right that most Dutch people name spontaneously when asked for a fundamental right, however, is the freedom of speech and of expression (art. 7 of the Constitution), which seemed to emerge as the marker of Dutch values in the early 2000s. A third article that figures prominently in public discourse is art. 23, that is often invoked as the freedom of education, but more correctly involves the right of publically-funded denominational schools to set their own curricula. It was very much the outcome of the *schoolstrijd*, the school wars in the second half of the 19th century and has not been changed since its incorporation in the Constitution in 1917

C. The Interplay Between Constitutional and National Identity

The text of the Constitution, and the culture surrounding it, are thus in many ways related to the process of formation of the Dutch nation, and the internal and external challenges that it has faced over time. It reveals, for instance, the decentralised character of Dutch governance, and its regent tradition of consensus, cooperation and « pragmatic pluralism »[50]. The fact that the Dutch, already in the 17th century, had many rights that others could only claim via revolution, and that there have been no large revolutionary moments in Dutch history could explain the absence of the dramatic language often found in other constitutions[51]. In general, the Constitution reveals a « rights-free citizenship », in which the essence of national citizenship lies more in a particular social identity than a political one – the Dutch term for citizen, *burger*, is more closely related to the French *bourgeois* than it is to *citoyen*[52]*.* Attempts to define Dutch citizenship in the

[49] The Netherlands Equal Treatment Act of 1994. The second part of art. 1 runs: « Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted ». The Equal Treatment Commission, that has engendered widely publicised rulings on equal treatment over the years, became part of the Netherlands Human Rights Institute in 2010.

[50] A. LIJPHART, « The politics of accommodation: pluralism and democracy in the Netherlands », *in Politics in the Netherlands: how much change?*, H. Daalder and G. Irwin (eds.), Berkeley and Los Angeles, University of California Press, 1968 and Council of State, *supra,* note 33, para 2.2.

[51] H. DAALDER, *Ancient and modern pluralism in the Netherlands: The 1989 Erasmus lectures at Harvard University*,Cambridge, Harvard Working Paper, 1989, p. 22.

[52] For a more extensive discussion see Chapter 3 of B. OOMEN, *supra* note 34.

early 2000s via a civic integration test and in the civic studies curriculum, for instance, strongly place emphasis on (the acceptance of) social values instead of formal rights and the formal legal structures[53].

Even the exceptional emphasis on internationalism, the provisions in which the constitutional language does become fiery, and that Dutch lawyers invoke with pride, is closely related to Dutch conceptions of selfhood. The Dutch has, for many years, been self-identified as internationalist and open-minded. From Grotius onwards, Dutch diplomats and politicians have played a key role in the development of international law, for instance via the organisation of the Hague Peace Conferences of 1899 and 1907[54]. This emphasis, of course, derived very much from the recognition of the importance of international law for a small, mercantile nation like the Netherlands. Here the quote « ploutos sits on pax' lap », wealth is the child of peace, is often invoked[55]. The provisions on supporting the international legal order included in the 1950s were not only a codification of what had been the attitude towards international law for centuries, but also very much served to set the right example for others[56]. In line with this tradition, prominent scholars and politicians started conceiving of the Netherlands as a *gidsland*, a guiding nation, in the 1970s, emphasising that it should lead the way in the development of international law and human rights[57]. It is in line with this tradition that the Hague hosts the Peace Palace, the International Court of Justice, the International Criminal Court and many other international legal institutions today.

Internationalism and open-mindedness might have well been considered hallmarks of Dutch identity between the 1960s and the 1990s,

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[53] M. HURENKAMP and E. TONKENS, *Wat vinden burgers zelf van burgerschap? Burgers aan het woord over binding, loyaliteit en sociale cohesie*, Den Haag, NICIS, 2008; B. PRINS and S. SAHARSO, « From Toleration to Repression: The Dutch Backlash Against Multiculturalism », *in The Multiculturalism Backlash: European Discourses, policies and practices*, S. Vertovec and S. Wessendorf (eds.), London, Routledge, 2010, pp. 72-91.

[54] H. GROTIUS, *The Law of War and Peace*, 1625; A. EYFFINGER, *The Hague: International Centre of Justice and Peace*, The Hague, Ministry of Foreign Affairs, 2003.

[55] R. VAN DITZHUYZEN *et. al*., *Tweehonderd jaar Ministerie van Buitenlandse Zaken*, The Hague, SDU Uitgevers, p. 147, 1998.

[56] As becomes clear from the relevant parliamentary discussions, see B. OOMEN *supra* note 34 and H. REIDING, *The Netherlands and the development of international human rights instruments*, Antwerp and Oxford, Intersentia, p. 32 2007.

[57] The term was coined by B. DE GAAY FORTMAN, in « *De vredespolitiek van de radicalen* », *International Spectator*, xxvii, 1973, pp. 109-113.

but this underwent rapid change at the turn of the century[58]. The 9/11 attacks to the World Trade Centre were followed by a rise in xenophobia, islamophobia, the denial of rights in the War against terror and populism worldwide, but also by two events that had just as large an impact on the Netherlands. The first was the rapid rise of politician Pim Fortuyn in the months after 9/11, whose distinctly populist and islamophobic agenda was a clear departure from previous politics of multiculturalism. After Pim Fortuyn was shot, in May 2002, by a left-wing extremist, his LPF party gained 26 out of the 150 seats in parliament, making it the second-largest party. A year later, the stabbing of the highly outspoken filmmaker Theo van Gogh, known for his criticism of Islam, by a Muslim fundamentalist, led to an increase of islamophobia and polarisation in society. The Netherlands, in the analysis of many scholars, closed up, becoming a country in disarray[59]. The 2005 Dutch vote against the European Constitution, which surprised many observers, is but one example of this increased nationalism, as is the 2016 rejection of the Association Agreement with the Ukraine .

It is against this background that the discussions on the revision of the Constitution, examined in the next section, can be understood.

4. The Thomassen Constitutional Review Commission of 2009-2010

Early 2007, the fourth Dutch cabinet under the leadership of Christian Democrat (CDA) Prime Minister Balkenende took office. It was a coalition government that also consisted of the Social Democrats (PvdA) and the ChristianUnion (CU). Part of the coalition agreement read that « As regards the Constitution, last revised 25 years ago, a Constitutional Review Commission will advise on the pros and contras of a preamble, the accessibility for citizens and the relationship between the fundamental rights in the constitution and those in international treaties, like the right to a fair

[58] For a characterisation of the Netherlands from the 1960s onwards see J. KENNEDY, *Nieuw Babylon in aanbouw: Nederland in de jaren zestig*, Amsterdam and Meppel, Boom, 1995. For an insightful analysis of the changes after 2000 see I. BURUMA, *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance*, London, Atlantic Books, 2007.

[59] R. PENNINX, « After the Fortuyn and Van Gogh murders: Is the Dutch Integration Model in Disarray? », inS. DELORENZI, *Going Places: Neighbourhood, Ethnicity and Social Mobility,* London, Institute for Public Policy Reseach, 2006, pp. 127-138. O. VERKAAIK, « The cachet dilemma: Ritual and agency in new Dutch nationalism », *American Ethnologist*, 37, 2009, pp. 69-82.

trial and the right to life »[60]. Understanding the reasons for this proposal and the outcomes of the work of the Commission calls for a consideration of the run-up to the elections, the composition of the Commission, and the backgrounds of individual members and ministers concerned.

A. Background to the Commission

The early 2000s were thus times of great confusion that in many ways led to a call for explicating « real Dutch values ». There was the rise of Pim Fortuyn, populism but also radicalisation and islamophobia as part of the movement described above. Another indicator of the changing Dutch relationship vis-à-vis the international legal order was the outcome of the 2005 referendum in which 61.6 % voted no against a European Constitution[61]. The results came as a shock to all main political parties at the time, who were all in favour of the European Constitution, and were interpreted as a display of a cleavage between the cultural elite and the majority of the Netherlands[62]. They led to a number of policy responses. One was a Commission mandated to advise on how the core values of the *Rechtsstaat* could best be disseminated[63]. Another key initiative of the 2nd Balkenende cabinet, that included the Democratic Party D66 and the Liberal Democrats VVD and was in place from 2003-2006 was a National Convention, asked to contribute to the restoration of the relationship between politics and society, amongst others, by discussing the position of

[60] MINISTERIE VAN ALGEMENE ZAKEN, *Samen Werken, Samen Leven: Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA en ChristenUnie*, Den Haag, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2007.

[61] D. CHALMERS and G. MONTI, Press describe how the main reasons why the Dutch voted against were the lack of information (32%) and the fear of a loss of national sovereignty (19%), in *European Union Law: updating supplement*, Cambridge, Cambridge University Press, 2008. K. AARTS and H. VAN DER KOLK, set out the that majority of the Dutch were still pro-European Union, but that a mistrust of the euro, the East (Turkey) and the elite also lead to the negative vote, in « Understanding the Dutch « No »: The Euro, the East, and the Elite », *PS, Political Science and Politics,* 2006, pp. 243-246.

[62] K. AARTS and H. VAN DER KOLK, *Ibid.*set out the that majority of the Dutch were still pro-European Union, but that a mistrust of the euro, the East (Turkey) and the elite also lead to the negative vote.

[63] The Dutch word *rechtsstaat* has a meaning more or less similar to the German term – a state that adheres to the Rule of Law. The advice of the Committee can be found in [1] R. COMMISSIE UITDRAGEN KERNWAARDEN VAN DE RECHTSSTAAT, *Onverschilligheid is geen optie: de rechtsstaat maken we samen*, Den Haag, Minister van Justitie en de Minister van Binnenlandse Zaken en Koninkrijksrelaties, 2008.

the Constitution in society and ways of changing society[64]. It was one of the members of the Convention, Sophie van Bijsterveld, who wrote an op-ed in 2006 where the term constitutional identity surfaced for the first time in the Dutch debate. There, she called for attention for national identity in the Constitution, in line with the EU Charter, describing how the preamble and first articles « offer the contours of an image of man and society. The chapter on fundamental rights also explicates the values behind these rights ». She argued that « constitutional consciousness » does not come automatically, but needs to be brought to life – for instance in the context of immigration and integration – and that a preamble to the Constitution could play an important role here[65]. The National Convention did indeed end up advising an inspiring preamble that would offer « direction, inspiration and support », a chapter with general provisions including those about democracy and the rule of law, the introduction of constitutional review and a lighter procedure for constitutional revision[66].The cabinet fell before anything could be done with the results, but the recommendations to look into a preamble and general provisions did, as stated above, make it into the governmental agreement of the CDA-PvdA-CU cabinet that succeeded it in 2007. In its first letter to Parliament on constitutional revision, the government explicitly placed the plans for constitutional revision in the context of the need to explicate national identity. It was part of a wider policy ambition to « strengthen the Constitution » closely connected to the determination of « strengthen[ing] citizenship »[67]. A related initiative, for instance, was the drawing-up of a *Handvest Verantwoord Burgerschap*, a charter on responsible citizenship[68]. The government made the connection

[64] Mandate Nationale Conventie, installed 1 January 2006. Another initiative at the time was the Burgerforum Kiesstelsel, *Met één stem meer keus: Advies van het Burgerforum Kiesstelsel over het toekomstige kiesstelsel*, The Hague, Burgerforum Kiesstelsel, 2006. Here, too, nothing happened with the recommendations.

[65] S. VAN BIJSTERVELD, « Identiteit hoort in de Grondwet », *NRC Handelsblad,* 15 February 2006, p. 6. A more worked out position can be found in: S. VAN BIJSTERVELD, *Op weg naar articulatie van constitutionele identiteit*, *in De Grondwet herzien: 25 jaar later 1983-2008*, M. v. B. Z. e. Koninkrijksrelaties (ed.), The Hague, MinBZK, 2008, pp. 69-83. Apart from this, the term constitutional identity hardly surfaced in the Dutch public, policy and legal debate on the work of the Constitutional Review Commission.

[66] NATIONALE CONVENTIE, *Hart voor de Publieke Zaak: Aanbevelingen van de Nationale conventie voor de 21e eeuw*, Den Haag, 2006.

[67] House of Representatives, Letter by the Ministers of Interior and of Justice on the Mandate of the Commission, 17 January 2008 (31570-25).

[68] This was an initiative that was much ridiculed and ended up with the printing of a block calendar full of advice on how to be a responsible citizen. For a critique of the

with the National Convention, stating how the Commission could advise on topics like inclusion of the Dutch language in the Constitution, and a preamble detailing « basic features and values of our form of government, legal order and/or national identity »[69]. The fact that topics like the right to life and the right to a fair trial were included in the mandate was closely related to the politics of the coalition government's formation and the lobby surrounding it. Including the right to life was a wish of the ChristianUnion, connected to its anti-abortion viewpoints[70]. The right to a fair trial was a long-standing wish amongst lawyers strengthened by discussions on legal aid in the Netherlands, the position of the administrative division of the Council of State and the limitation of procedural rights in large administrative projects[71].

With this explanation of the government's ambitions, explicit questioning of the need to strengthen constitutional identity started. The Council of State, for instance, kicked off with a rather negative advice on the mandate. It supposed that the need to do « something » about the Constitution came from the « social changes of the past decade, in the world, in Europe and the Netherlands » that caused the question concerning « communal values and national identity » to be raised more often[72]. Still, it stated that it was unclear what the problem was, what caused the problem and why changing or expanding the Constitution would be the most logical solution towards solving the problem. Concerning the inclusion of new rights, the Council felt that this could be part of a more systematic review, but that the background to this request was now unclear.

It was also the Council that first put the question of the relationship between the national and international legal order on the table, under the heading of *constitutionele weerbaarheid,* constitutional resilience*.* The government had raised the notion of constitutional resilience in its first

responsibilisation of citizenship see W. SCHINKEL, *De gedroomde samenleving*, Kampen, Klement, 2008.

[69] *Ibid.*

[70] https://www.christenunie.nl/l/library/download/131391 that generally takes a more conservative stance towards international law. It would not be explicated why this was needed, https://www.rijksoverheid.nl/documenten/rapporten/2009/04/17/het-recht-op-leven-in-de-nederlandse-grondwet Peters recht op leven p. 55

[71] These are the reasons offered by T. BARKHUYSEN, M. VAN EMMERIK and J. GERARDS, *De toegang tot de rechter en een eerlijk proces in de Grondwet? Behoeft de Nederlandse Grondwet aanvulling met een recht op toegang tot de rechter en een eerlijk proces?*, Deventer, Kluwer, 2009. They also refer to an earlier plea in favour of inclusion of the right to a fair trial in the Constitution by A.M.L. JANSEN, *Constitutionalisering van het bestuursprocesrecht*, Deventer, Kluwer, Preadvies NVvR, 2004.

[72] COUNCIL OF STATE, *supra* note 35, p. 1.

communication regarding the Commission but only as a response to the democratic paradox – the possibility of democratically electing an undemocratic government that subsequently abolishes the Constitution –, technically a possibility given the fact that democracy and the rule of law are not codified in the Dutch Constitution. The Council of State, however, pointed out the need for resilience towards the international legal order, recounting how the transfer of powers to the international realm had been « considered a positive development for years » while mentioning how the increase in interdependence made it important « that the Dutch democratic legal order is not eroded in its core by the international order »[73]. One reason for concern the Council of State pointed out, is the international cooperation outside of the EU that has more and more influence on the national legal order but in which « core principles like democracy and the rule of law are not secured ». As an example, the Council quoted the *Kadi* case, concerning terrorism lists of the Security Council, drawn up secretly, set by resolution and with freezing of bank accounts as a result[74]. This particular concern was worked out in one of the many background studies to the work of Commission, in which BESSELINK and WESSELS indicated that the Dutch monism does not always allow for a substantive appreciation of decisions made by international organisations. Referring to the *Kadi* case, they argued for explicit parliamentary approval for treaties with direct effect, for a system in which international norms and decisions that violate « fundamental constitutional principles of democracy and the rule of law » would not apply in the Netherlands and for a two-third majority approval of international provisions that clash with constitutional rights[75].

Parliament, if possible, was even less convinced of the need to strengthen the Constitution. In the end, all opposition parties asked the three-party cabinet to refrain from the establishment of a Constitutional Commission. Concerning a preamble, for instance, the Socialist Party representative echoed a general feeling when saying that « the government

[73] *Ibid*,, 4.2.3

[74] *Ibid.;* see CJEU, *Kadi v. Council and Commission,* C-402/05, 9 March 2008.

[75] L. F. M. BESSELINK and R. A. WESSEL, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht: een « neo-monistische » benadering*, Kluwer, Alphen a/d Rijn, 2009. A last recommendation was the recognition of *ius cogens* as superior law. For a criticism see A. NOLLKAEMPER, « De Grondwet en de opkomende angst voor de internationale rechtsorde », *Tijdschrift voor Constitutioneel Recht,* July, 2010, pp. 286-296, who expressed concern at the lack of expertise in the field of international public law on the Commission and J. W. A. FLEUREN, « Grondwet, democratische rechtsstaat en internationale rechtsorde », *RegelMaat*, 26, 2011, pp. 99-113 who, like A. NOLLKAEMPER did not see the need for constitutional revision.

wants to include a statement of principles concerning our national identity. But the SP has very different ideas on who we are and where we should go from the CDA, PvdA or Christian Union. This preamble will either consist of meaningless generalisations, or things with which many Dutch people would not agree »[76].

The government, nevertheless, did persist and the Constitutional Review Commission was created by PvdA minister of the interior Ter Horst and CDA minister of justice Hirsch Ballin in July 2009. During the installation, minister Ter Horst reiterated the main reasons to set up the Commission. The first was what she called a concern about the « fragile consciousness » of constitutional values, and the need to explicate those values that form the essence of the Dutch system, like democracy and the rule of law in a context of radicalisation and polarisation. The second rationale was the possibility that international organisations took decisions of direct importance to Dutch citizens but without the possibility to influence them, and the question whether important treaties did not need extra democratic legitimisation.[77]

B. The Process

The Commission's mandate thus changed a number of times, but ended up including 1) the accessibility of the Constitution and its meaning for citizens, 2) the need for a preamble, and the question of what its text could be, 3) the relationship between fundamental rights in the Constitution and those in international treaties, like the right to a fair trial and the right to life, 4) fundamental rights in the digital age, 5) the influence of the international upon the national legal order, 6) the relationship between core Dutch constitutional values and treaty provisions or decisions of international organisations, 7) limitation of constitutional rights.[78] At an earlier stage the minister had explained to parliament how these questions could be grouped into three main topics: the *accessibility* of the constitution for citizens, the relationship between the Constitution and a *resilient democracy* (including the relationship with the international legal order), and the relationship between *constitutional* and *human rights*[79]. One of the big debates in Parliament had been the composition of the Commission[80]. The Netherlands

[76] B. VAN DER ZANDEN, « Oppositie blokkeert staatscommissie Grondwet », *ANP Nieuws*, 2 October 2008.
[77] Speech Minister TER HORST at the Installation of the Constitutional Review Commission, The Hague, National Archives, 9 July 2009.
[78] HOUSE OF REPRESENTATIVES, Letter concerning the mandate of the Constitutional Review Commission, 31570 8, 26 January 2009.
[79] HOUSE OF REPRESENTATIVES II, 31570, 8, Debate on 14 November 2008.
[80] *Ibid.*

has a long tradition of Constitutional Review Commissions, which can either be made up of politicians or of constitutionalists/experts or those who straddle both identities[81]. The explicit fear of Parliament that a commission purely made up of experts would lead to less political support was ignored and the government put in place a Commission composed of nine professors, mostly in constitutional law, and only one politician (a senator of the ChristianUnion, the party most supportive of constitutional review). The Commission was thus highly representative of the Dutch legal culture set out above and quickly redefined its mandate as concerning a legal question, calling for a legal answer. This does not mean that it did not differ on perceptions of the Constitution. PETERS commented on the carefulness of the Commission, stating that « lawyers are generally conservative, and this applies even more for constitutional lawyers » and – correctly – dividing the Commission into those in favour of a sober constitution and those seeking to dress up (*verfraaien)* the document[82]. This resulted in great division on the aims of constitutional revision that would transpire in the Commission's advice.

C. The Commission Report and Its Follow-up

The Commission came with an advice that, for a large part, showed dividedness and conservatism. Following the Dutch cautious constitutional culture, it stated that there were no urgent reasons for constitutional review and need to assume that the Dutch constitutional system would be in danger without any changes, but that it was good to keep it up-to-date[83]. PETERS writes, correctly, that the ambition to turn the Constitution into an inspiring document was absent[84]. Other scholars were equally critical, characterising the Commission's report as a « still-born child »[85].

Despite these criticisms, the Commission did agree on a number of issues. It was not in favour of a preamble, but unanimously recommended a general provision stating that the Netherlands is a *democratische rechtsstaat (*a democracy abiding by the rule of law), that the government respects and guarantees human dignity, fundamental rights and general legal principles and that public power can only be based on the Constitution or an Act. It

[81] K. V. LEEUWEN, *Grondwetscommissies in het spoor van Thorbecke: Honderd jaar debat over de grondwet en over de vertegenwoordiging van de burger 1883-1983 - II*, Enschede, Nijmegen University, 2013.
[82] J. PETERS, « Staatscommissie Thomassen: te voorzichtig », *Nederlands Juristen Blad*, 2281, 2010, p. 2803.
[83] STAATSCOMMISSIE GRONDWET, *supra,* note 4, p. 13.
[84] J. PETERS, *supra,* note 85, p. 2802.
[85] L. F. M. VERHEY, « De Staatscommissie Grondwet: een doodgeboren kind? », *Nederlands Juristen Blad*, 2282, 2010, p. 2809.

also argued that strengthening the position of the Constitution called for the introduction of constitutional review. It put forward a number of proposals for clarification of the Constitution, but generally held that accessibility should be strengthened through education rather than through constitutional revision.

In terms of the relationship between the national and the international legal order the Commission was also generally in favour of keeping and even strengthening the Dutch tradition of internationalism, notwithstanding an increased attention for the role of democratic legitimisation of international decisions by Parliament[86]. It unanimously recommended inclusion of the term European in Article 90, which would then read « The Government shall promote the development of the international *and European* legal order ». A majority of the Commission also supported further strengthening of commitment to internationalism by arguing that *jus cogens* should explicitly be considered to prevail over constitutional provisions, and was in favour of review of national legislation against these binding rules of international law[87]. In line with the intentions of the drafters of the Constitutional provisions on the international legal order in the 1950s, the Commission called for a strengthening of the role of Parliament. It, for instance, unanimously called for explicit parliamentary approval of treaties with direct effect and a majority of the members recommended approval with a two-third majority of treaties with a strong influence upon the Constitution[88]. On other issues the Commission was more divided: half of the members, for instance, stated that decisions of international organisations should not apply if they violated the general provision that it proposed.

In terms of the *inclusion of international human rights* in the Constitution, the Commission first proposed a general limitation clause that would strengthen the normative power of the Constitution. Legally, it held, it was not necessary to include human rights already adequately protected by international treaties, and this could even diminish their accessibility. Using the standard of normative strengthening, the whole Commission felt that the right to a fair trial should be included in the Constitution – art. 6 ECHR, after all, does not wholly cover administrative disputes. In terms of other rights, the Commission was divided over two positions well characterised by NIEUWENHUIS[89]. First, there are those who support internationalisation of

[86] STAATSCOMMISSIE GRONDWET, *supra* note 4; see J. PETERS, *supra,* note 85, p. 2806.
[87] STAATSCOMMISSIE GRONDWET, *supra* note 4,§ 13.3.2
[88] *Ibid.*, § 12.2.3 and 12.4.4
[89] A. J. NIEUWENHUIS, Uitbreiding van de nationale grondrechtencanon? Over de opname van nieuwe grondrechten in de Grondwet, *Tijdschrift voor Constitutioneel Recht*, 2011, p. 259.

these rights, and only see a supplementary role for national constitutions. An alternative view considers that at least the most fundamental rights should be included in the national constitution, so as to provide a clear overview. In addition, he set out how the ECHR and the EU Charter are based on the idea of a margin of appreciation and respect for constitutional identity, thus leaving the primacy in the protection of fundamental rights up to nations[90]. In line with this, half of the Commission recommended inclusion of fundamental rights like the right to life, the prohibition of torture and the right to family life in the Constitution, whereas the other half did not see the need to do so. In addition, the Commission made a number of recommendations for modernisation of the Constitution to bring it up-to-date in terms of digitisation[91].

In 2010, by the time the report was presented, however, a new government had been voted in, a minority government that consisted of the Liberal Democrats (VVD, with prime minster Rutte) and the Christian Democrats CDA, with the support in Parliament of the extreme right wing PVV, led by Geert Wilders. The new minister of the interior was Piet-Hein Donner, a Christian Democrat and constitutionalist himself who had, in the past, been part of Constitutional Review Commissions, as had his father and grandfather, and who – in 1998 – had characterised the Constitution as « past coagulated/solidified » and « political strife gone silent »[92]. At the presentation of the Commission's report, he generally echoed the Commission's conclusion that there was no need to review the Constitution, and – as a declared opponent of constitutional review – characterised the Commission's advice to consider constitutional review as « total absurdity »[93].

The formal governmental response, that seemed handwritten by the same minister, followed the same line. It stated how there are different understandings of the functions of a constitution, but that the Dutch « constitutional culture and traditions » are « its sober, open (not exhaustive) and codifying character, its limited changeability and the prohibition of constitutional review »[94]. It depicted the Dutch Constitution as the residue of

[90] *Ibid.*
[91] As these do not directly concern the interrelationship with the international legal order, they will not be discussed here.
[92] J. P. H. DONNER, *supra*, note 33, pp. 9-10.
[93] « Het moet niet gekker worden », speech by J. P. H. DONNER at the presentation of the report of the Constitutional Review Commission, 11 November 2010.
[94] MINISTER OF THE INTERIOR, *Governmental response concerning the report of the Constitutional Review Commission, House of Representatives II*, 31570 20, 24 October 2011.

« historic achievements », an institutional-organisational document and a safeguard. The Dutch Constitution, it stated, is less suited to perform an « educational, binding or inspirational role » and the cabinet preferred to keep it that way. It intently quoted Dutch constitutionalist Struycken, who in 1914 had written « Beware of overstatement of the importance of the Constitution. Respect it as a historic national document that can be of value for many years. Do not abolish her, and when the time for change has come do not try to change her, to modernise her, but only change those things that stand in the way of the natural development of the life of government »[95]. Changing the Constitution, the government stated, should only be done in times of urgent social need, concerning topics with enough « constitutional ripeness »[96]. With these criteria in mind it dismissed the idea of a general provision, the proposal concerning a clause on the limitation of rights, the proposal on the right to a fair trial and rights altered by digitisation. It only promised to prepare a Bill pertaining to the modernisation of art. 13, that still explicitly spoke of letters, the telephone and the telegraph in guaranteeing the privacy of correspondence. Still, it concluded by stating that there was no political and social need for revision, even if the contribution of the Commission had been useful: « After all, the Constitution as anchor of the constitutional system consolidates, and is shaped by long-lasting discussions and developments »[97].

The total dismissiveness of the report did lead to some parliamentary debate, with one new parliamentarian wondering why a debate on something as important as the Constitution took place with only two hours reserved for it, in a small commission room. Opposition parties expressed disappointment and openly wondered whether the negative response by a minister of the same party that had put the commission in place (the CDA) meant that this party regretted its installation. Reflecting on the rationale for revision, a representative of the other [installing] party, the Social Democrats, mused wistfully « I find this a very difficult question to answer. I do know that the parties that formed the coalition at the time wanted it. This, in turn, was a result of a discussion on what our constitutional identity is and on whether certain developments in our country do not force us to strengthen that identity. At the time, the discussion on constitutional identity was very topical, not only in my party but also with others »[98].

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[95] *Ibid.*, p. 4.
[96] *Ibid.*
[97] *Ibid.*, p. 12.
[98] P. HEIJNEN (PvdA) in HOUSE OF REPRESENTATIVES II 2011-2012, General Discussion, 3 May 2012, 22.

One striking feature of the parliamentary debate was the emphasis on the application of international human rights law. The governmental agreement that bound the VVD-CDA coalition, and ensured PVV support, stated that if national policies were to clash with international treaties, the government would seek to amend these treaties. This was not merely an attempt to carve out space for the strict immigration policies that formed a key element in the PVV program[99]. It also echoed sentiments voiced by conservative scholar BAUDET in a 2010 op-ed titled « the European Court of Human Rights Is a Severe Threat to Democracy » and by VVD parliamentarians DIJKHOFF and BLOK in articles with titles like « Limit the European Court » and « Treaties Should Not Have Direct Effect »[100]. By the time that the report of the Commission was debated in Parliament, another VVD Parliamentarian, TAVERNE, had proposed to limit the application of international law [101].

It would be the Senate that would salvage some of the recommendations of the Commission, passing motions calling for inclusion of both a general provision and the right to a fair trial in the Constitution. These motions were acted upon by the VVD-PvdA cabinet Rutte II, set up in 2012. By 2016, it tabled two bills in Parliament. The first introduced « the right to a fair trial, within a reasonable term, by an independent and impartial judge »[102]. In its motivation, the government pointed out that certain – mostly administrative – disputes were not covered by art. 6 ECHR. It argued that these were already covered by national law, but that the Senate's request, in combination with the institutional-organisational character of the Constitution, as a safeguard, called for clarification of the right. Such clarification, as a by-effect, could stimulate constitutional dialogue between Dutch and European and international judges, but this was not the main

[99] CDA & VVD, *Vrijheid en verantwoordelijkheid: Regeerakkoord VVD-CDA*, The Hague, 2010.

[100] T. BAUDET, « Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie », *NRC Handelsblad*, 2010, p. 28; S. BLOK and K. DIJKHOFF, « Leg het Europees Hof aan banden », *De Volkskrant*, 2011, p. 28; S. BLOK, K. DIJKHOFF and J. TAVERNE, « Verdragen mogen niet langer rechtstreeks werken », *NRC Handelsblad*, Amsterdam, 2012. For an analysis of Dutch criticism of the ECHR see B. OOMEN,*supra*, note 29..

[101] HOUSE OF REPRESENTATIVES II 2011-2012, 33359, 2. The proposal concerns an amendment to the Constitution that would put an end to the supremacy of international law over national law, and to judicial review altogether, and does not, at present, have the required majority. See: J. W. A. FLEUREN and J. DE WIT, « Het voorstel-Taverne », *Nederlands Juristen Blad*, 40, 2012, pp. 2812-2818.

[102] HOUSE OF REPRESENTATIVES II 2015-2016, Declaration pertaining to the right to a fair trial, 34517, 2 (see also 3, 4).

goal. The second bill called for by the Senate introduced a highly shortened version of the general provision proposed by the review Commission, reading « the Constitution guarantees democracy, the rule of law and fundamental rights ». The explanatory memorandum here sets out how these are core principles, in line with the function of the Dutch Constitution as a bulwark, enshrined in the European context in many other national constitutions[103].

5. Conclusion

The Netherlands is often quoted as one example of a wider European and global tendency to consider the codification of international human rights law in the national constitution. The rationale behind this trend can be understood in two different ways: in using national constitutions as *bridges* paving the way for further strengthening of the international legal order, or as *bulwarks* thrown up to protect what are perceived as national interests against the forces of globalisation.

A careful look at the reasons why codification of human rights law was considered in the Netherlands, and the outcome of this process, reveals a conceptualisation of the constitution as much more of a bulwark than a bridge. The main reasons for revising the Constitution were related to domestic politics: the increase of polarisation, xenophobia and radicalisation in society. These trends are, of course, closely related to global phenomena but do play out differently in different nations. The redefinition of the relationship towards the international legal order derived from a desire, tabled by the Council of State, to keep out the unwanted effects of legal globalisation, under the heading of « constitutional resilience ». There was no wholesale discussion on codification of human rights law as such. The question pertaining to the right to life had been tabled by the ChristianUnion, for very specific political reasons. The questions pertaining to the right to a fair trial was a response to domestic budget cuts concerning legal aid, combined with a concern about the fact that art. 6 ECHR does not wholly cover administrative disputes.

Understanding why the proposals of the Constitutional Review Commission yielded so little results requires an understanding of Dutch constitutional identity. The main political driver behind constitutional revision – the felt need to strengthen national identity and to contribute to national cohesion –, is at odds with the text of the Constitution, the culture surrounding it and the way in which it has (not) interacted with processes of

[103] HOUSE OF REPRESENTATIVES II 2015-2016, Declaration pertaining to a general provision and explanatory memorandum, 34516, 2- 4.

nation-building over the past 200 years. The text of the Constitution, including its rigidity, made it impossible for one government to radically alter its aims. Both the members of the Constitutional Review Commission and the minister that received its advice were largely exponents of this constitutional culture that considers the Constitution as one regulative document amongst many, directed towards organs of state, with not much of a role to play in terms of nation-building. The Commission, for instance, was quick to redefine the request to strengthen the « meaning and accessibility » of the Constitution for the citizens into a question pertaining to the legal normativity only. The lack of knowledge of, and interest in the Constitution by laymen is illustrated by the lack of press coverage of the process, which led the project to be the domain of constitutional lawyers only.[104]

What, now, are the more general lessons that can be drawn regarding constitutional identity as an analytical tool for understanding the interplay between the national and the international legal order? First of all, there is the importance of using all three understandings of constitutional identity – focusing on the text of the constitution, the constitutional culture and the actual interplay with national identity. The text of a constitution itself, including the procedures put in place for revision, is a key factor of how processes of constitutional revision concerning a topic like the one at hand will play out. The values and attitudes pertaining to the constitution amongst lawyers, parliamentarians and laymen are a second important element in understanding how the interplay with international human rights law plays out in a given national setting. Finally, there is the explanation offered by the historic role that a constitution has played in processes of nation-formation and its relationship towards national identity. As the Dutch case demonstrates, such a constitutional identity (in the sense of national identity expressed and shaped by means of the constitution) need not be there at all.

This brings us towards one of the most defining aspects of the Dutch Constitution, that aspect of an otherwise absent constitutional identity that is prominently present and proudly shared (be it amongst lawyers) – its internationalism. This internationalism was upheld in the advice of the Constitutional Review Commission and in the subsequent governmental response. The reason here was not an openness towards the international legal order or a desire to strengthen it within Parliament or society at large – the political and social climate, rather, was much more nationalist than in previous decades. Instead, the explanation lies in this particular aspect of the constitutional identity, expressed in the one « clarion call » in the text of

[104] R. A. J. V. GESTEL, « De Staatscommissie Grondwet: een wetenschappelijk project? », *RegelMaat*, 26, 2011, pp. 67-71.

the Constitution, proudly inserted by parliamentarians in the 1950s and upheld by lawyers over the years and an expression of centuries of nation-formation by means of openness that here functioned as an « anchor » towards tidal directions turned the other way.