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The Evolution and *Gestalt* of the Dutch Constitution

Leonard F M Besselink

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Abbreviations

- AB Administratiefrechtelijke beslissingen
 ABRvS Afdeling bestuursrechtspraak Raad van State
 CDA Christen Democratisch Appèl [Christian Democrat Party]

CMLRev	Common Market Law Review
D66	Democraten '66 [social liberal party]
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EK	Eerste Kamer [Upper House]
HR	Hoge Raad
ICCPR	International Covenant on Civil and Political Rights
LJN	Landelijk Jurisprudentie Nummer
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
PCIJ	Permanent Court of International Justice
PvdA	Partij van de Arbeid [Labour Party]
Rb	Rechtbank
RM Themis	Rechterlijk Magazijn Themis
Stb	Staatsblad
TK	Tweede Kamer
W	Weekblad voor het Recht

A. Introduction

One way of distinguishing constitutions in historical terms is between, on the one hand, modern revolutionary, blue-print, single document constitutions, which have their origin in an identifiably more or less revolutionary constitutional moment—usually connected with some form of political cataclysm (a war or revolution causing political, social, and economic collapse)—and, on the other hand, constitutions which are the product of an incremental historical process and in which socio-political developments and evolutions become codified. The constitutional system of the Netherlands¹ is definitely to be grouped in the latter category of what one may call ‘evolutionary’ constitutions. It is, in other words, more like the British Constitution and those of the Nordic countries (at least as they were until a few decades ago), and indeed more like that of the European Union² than the continental European constitutions of Germany, Italy, or France.

Among distinctive features that places it in the group of ‘evolutionary’ constitutions is the multi-source nature of which the Constitution (*Grondwet*, literally Basic Law, but this is never used in translations into English) is but one source, though an important one, between

¹ Legislation: The texts of all Acts of Parliament are published officially in the *Staatsblad*, each Act being published in a separate *Staatsblad*, carrying a year and a separate number, every year starting with 1. It is published only electronically since can be consulted at <https://www.officielebekendmakingen.nl/staatsblad>. It contains every *Staatsblad* published after 31 December 1994.

With few exceptions, after amendment of ordinary legislation, only the respective amendments are published in the *Staatsblad*. There are various consolidated versions published in commercial editions, of which *Schuurmans en Jordens* used to be most complete, but this publication has been discontinued in February 2012. All consolidated legislation in force at any moment since 1 May 2002 or lapsed since, however, can be consulted at <http://wetten.overheid.nl/>.

Most case law, particularly of courts of the highest instance, but also much of the case law of lower courts, can be found via <https://uitspraken.rechtspraak.nl/>.

This chapter was completed in autumn 2019; later developments have not been incorporated.

² See Leonard F M Besselink, ‘The Notion and Nature of the European Constitution after the Lisbon Treaty’, in Jan Wouters, Luc Verhey, and Philipp Kiiver (eds), *European Constitutionalism beyond Lisbon* (Uitgeverij Intersentia, Cambridge, 2009) 261–281.

various sources of constitutional law. Another constitutional document, which is of superior rank to the *Grondwet*, is the Charter for the Kingdom (*Statuut voor het Koninkrijk*). It regulates the constitutional relations between the European and Caribbean countries that form part of the Kingdom, in a quasi-federal manner. However, as we will explain below, also directly effective provisions of international treaties, particularly human rights treaties, are considered to be a source of national constitutional law, with overriding effect towards conflicting norms. Also, there are important rules of customary constitutional law, particularly regarding the parliamentary system, the principle of monism in the relation between international and national law, as well as certain aspects of the principle of judicial deference towards the legislature.

In this chapter, the term ‘Constitution’ (with a capital C) is used when we refer to the *Grondwet van het Koninkrijk der Nederlanden*. When we refer to the broader complex of constitutional norms, we refer to ‘the constitution’ (in lower case), or as the ‘constitutional order’ or ‘constitutional system’.

Other distinctive features are the absence of constitutional review of acts of parliament by courts without sovereignty of parliament, an openness to international law and international society, the lack of an explicit constitutionally relevant concept of sovereignty, and an overall low degree of ideology in the text of the Constitution: it lacks a preamble with its attendant rhetoric. Terms like ‘democracy’, ‘the people’, or ‘nation’, are absent so far.³ We will describe these features below. They can only be properly understood when viewed in historical perspective.

Given the evolutionary nature of the Netherlands’ Constitution, the ‘origin’ of the constitution and its evolution cannot be strictly separated. Which of the texts bearing the name Constitution (*Grondwet*) should be considered to be the original of the present one is hard to say for reasons that we presently explain, but is not much of an issue. Also, any attempt at identifying original constituent power is meaningless; there has never been a body that could claim to have been a constituent assembly that coined the original, ‘first’ constitution. Most constitutional reforms were the product of political circumstances, often international political circumstances, prepared textually by a committee appointed by the government, only in recent times after consultation and with the approval of the Lower House (*Tweede Kamer*): the so-called *Staatscommissies* (Royal Committees). They were not quite like a constituent assembly, though, as we shall see, formally that was called for at the end of the Republic in 1795, by the States-General at its own abolition.

The historical evolutionary nature of the constitution necessitates a format that is slightly different from other chapters in this book in the first two parts. In Part B we sketch the outlines of the historical development of the constitution, which is marked by continuity and incrementalism. In Part C, we describe the institutional parameters of constitutional development. Part D looks at the fundamental concepts and structures of the constitutional system, while Part E concludes this contribution with a discussion of the constitutional identity which inheres in these.

³ A constitutional amendment is awaiting a second reading, which proposes to open the Constitution with an unnumbered provision which reads: ‘The Constitution guarantees fundamental rights and the democratic state under the rule of law [*democratische rechtsstaat*]; Act of 9 March 2018, *Staatsblad* 2018, 86. It was adopted with slightly over two-thirds of the vote in the Lower House, but with majority of three votes only in the Upper House, which makes its fate at second reading (when two-thirds of the vote is required) quite uncertain. The provision is mainly criticized for being only aimed at interpreting the provisions of the Constitution, while the government made clear this interpretation should be restricted to interpretation by the legislature and not the judiciary.

B. Origins of the Current Constitution

1. What is the Constitution?

Usually, the original of the present Constitution is taken to be either that of 1814, which is the first one promulgated after the Netherlands regained independence after its incorporation into the Napoleonic Empire (1810–1813), or that of 1815, which is the one which incorporated Belgium as determined by the Congress of Vienna and formally declared the Netherlands a Kingdom (it had previously been a Principality). Neither of these original texts (1814/1815) constitutes anything like present constitutional reality. The text of the present Constitution was adopted in its present form after a general revision in 1983, but substantively, this text was not the product of major constitutional innovation either, rather a consolidation and modernization of the previous Constitution, which was the 12th amendment since 1815 (which has itself been amended ten times between 1983 and 2018).

Whichever Constitution one would begin with, the present one can only be understood as a product of both long-term and short-term developments. Indeed, as we argue below, even the experience of two centuries of the Republic of the United Provinces has had a long-lasting influence in some constitutionally relevant respects, but many elements are dependent on shorter term contingencies.

Here we take 1814/1815 as the origin of the present Constitution in order to discuss the constitutional moments which have led to the amendments and revisions which have been the most decisive in shaping the present Constitution.

2. National Constitutional Development: International Parameters and National Causes

a) The Historical Experiences

At the basis of the constitutional transformations and adaptations are historical experiences, many of which coincide with international political developments. Many of these are also shared by other European countries, though such international events are translated into and channelled through one's own traditions, institutions, and particularities to arrive at solutions which turn out to be peculiar to each country. In other words, the same international events may not have had quite the same constitutional impact abroad which they had in the Netherlands.

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

The Netherlands is a relatively small European country, although, from the early seventeenth century until the end of the Second World War, it possessed important overseas colonies, in particular in the Malay Archipelago. These made the Kingdom an economic world power. Within Europe, the geographic size of the Netherlands has basically been as small as it is now, but to an extent this has been compensated for by its location in the delta of two main continental rivers, the Rhine and Meuse, which made large parts of the European continent its hinterland, while the North Sea coast opened up the country to other parts of

the world. Its economic potential, and its colonial empire in particular, was based on its sea power as well as its favourable location for international trade.

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

Apart from the international context as explanatory background factor to constitutional change, there have been purely endogenous reasons for a number of constitutional amendments which have occurred. One may submit that in constitutional affairs a certain primacy of national socio-political relations has dominated since the 1990s: while the world globalized, the constitutional debate in the Netherlands gradually became reduced to national concerns.

b) The Years

Within the process of constitutional development and change through constitutional amendment one can distinguish between moments of transformation, moments of constitutional adaptation, and the more minor changes as reflected in the Constitution.

Overall, we can say that, in the Netherlands, the transformations mainly took place in the 'long nineteenth century',⁴ the first one being the political transformation which brought about the 1814/1815 Constitutions, the last one that of 1917. The amendments of roughly the first half of the twentieth century (except for the one of 1917, which we mentioned) are forms of constitutional change which can rather be characterized as adaptations to the political environment. The second half of the twentieth century has seen an ever-increasing number of constitutional amendments, but paradoxically few of these—if any—transformed the constitution, even though in 1983 a fully revised of the text of the Constitution entered into force.

The various amendments are represented in Figure 8.1. We briefly elucidate them in the next sections.

3. The Great Transformations

a) The Original Constitution: 1814 or 1815?

The present Constitution of the Kingdom of the Netherlands⁵ dates back to the beginning of the nineteenth century. There is no agreement on whether it is the Constitution of 1814 or that of 1815 which is legally the original of the present Constitution. The reason for this is partly legal, and concerns the issue whether procedures for revision were followed or not; and partly it is a matter of what is meant with 'original'.⁶

⁴ I.e. from the French Revolution until the end of the First World War.

⁵ As per January 2019, the last amendment dates from 26 November 2018 (Stb. 2018, 493); the last consolidated version was published in Stb. 2019, 33 of 16 January 2019.

⁶ Roelof Kranenburg, *Het Nederlands staatsrecht* (8th edn, Tjeenk Willink & zoon, Haarlem, 1958) 46, had serious doubts on whether the 1815 Constitution was a new Constitution; Alexander F De Savornin Lohman, *Onze Constitutie* (4th edn, Kemink, Utrecht, 1926) 59, denied it was; whereas Antonius Struycken, *Het staatsrecht van het Koninkrijk der Nederlanden* (Gouda Quint, Arnhem, 1928) 54; Combertus W van der Pot, *Handboek*

<i>The great transformations</i>	
1579	Union of Utrecht
1798	post-revolutionary instability until the end of 1813
1814/1815	the Post-Napoleonic settlement
(1840) 1848	the liberal revolution
1917	the democratic break-through
<i>The adaptations</i>	
1887	parliamentary consolidation
1922	after the War
1948	Post-Colonial Constitution
[1949]1953/1956[1963]	Post-Colonial Internationalism
[1972] 1983	<i>Zeitgeist</i> of the 1960s
2000	after the fall of the Wall
<i>The minor amendments</i>	
1884, 1938, 1972, 1987, 1995, 1999, 2000, 2002, 2005, 2008...	

Figure 8.1 Constitutional transformations, adaptations, and minor amendments

The formal continuity of the 1814 and 1815 Constitutions is problematic in as much as the terms of the procedures for constitutional amendment could not be followed at the time. The amendment of the 1814 Constitution, in order to reflect the unification with Belgium, could not legitimately be passed by complying to the formal procedures, as that would only involve the institutions of the Northern Netherlands without any representation of the Belgians. This would amount to imposing a constitution on the Southern Netherlands. Instead a Constitution was negotiated in a royal committee composed of equal numbers of Dutch and Belgian representatives, which, in accordance with Belgian desires,⁷ introduced such features as bicameralism (a nobility of the blood was politically prominent in the Southern Netherlands, and these wished not to assemble with the commons) and entrenchment of the prohibition of censorship (which in the Netherlands had already been abolished by royal decree in 1814, but had no further constitutional basis).

The text negotiated in the royal committee was adopted by the institutions of the Northern Netherlands with near unanimity. It was then presented to Belgian noblemen and outstanding citizens who, only by applying ‘Dutch arithmetic’, were considered to have voted in favour.⁸ This referendum was not provided for in the provisions on constitutional amendment of 1814 and, to that extent, implied discontinuity with the Constitution of 1814.⁹ Also

van het Nederlandse staatsrecht (16th edn, Kluwer Juridische Uitgevers, Deventer, 2014) 138, hold that the 1815 Constitution was not an amendment of that of 1814, but a new Constitution.

⁷ Herman T Colenbrander, *Ontstaan der Grondwet*, vol II (first published 1908, Nijhoff, s’Gravenhage, 1909).

⁸ Of these 1323 cast a vote, 796 negative and 527 a positive vote. Of the noes, 126 voters declared on their ballot paper that they had voted against only because they were opposed to the clauses on freedom of religion which implied the equality of the Protestant and Catholic religion. These clauses had been imposed by the Vienna Congress and were therefore not liable to amendment. William I assumed therefore that those 126 votes were otherwise in favour of the Constitution and had therefore to be considered such, shifting the balance of 670 noes to 653 yes. On top of that, he assumed that those who did not show up at the ballot box acquiesced in the proposal, which added a further 281 to those in favour—a trick that William learnt from Napoléon. Thus, a majority was reached.

⁹ Pieter J Oud, *Het constitutionele recht van het Koninkrijk der Nederlanden*, vol 1 (2nd edn, WEJ Tjeenk Willink, Zwolle, 1967) 4–10.

the text of the 1815 Constitution contained several novelties, was both in Dutch and French, and was established and promulgated *in toto*.¹⁰

Are these formal and legalistic reasons conclusive evidence for considering the Constitution of 1815 the original one? Not if one is aware that the union with Belgium soon proved to be a brief, temporary and constitutionally unsuccessful addition to the political formation of the Northern Netherlands as it had existed as a polity since the sixteenth century; it was ended in formally and legally the same ‘unconstitutional’ manner in which it had begun, but this time the other way round: without the Belgians participating in the institutions involved in constitutional amendment. Politically, the real constitution was the Constitution of 1814, which established the political entity as we still know it, not the Constitution of 1815. Apart from the failed union with Belgium, the latter’s lasting importance is the fact that it made William I to what he already was—a king—and the country to what it in reality had been: a kingdom. Moreover, it left bicameralism as a heritage.

The somewhat debatable origin of the Constitution is symptomatic for the historical-evolutionary nature of the constitution of the Netherlands. The events of 1815 are evidence of the codifying nature of the Constitution: even when it comes to the nature of the state itself, it does not aim to modify future reality, but codifies a reality that historically and politically precedes it. The 1814 Constitution, then, was ‘original’ only in a sense, and incorporated some of the accumulated experience of its precursors, to which we devote some attention, as it both highlights some aspects of the constitutional culture to this day.

b) The Republican Pre-History of the Kingdom (1579–1795): Republic without Sovereign

The Constitution of 1814 had come about at the end of a period of more than eighteen years of political instability in the aftermath of the French Revolution. This period of instability began with the ending of the Republic of the United Provinces, a Republic which had its constitutional foundation in the *Unie van Utrecht* of 1579, a Treaty of alliance between the Provinces, and which lasted until 1795, when, formally in full accordance with the constitutional principles and procedures of the Republic, the State’s General and the Provinces decided to end the Republic by calling for a constitutional assembly to convene on the principles of a new Republic. Even the Revolution which had started in France did not interrupt formal constitutional continuity with this Republic.

By 1795, this confederal Republic had developed into an inefficient polity run by a quasi-hereditary or otherwise co-opting ruling elite known as the ‘*Regenten*’. They were mostly patricians, that is to say aristocrats of merit as opposed to nobility by blood, whose merit originally was a contribution to the wealth and wellbeing of the country, but which was sometimes only remotely related to the actual successors in office. Also, the highest office in the Republic, that of *stadtholder* (literally *locum tenens*), shared some of this fate. This office—each province had its own *stadtholder*—found its origin in the impossibility to find a permanent successor to the last sovereign, King Philip II of Spain, who had been abjured in 1581, nine years after William the Silent called for a revolt. A succession of foreign dignitaries had been approached to be the personification of the polity in each of the Provinces, ranging from the Duke of Anjou to Elizabeth I of England. But in the end, none of them proved acceptable to the Provinces, also because they claimed a kind of sovereign lordship or

¹⁰ Also, the revision resulting in the 1983 *Grondwet* was through article-by-article amendment. After the promulgation of a constitutional amendment a consolidated version is usually published in the *Staatsblad*, but this was not done after the amendments of 1884, 1917, 1999, 2000, and 2005.

kingship which had been a cause of the revolt that led to Philip's abjuration. So, in the meantime, each Province itself appointed a *stadtholder* as substitute for the absent sovereign.

Sovereignty for the Provinces resided in each Province itself and in the traditional constitutional arrangement which was deemed best to secure political liberty. This was of lasting importance: the Republic did without a personified sovereign for more than two centuries, while during these centuries it even functioned without its surrogate—the *stadtholder*—for nearly seventy-five years during the so-called *stadhouderloze tijdperken* (the two *stadtholder*-less eras from 1650 to 1672, and from 1702 to 1747).

For an office that was not meant to be the embodiment of sovereignty, it is somewhat curious that it turned from a quasi-elective office into a hereditary one, eventually concentrated in one and the same person for all provinces. It was occupied by members of the family of Orange in most provinces. Holland and Zeeland had introduced the hereditary *stadtholder* already in 1674, while Frisia had introduced it in 1675. Until 1647, Frisia had usually chosen a *stadtholder* from the House of Nassau-Dietz, and the other provinces from the House of Orange; the two Houses merged in 1747, William of Orange-Nassau becoming hereditary *stadtholder* in all provinces, as remained the case for all his successors.

For more than two centuries, the Netherlands experienced a state in which the component provinces each claimed sovereignty without there being a single office to personify this sovereignty, nor would the confederate state itself be sovereign over the provinces or, for that matter, have a sovereign. Against this historical background, it is not so unnatural that to this day, neither in constitutional practice, nor in constitutional theory, nor in the Constitution of the Netherlands itself is there any strong concept of sovereignty to be found. Only in recent years, concomitantly with the recurrence of the topos of 'sovereignty' in mainly populist political rhetoric, has the study of the concept of sovereignty regained interest among younger academics.¹¹

c) Post-Revolutionary Constitutional Instability: The Batavian Republic, the Kingdom Holland, and Formal Part of France (1795–1813)

During the eighteenth century, republican traditions, and virtues at the basis of the Republic eroded. Thus, by the end of the century, the 'patriots', ignited by the French Revolution, could understandably conceive of the governing class in the last phase of the Republic as an *ancien régime*. Initially, the Batavian Republic, as successor to this *ancien régime*, was modelled on the ideas of the French Revolution. It proved to be a constitutionally highly unstable state, with a succession of largely abortive 'Batavian' constitutions; those of 1798, 1801, and 1805, which reflected increasingly French influence and interference even at the textual level, issuing in the Kingdom of Holland under the French puppet King Louis Napoléon in 1806, under a constitution more or less dictated by the French. A few years later the situation became more straightforward as the Netherlands came under direct French rule that lasted from 1810 until the end of 1813.

¹¹ Thierry Baudet, *The Significance of Borders: Why Representative Government and the Rule of Law Require Nation States* (2012) PhD dissertation Leiden University, open access at <https://openaccess.leidenuniv.nl/handle/1887/19141> (last accessed on 24 March 2022) (Baudet entered into politics on a populist right wing ticket with his *Forum voor Democratie*, established in 2015, and became member of the *Tweede Kamer* that year); Michiel Duchateau, *Het Europees Parlement als transnationale volksvertegenwoordiging: Over volkssoevereiniteit, (con) federalisme en Europese volksvertegenwoordiging* (Kluwer, Deventer, 2014), PhD dissertation RU Groningen; Jan Willem Casper van Rossem, *Soevereiniteit en pluralisme: een conceptuele zoektocht naar de constitutionele grondslagen van de Europese rechtsorde* (Kluwer, Deventer, 2014) PhD dissertation Utrecht University.

d) Regained Independence and the Constitution of 1814

The unstable Batavian/French period formally ended with the proclamation of 21 November 1813 by which two prominent statesmen, Van der Duyn van Maasdam¹² and Hogendorp,¹³ took upon themselves the provisional 'general government' (*Algemeen Bestuur*) of the country at national level, thus constituting the new state of the Netherlands.¹⁴

Hogendorp was the architect of the proclamation of 1813, but, more importantly, also of the Constitution of 1814. He had been working on a revision of the *Unie van Utrecht* ever since the end of the old Republic, proposing to reinforce central government in the person of the Prince together with a first minister, *raadspensionaris*, as a kind of chancellor, next to (not under) him. Hogendorp's idea was to 'restore the old Republic', but with stronger central government under the Prince of Orange and a chancellor, with the States-General in a central role. Additionally, the provinces would be regions within a unitary state and no longer the old 'sovereign' powers. This was elaborated in his *Schets eener Constitutie* (Sketch of a Constitution),¹⁵ which William I gave as the starting point for the deliberations of the Royal Constitutional Committee which he commissioned to design the Constitution of 1814.

One lasting contribution of the instability of the Batavian/French period to the settlement of 1814/1815 is the option for a decentralized unitary state. It resulted from the compiled experience of over-emphasis on decentralized units during the highly confederal Republic and of over-centralization during the 'French' period, both being at best inefficient and at worst ineffective. The option for a decentralized unitary state was evident on the one hand in the centralized government in the King (particularly under William I), but also the retention of a good amount of decentralization in provinces and municipalities as constitutionally recognized original communities with autonomous powers of their own, as it exists to this day. In terms of regulating the exercise of political power at the national level, however, the Constitution of 1814/1815 was far from anything like a democratic state. To become so, the Constitution and constitutional practice had to undergo a radical transformation which began in the 1840s and was carried to its full constitutional conclusion only in 1922.

e) The 1840s and the Liberal Reform of 1848

The Constitution of 1814 (as well as that of 1815) was not a *constitution octroyée*. To the contrary, William I had asked for a constitution as a condition for accepting power as sovereign prince, *soeverein vorst*, in one of his first proclamations.¹⁶ This constitutionalist stance did not transpire in the way he exercised his powers. William I governed in an autocratic manner and to a large extent by royal decree. This was based on an interpretation of the Constitution to the effect that it did not forbid this practice, and therefore gave the King the freedom

¹² Adam FJA Graaf [Count] van der Duyn van Maasdam, 1771–1848, a moderate liberal who had been a member of the court of the Prince of Orange-Nassau that was to be the later King William I. William II appointed him in 1848 as a member of the *Eerste Kamer* in order to help the liberal revision of the Constitution to a majority.

¹³ Gijsbert Karel van Hogendorp, 1762–1834, from the old *regenten* party, but a liberal mind; was later made a count, *graaf*, by William I.

¹⁴ On the chaotic events of 1813, see Wilfried Uitterhoeve, 1813, *Haagse Bluf: De Korte Chaos van de Vrijwording* (Vantilt, Nijmegen, 2013).

¹⁵ Written in three different versions in 1812–1813 and circulated at limited scale around November and December 1813, but not published until Johan Rudolf Thorbecke included it in his *Aanteekening op de Grondwet*, 1839.

¹⁶ Proclamation of 2 December 1813, *Staatscourant* 1813, no. 2: 'Your trust, your love places sovereignty in my hands, as all sides are calling for me to accept it, and as the fatherland's distress and the state of Europe is demanding it. Well then, I will sacrifice my reservations to your wishes; I will accept what the Netherlands offers me, but I will also accept it only under guarantee of a wise constitution, which will guarantee your freedom against future abuses.' Translation by the author.

to regulate by royal decree all matters that had not been covered by an Act of Parliament. Parliament's own approach contributed to that view. In 1818 it adopted an Act (the so-called *Blanket Act*) which made infringement of royal decrees a criminal offence. This legitimated the King's power. Only in 1887, that is to say after the parliamentary system of government had taken shape, the *Hoge Raad* (Supreme Court) ruled in the *Meerenberg* case of 1879¹⁷ that many decrees were unconstitutional. It derived from the system of the Constitution that the power to regulate a matter by royal decree must explicitly be based on an Act of Parliament or a provision of the Constitution itself.

The personal regime of William I made him the object of broader political dissatisfaction and exposed him to fierce political criticism in the course of his government. Thus, the Belgians, who had never been very happy with the union with the Northern Netherlands imposed by the Vienna Congress, revolted in 1830. Notwithstanding the fact that their wish for independence was thus realized and was even sanctioned by the great powers, William I was not willing to give in easily to the facts of life. He not only kept the country in a state of military alert at great financial expense, but also would only agree to adapt the constitutional revision to reflect the new situation ten years later, when he gave in to international reality.

This revision was accompanied by a debate about a broader modernization of the Constitution than the government was prepared to propose, a debate which had already begun in the 1830s and was caused by the Constitution's obvious condonement of autocratic government. It not only adapted to the reality of Belgium's independence, but also introduced criminal ministerial responsibility and increased powers of the Lower House over the biennial budget.

In hindsight, the introduction of this very limited form of ministerial responsibility urged by the Lower House against the initial views of the government in 1840 was indeed a systemic change in the form of government. The new provision required a countersignature of a minister for every royal decree and royal ratification of Acts of Parliament and created criminal responsibility for the co-signing ministers should the relevant royal decrees and Acts of Parliament contravene the law. The systemic nature of the change is on account of the fact that the King could no longer take decisions without involving a minister, as William I had usually done—the Constitutions of 1814 and 1815 only required him to hear the *Raad van State* (Council of State¹⁸) and made no mention of a council of ministers, nor of the powers of ministers in relation to the King, thus legitimating the circumvention of the political influence of ministers.

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

Economic and financial crisis was around by the 1840s, with occasional rioting consequently adding to the sense of crisis in politics. There was an ever-increasing constitutional debate, kept alive by a fairly small minority of liberals. Thorbecke, a law professor in Leiden, was pivotal in this. He had already been a member of the doubled Lower House, which was elected for the purpose of voting on the Constitution of 1840, and he was briefly a member in 1844–1845. In the Autumn of 1844, he launched a proposal for constitutional reform, which was supported by eight other members of parliament (hence its nickname of the proposal of the 'nine men', *nevenmannen*). The Lower House answered the question whether

¹⁷ HR 13-01-1879, W 4330 (*Meerenberg*), ECLI:NL:HR:1879:1.

¹⁸ Art 32 of the Constitution of 1814; art 73 of the Constitution of 1815.

to introduce a bill to amend the Constitution negatively by thirty-four against twenty-one votes. The quest for constitutional modernization, however, remained a nagging matter.

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

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

The bills did not easily pass the predominantly conservative parliament. But with all kinds of royal interventions, including the appointment to the Upper House of five new members to the liberal cause in order to acquire a majority for the bills, they were eventually adopted. Shortly after, William II died of a heart attack.

The 1848 Constitution was the product of the pressures of international developments in Europe.¹⁹ What converted William II and the conservative majority to agree to the liberal amendments to the Constitution was fear, which was fed by what was happening abroad. Another factor for the King also his dynastic interest. As he put it, on 16 March 1848, right in the middle of the crisis, in a meeting with the ambassadors of Austria, England, Russia, and Prussia (!), he managed to convert from very conservative to very liberal within twenty-four hours.²⁰ Once again, the European international context proved decisive; it provided a constitutional moment in which an amendment, which aimed at true reform, was achieved.

f) Settling for a Parliamentary System of Government: The 1860s

Transformations are not a matter of textual amendment only, in particular when it concerns major reforms. The greater the intended transformation, the more important (and often difficult) is its achievement in practice. Notwithstanding its huge importance, the 1848 amendment of the Constitution was not the final and definitive settlement for a parliamentary system of government in practice. It was the parliamentary events in the 1860s which settled for a parliamentary system of government. Two successive events in parliamentary history established the relevant customary law definitively.

Firstly, there was the conflict over the sudden resignation of the Minister of Colonial Affairs, P Mijer, and his appointment as governor-general of the East Indies in 1866. Being considered the most important man in a newly appointed cabinet, his unexpected and

¹⁹ See Johann C Boogman, *Rondom 1848* (Fibula-Van Dishoeck, Haarlem/Unieboek, Bussum, 1978) 51.

²⁰ Jeroen van Zanten, *Koning Willem II, 1792–1849* (Boom, Amsterdam, 2013) 541.

unannounced resignation led to dismay in the Lower House. The government defended his resignation as minister and appointment as governor-general by referring to the King's decision to do so as a personal prerogative. This caused a resolution, passed on 27 September 1886, which, in so many words, 'disapproved of the line of conduct with regard to the stepping down of the minister of Colonial Affairs'. The next day the Lower House was dissolved by royal decree. Although the majority after elections remained liberal, the new Lower House only debated the matter, generally reminding of the rule of ministerial responsibility, however without passing a new resolution against the cabinet, which had stayed in power.

A second affair concerned Luxembourg in the aftermath of the French–Prussian war of 1866. King William III, through a personal union, was also head of state (Grand Duke) of Luxembourg. In the aftermath of the French–Prussian war, Napoléon III approached William III to sell Luxembourg to France by treaty. Initially, such a transfer seemed to be tolerated by Bismarck, but when the Chancellor was called to account in the *Reichstag* (1 April 1867), the matter was declared a *casus belli*. Internationally, the matter was resolved at an international conference in London at which the independence and neutrality of Luxembourg was guaranteed by the great powers and the Netherlands. At the national level, the Lower House thought the whole affair had not been handled properly by the government as it had no responsibility for Luxembourg, nor was there any national interest in guaranteeing its neutrality. The conflict expressed itself in the rejection of the budget for Foreign Affairs by the Lower House. The cabinet tendered its resignation, but the King refused it and instead dissolved the Lower House (January 1868). The subsequent elections did not change the political composition of the Lower House and, this time, the new Lower House passed a resolution expressing its opinion, 'that no interest of the country required the most recent dissolution of the House'. Because after this motion of censure the ministers did not immediately resign, the pressure was further stepped up by again rejecting the budget for Foreign Affairs. Subsequent to this rejection, the ministers tendered their resignation, and this time the King called for a new cabinet to be formed, so that they could be replaced in accordance with the political preferences of the Lower House.

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

- 1) the scope of political ministerial responsibility as extending to all and every exercise of royal power was confirmed in practice, thus extending parliament's power to approve and disapprove of all exercise of governmental power;
- 2) the rule that when parliament expresses a motion of censure the cabinet is forced to resign; and
- 3) that if instead of resignation of the members of the cabinet the course is taken of a dissolution of parliament, the subsequent elections are decisive, and no further possibility of dissolution exists for the government.²¹

These constitutional rules remain customary constitutional law to this day. If the 1868 events did not establish it, they at least confirmed the parliamentary system of government.²² The establishment of the rules in practice brought the reform of 1848 to its logical conclusion.

²¹ See Section C.3.

²² Pieter J Oud, *Honderd Jaren: een eeuw van staatkundige vormgeving in Nederland 1840–1940* (Van Gorcum, Assen, 1971) 89.

g) Towards Democracy: 1917

The parliamentary system developed further in the decades after 1868. Thus, until 1887, only when a political conflict occurred within the cabinet, or alternatively between the cabinet and the Lower House, a cabinet would resign. Since the elections of 1887, a cabinet would also resign because of the result of regular periodic elections the Lower House. Since 1917, a convention has taken root for the cabinet to resign on the day (or eve) of the elections, in other words, before electoral results are certain. This then opens the way for the forming of whatever cabinet may prove to have a sufficient political basis in the Lower House. This convention is related to the replacement in that year of the majoritarian electoral system of a single constituency first-past-the-post system, by a system of strict proportional representation. In this system, elections no longer resulted in clear political majorities, thereby creating the necessity of forming coalitions between the minority groups in parliament.

The parliamentary system of government established in the 1860s did not achieve democracy in its modern sense. Electoral rights were held only by a few wealthy men. The general franchise was not achieved until 1917 in practice and was constitutionally entrenched only in 1922. The reason why it took so long is because of the political linkage which was made with the other issue which dominated politics throughout the second half of the nineteenth century: the issue of state subsidies for protestant and catholic schools: the so-called 'school struggle'. In 1848, the Constitution had introduced liberty of education, which was initially interpreted to prohibit state subsidies for schools which were not run by public authorities. Later on, such subsidies were a matter of political undesirability rather than of constitutionality. Protestants and Catholics came to stand in opposition to the liberals (and later also to the socialists). As long as the issue of state subsidies for denominational education as a corollary of the equal liberty of education was not solved, the Protestant and Catholic groups in the Lower House would not cooperate on introducing the general franchise (the so-called *non possumus* policy).²³ In 1887 the main political groups agreed to a constitutional amendment which extended the right to vote to male residents of Dutch nationality who fulfilled certain criteria of suitability and social welfare which were to be determined by an Act of Parliament. This '*caoutchouc* provision' shifted the emphasis from constitutional amendment to electoral reform by an Act of Parliament. Although this made it possible to extend the franchise, it did not silence the call for a truly universal suffrage—an issue on which political parties remained internally split until the beginning of the twentieth century. To be precise, even the socialists were at best lukewarm about the right to vote for women. It was only after the First World War had begun—where the Netherlands remained neutral—that a breakthrough was made: an agreement was found on a constitutional amendment which grants denominational primary schools' financial equality to public schools (those established and operated under responsibility of local government), in return for consent to general suffrage.

The constitutional amendment which entered into force in 1917 stipulated general suffrage for men, opened the possibility of extending the franchise also to women by Act of Parliament,²⁴ abolished the constituencies and introduced proportional representation.²⁵ In

²³ In certain catholic circles there was an awareness that the franchise would increase their presence and profile in politics, a reason why Dutch Catholics earlier in that century had not rejected the idea of popular sovereignty as Calvinist Protestants had done. As the nineteenth century progressed, Catholics were in the process of social, cultural, and political emancipation from earlier open discrimination, which explains their more pragmatic approach to the franchise than that of the Protestants, with whom they allied for reasons of support of their denominational schools.

²⁴ Art 80 of the Constitution 1917.

²⁵ Transitory Art VII of the Constitution, amending the *Kieswet* (Electoral Act).

1919, women were granted the right to vote (and by implication to stand for election also, although this did not seem to be contemplated as a probable eventuality), and this was entrenched in the amendment of 1922.

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

4. The Adaptations

a) 1922 and Beyond: Consolidating Parliamentary Democracy and 'Pillarization'

Also, the constitutional amendment of 1922 can be viewed against the background of the international situation, particularly the devastation which the war had brought on Europe and the revolutionary movements of 1918 in Russia and elsewhere. Democratization was a major element in the reform. Apart from the entrenchment of the universal suffrage, which we mentioned above, and an amendment to restrict the succession to the throne to the descendants of Queen Wilhelmina,²⁶ the main amendments were the increased role of parliament in international affairs: declaring war and concluding treaties was made dependent on prior approval of the State's General. A provision was introduced to the effect that before resorting to war, the government shall attempt to resolve conflicts with foreign powers through judicial and other peaceful means.²⁷ The amendment on prior approval of treaties, though intended as a major tool of democratization, was technically not successful, in as much as in the course of the parliamentary treatment the government began shifting its position and distinguishing 'treaties' from 'other international agreements', the former requiring prior approval, the latter (whose definition varied, but extended particularly to international engagements in less solemn form) only needing notification to parliament. This failure was to be corrected with the constitutional amendment of 1953, when the principle of prior parliamentary approval was extended to all international treaties, whatever their name or form; also, treaties that diverge from the constitution can only be approved with a majority of two-thirds in both Houses. This requirement is now article 91 of the Constitution.

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

It would be a serious mistake, however, to think that, in the Dutch context, representative democracy is the same as parliamentary democracy. Quite to the contrary, parliamentary representation was only one aspect of a much broader concept of democracy, which was a consequence of the permanent minorities of which civil society was composed. As of approximately the 1870s, society began articulating itself into four religious and ideological streams: Protestant, Catholic, Socialist, and Neutral. These developed into four 'pillars',

²⁶ Wilhelmina was Queen since the death of her father in 1890, but during her minority until 1898, when she reached the age of eighteen, the royal authority was exercised by the Queen-Widow, Princess Emma of Waldeck and Piermont. Wilhelmina reigned until 1948. Wilhelmina had been fairly seriously ill several times and had several miscarriages. The constitutional amendment restricting the royal succession was intended to keep from the throne far removed German cousins and nephews, who tended to assemble in The Hague during such periods of ill health. It became feasible only after she had given birth to her daughter, Juliana, her only child.

²⁷ Art 57 of the Constitution of 1922.

each of them closed onto themselves, each having their own sports clubs, trade unions, employers' organizations, newspapers, broadcasting associations, social clubs, and political parties, through which their political elites brokered the political compromises to keep society together—the ending of the struggle over financial equality of schools and electoral rights was one of its feats.

It was during the period stretching from secularization of the 1960s to the de-ideologized 1990s that the pillarized society was gradually dismantled.

Pillarized society also had a constitutional aspect. In 1922, the Constitution provided that, by Act of Parliament, public bodies with powers of regulation, other than those expressly mentioned in the Constitution, could be established.²⁸ In 1938, this provision was elaborated to provide for the possibility of supervision over these public bodies, including the right to quash their decisions in case they conflicted with the law or the general interest. Also, there was added a set of provisions on public regulatory bodies for professions and industries.²⁹ These provisions still occur in the present-day Constitution³⁰ and are the basis for the consociational organization of the economy in which representatives of government, trade unions and employers' organizations, consult, discuss, and agree on main aspects of the economy and economic policies.

b) After the Second World War: The Failed Constitutional Reform (1954–1983)

During the German occupation of the country in the Second World War and immediately after, much time was spent on a reconsideration of the constitutional order—usually in vague and undefined terms of 'renewal'.³¹ In the Speech from the Throne of 1946, the government announced a general revision of the Constitution, but in practice this turned out not to be a very pressing concern. After the liberation, wartime ideas about a new constitutional system were soon frustrated. They had been mostly too vague and undefined. The traditional political parties regained the position they had before the war, thus effectively returning to previous constitutional relations.

In 1950, a *Staatscommissie* (Royal Committee), established by royal decree and composed of both constitutionalists and politicians from the main political parties and chaired by Minister van Schaik, was given the task to tender its advice on a general revision of the Constitution. Its 1954 final report did not propose systemic changes, did not receive much acclaim, and was shelved,³² with the exception of some amendments on international treaty-making, as suggested in an interim report of 1952 which we briefly discuss below in Section 4.c.

The second half of the 1960s seemed at first to be a turning-point. Social and cultural movements and social contestation of the 'establishment' evidenced by the Dutch version of the beatniks, *Provos*, also affected the political environment. The announced marriage of the probable heir to the throne, Beatrix, with a German, was a focal point of socio-political and cultural contestation, with smoke bombs and alternative 'happenings' marking the wedding in Amsterdam in March 1966.

1966 was also the year that a committee calling itself *Democraten '66* (D66) issued a pamphlet in which serious concern was expressed about the state of the political system, the

²⁸ Art 194 of the Constitution of 1922.

²⁹ Art 152 to 4 of the Constitution of 1938.

³⁰ Art 134 of the Constitution.

³¹ Simons, *Twintig jaar later* (Samson 1966).

³² For an overview, see Henc van Maarseveen and Monique Koopman, *De parlementaire geschiedenis van de Proeve van een nieuwe Grondwet (1950–begin 1967)*, (Staatsuitgeverij, 's-Gravenhage, 1968) 1–18, and *passim*.

political parties and the parliamentary system of government. Direct election of the Prime Minister and abolition of proportional representation as the very cause of the prevalent culture of permanent compromise and unclear decision-making were the centre pieces of the proposed overhaul of the constitutional system. For the Minister for the Interior, who was responsible for constitutional affairs, it was a reason to commission a Draft for a New Constitution, *Proeve van een nieuwe Grondwet*, written by civil servants in consultation with a number of professors of constitutional law.

In 1967, the government installed another *Staatscommissie*, chaired by former Prime Minister Cals,³³ and co-chaired by Andreas M Donner, professor of constitutional law and later president of the European Court of Justice and member of the European Court of Human Rights.³⁴ This *Cals-Donner* committee proposed to retain the principle of proportional representation, but proposed electoral districts in each of which at least ten members of the Lower House would be elected, thus enhancing the relation between voters and elected.³⁵ In elections for the Lower House, the committee proposed voters would cast a vote for the person who they deemed should lead a cabinet; but only in case a person would obtain an absolute majority of the votes cast, the King would have to appoint this person as the one to form a cabinet that he was to lead.³⁶ Under this proposal, the necessity for a cabinet to have sufficient confidence of a majority of the Lower House would remain unaltered. This proposal was in effect intended to mean that the elections gave an indication of who was to be charged with forming a cabinet, rather than being a direct election of the Prime Minister. The exceptional case in which a candidate would receive an absolute majority of the vote would, according to the committee, in practice, always be a candidate who would have the support of a majority in parliament.³⁷

These proposals were hotly debated in parliament. Two members of the Lower House introduced a bill which proposed a directly elected Prime Minister *tout court*—an option which had been rejected by the *Staatscommissie*.³⁸ But neither this nor the proposals of the committee were accepted by parliament.

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

This general revision of the Constitution was finally achieved in 1983, after a relatively minor adaptation in 1972, lowering the ages for right to vote and to stand for election. The

³³ Jozef MLTh Cals (1914–1971), a catholic politician who had been Prime Minister from 1965 until 1966.

³⁴ Andreas M Donner (1918–1992), at that point in time Judge at the European Court of Justice; member of the Calvinist *Anti-Revolutionaire Partij*, later Christian Democrat Party (CDA); law professor at the Protestant Free University of Amsterdam from 1945–1958; he was member of the European Court of Justice from 1958 until 1979; professor of constitutional law in Groningen (1979–1984); member of the European Court of Human Rights (1984–1987); previously member of the *Van Eysinga*-commission which prepared the constitutional amendments of 1953 and of the *Kranenburg*-commission which prepared the amendments of 1956, concerning international relations and the effect of treaties in the national legal order.

³⁵ The proposed art 42 para 1 read: 'Elections are based on proportional representation within the boundaries established by an Act of Parliament. An Act of Parliament can provide that with a view to elections of each of the Houses of Parliament the country shall be divided into separate electoral districts in each of which at least ten members shall be elected'; see *Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet*, 1971, vol II.

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

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

³⁸ Bill by the members Van Thijn (of the social democrat *Partij van de Arbeid*) and Goudsmit (D66), which was defeated in the Lower House in 1971.

1983 revision was in the end largely cosmetic and confirmed the historically incremental and very unrevolutionary nature of the Constitution. Alternatives were considered, but no major systemic changes were made. The language of the text was modernized, and many matters of detail were removed from the Constitution or delegated to the legislature ('deconstitutionalization'). Some called it 'a face-lift for an old lady'.³⁹

The system of government remained untouched. Measured by its initial ambition, the revision could be considered a failure. On the other hand, it proved that the system of government was so deeply entrenched in practice and in law that it was found not to be easily changeable.

The greatest novelty was the regrouping of previously incorporated fundamental rights and the formulation of new ones in the opening chapter of the Constitution. This was a sign of the times in which constitutional matters began to concern less the system of government than the assertion of individual rights.

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

c) Adapting to the International Environment: Decolonization, International Relations, and the Fall of the Wall

Practically the only circumstance necessitating constitutional amendment after the Second World War was in the context of international relations, which had undergone drastic changes. Again, this was a matter of adaptation to a changing environment, rather than an amendment causing changes in the political environment. The international situation had changed in three constitutionally relevant respects: the process of decolonization, the outbreak of the Cold War and its ending in 1989, and increased international cooperation, especially in transatlantic and European context.

Of these, the most pressing was the process of decolonization. Indonesian nationalists headed by Sukarno had declared Indonesian independence on 17 August 1945. After what was in effect a colonial war during two so-called *politioele acties* (July 1947–January 1948 and December 1948–January 1949), sovereignty was finally officially transferred on 27 December 1949. Looking at the East Indies, only Dutch New Guinea was initially left. The relation with the Dutch West Indies was renegotiated in terms that granted these countries autonomy within the Kingdom at the end of the 1940s and beginning of the 1950s. The Dutch West Indies comprised Surinam (in South America) and six Caribbean islands, which before 1948 were known by the name of the largest, Curaçao, and were subsequently called the Netherlands Antilles. In 2010, the Netherlands Antilles was broken up into three different islands acquiring the status of autonomous 'countries', and the three remaining small islands were added to the European Netherlands. The process of decolonization was well beyond the control of the constitutional provisions on the colonies.

Decolonization led initially to adaptations of the Constitution through a number of amendments passed in 1948. These changed the names of the territories mentioned in various constitutional provisions and made it possible to enter into a federation with Indonesia and

³⁹ Aalt W Heringa and Tom Zwart, *Grondwet 1983* (3rd edn, WEJ Tjeenk Willink, Zwolle, 1991).

to come to an arrangement granting autonomy to other parts of the Kingdom. As the federation with Indonesia soon proved stillborn, later amendments of the Constitution could only adapt to post-colonial reality. This happened in 1956 and 1963. The first, among other things, removed all mention of Indonesia and the envisaged federation with Indonesia. Relations with the Western parts of the Kingdom were reorganized in a Charter for the Kingdom of the Netherlands, *Statuut voor het Koninkrijk der Nederlanden* of 1954, with supra-constitutional status. The amendment of 1963 removed the mention of the Netherlands New Guinea, sovereignty over which had been transferred to Indonesia under strong international pressure a year earlier.

The Cold War led to several bills on excluding members from representative assemblies (including the Houses of Parliament) who had demonstrated a sympathy towards revolutionary aims. A somewhat similar proposal had been rejected in 1938, but the *staatscommissie-Van Schaik* had included it in an interim-report of 1952. In 1948, in response to the communist putsch in Prague, a successful initiative to amend the Constitution with a view to introduce the possibility of a civilian state of siege had been adopted. The committee's proposal of 1952, however, was rejected by the government and was not included in the bills it introduced on a number of other issues.

More successful were the proposals this same *Van Schaik* committee had made in its interim report, which built on the work of a parallel *Van Eysinga* committee. A new provision was adopted to the effect that the government 'shall promote the development of the international legal order'⁴⁰—one of the few 'ideological' provisions one can still find in the Constitution.⁴¹ Also, the failure of 1922 to submit in principle all treaties, irrespective of the form they take, to prior parliamentary approval was rectified. All this was accomplished in 1953.

On the status of treaties and of decisions of international organizations in the national legal order, the committee proposed to grant them *direct effect* in the domestic legal order, which was taken over in the amendment bill by the government and adopted by parliament. An amendment initiated by Serrarens—a member of the Lower House, later the first Dutch judge of the European Court of Justice⁴²—stipulating expressly also their *priority* over any contrary national legislation, was adopted against the wishes of the government.⁴³

In 1956, the provisions on the status of treaties and decisions of international organizations were amended in order to specify that this priority concerned only 'provisions which are binding on everyone', *een ieder verbindende bepalingen*. This was done upon the proposal of an advisory commission which was established by the government. Again, Andreas M Donner, the later president of the ECJ, was a member of this commission.⁴⁴ Thus the concept

⁴⁰ Art 58 of the Constitution of 1953.

⁴¹ Art 90 of the Constitution in the edition of 2019.

⁴² *Petrus Joannes Servatius Serrarens* (1888–1963), was a prominent catholic trade union leader; his appointment to the delegation to the ILO in 1921 instead of the socialist trade unionist Oudegeest, led to the very first Advisory Opinion of the Permanent Court of International Justice of 31 July 1922, *Nomination of the Workers' Delegate to the International Labour Conference*, PCIJ, Series B, n 1 (1922); Serrarens had been, amongst others, member of the Governing Body of the ILO and member of the Parliamentary Assembly of the Council of Europe; he was the only non-lawyer as judge of the Court of Justice, which was from 1952 to 1958.

⁴³ Arts 65, 66, and 67 of the Constitution 1953.

⁴⁴ Interestingly, Donner voted in all committees against proposals of granting direct effect and priority of international law over conflicting law; so it was not a surprise that as a judge in the ECJ he voted against *Van Gend & Loos*, see Pierre Pescatore at https://www.cvce.eu/en/obj/interview_with_pierre_pescatore_the_early_judgments_of_the_court_of_justice_1962_1966-en-1238d611-2883-43fa-921f-ac5861229ffa.html (last accessed on 24 March).

behind what was later developed by the ECJ as the doctrine of 'direct effect' was introduced in the Netherlands Constitution in the 1950s. Its consequences are discussed below (D.1.d.ff).

The radical change in the European, and indeed the global context which came with the fall of the Wall, was reflected in the constitutional amendment of the year 2000 which concerned defence. It changed the description of the tasks of the armed forces. These no longer only concerned the 'protection of the State's interests' but also 'maintaining and promoting of the international legal order' (article 97 para 1 of the Constitution), thus adapting to the tasks which the armed forces—with a problematic constitutional basis—had already assumed in the 1990s.⁴⁵ Also, a provision was inserted which imposed the obligation on the government to inform the States General prior to the deployment or making available of the armed forces for the purpose of maintaining and promoting the international legal order, including humanitarian assistance in armed conflict, unless compelling reasons prevent the government from giving such information in advance, in which case the information is to be provided as soon as possible (article 100 of the Constitution). This duty to give information is to enable parliament to debate such use of the armed forces and, within the normal rules of the parliamentary system, to influence the relevant decisions.⁴⁶

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

5. The Minor Amendments

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

- 1884 amendment to abolish the prohibition of constitutional amendments during a regency⁴⁷
- 1938 increase in the income of the Crown and that of members of the Lower House; introduction of ministers without portfolio (not heading a ministerial department); extension of the provisions on public bodies for industry and the professions
- 1972 lowering of the age to vote and stand for elections, abolition of state subsidies for protestant ministers and catholic clergy, adaptation of income of members of parliament and of the members of the Royal House
- 1987 a technical redrafting of article 12, concerning entering the home against the will of an occupant by public officials⁴⁸
- 1995 amendment to clarify beyond doubt that the armed forces do not need to have conscripts in active service
- 1999 lapse of a large number of transitory provisions, which had extinguished; amendment of the provision on ombudsman institutions in order to make explicit mention

⁴⁵ See Leonard FM Besselink, 'Military Law in the Netherlands', in Georg Nolte (ed) *European Military Law Systems* (Gruyter, Berlin, 2003) 547–556.

⁴⁶ A large number of members of parliament believe that this article may not give parliament a formal right of approval, but at least a 'substantive' one. This argument is difficult to sustain, as the government denies that there is a true right of approval.

⁴⁷ Wilhelmina, born in 1880, was the only foreseeable successor to the throne, which might mean a long period of a regency—as indeed it turned out to be (from 1890 to 1898).

⁴⁸ The obligation of prior identification and notice can be restricted by an Act of Parliament.

- of the National Ombudsman (established in 1981) without making any change to his position; amendment on guardianship and parental authority over the King who has not attained majority
- 2002 further amendment of article 12, in order to make exceptions for the necessity to provide a written report of the entry of a home against the will of the occupant in case when national security is involved
- 2005 provision enabling to provide for replacement of pregnant or ill members of representative bodies (parliament, provincial and municipal councils) by Act of Parliament
- 2006 amendment of article 23 on education in order to make it possible for primary schools to be housed in a building together with denominational schools
- 2008 rescinding of the mayor being chair of the municipal council, and of the royal commissioner being chair of provincial council; rescinding of being excluded from the right to vote if a person has been declared legally incompetent by judicial decision for reason of mental disorder
- 2017 providing a constitutional basis for 'public bodies' for the Caribbean parts of the Netherlands that were joined to the country of the Netherlands in 2010
- 2018 scrapping appointment of mayors of municipalities and King's commissioners in the provinces by royal decree[.]

This very list conveys the great variety of mostly not very pressing or very important constitutional matters. The withdrawal of transitory provisions which as a consequence of the lapse of time have lost their meaning is trivial but amending the provision on the King's guardianship in order to bring it in conformity with the Civil Code (!), as one did in 1999, does say something about the place of the Constitution within the legal order in relation to 'ordinary' legislation.

6. Perennial Controversies

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

Thus, the issue of reforming the system of government has remained controversial. The matter of bridging the gap between voters and the elected has been the object of various official committees, first the Royal Committee (*Staatscommissie Biesheuvel/Prakke*).⁴⁹ Next, a series of studies were commissioned by a committee of the Lower House between 1988 and 1993 (*Deetman Committee*). It produced many valuable analyses, although the whole exercise and its proposals constituted something like a *déjà-vu* after the mainly abortive discussions on this point prior to the revision of the 1983 Constitution. Among the issues discussed and proposals put forward were the introduction of binding referenda, the direct elections of mayors of municipalities and of the King's commissioners in the provincial administrations. It received no actual follow-up at the time, although the amendment of 2018 to remove the constitutional provision on the appointment of mayors and King's commissioners by royal decree might make these into elective offices if the legislature would decide so.

⁴⁹ *Eindrapport van de staatscommissie van advies inzake de relatie kiezers-beleidsvorming*, 's-Gravenhage, 1985.

Unsuccessful bills were introduced to reform the electoral system towards a German system, which, apart from purportedly bridging the gap between voters and those elected, might possibly lead to an easier articulation of majorities, but remaining within the boundaries of the constitutionally required principle of proportional representation. In 2017, a new Royal Committee on the Parliamentary System was yet again appointed by the government. It came up with a large number of proposals, amongst others to adapt elements of the electoral system, and reduce the powers of the Upper House (*Eerste Kamer*) to reject bills and introduce binding referenda and constitutional adjudication by a special constitutional court.⁵⁰

The study of pending amendments is fraught with difficulties as few of them eventually pass. Suffice it is to mention the most far-reaching amongst the proposals over recent decades. That is the proposal to limit the constitutional prohibition for courts to review the constitutionality of Acts of Parliament—a prohibition on which we have to say more below. The bill, initiated by members of the Lower House in 2002,⁵¹ excepts judicial review against classical constitutional fundamental rights from the prohibition.⁵² It was passed at the first reading in both houses, but got bogged down in second reading after stalling for many years in a succession of Lower Houses. It was eventually declared to have lapsed in 2018.⁵³

C. The Evolution of the Constitution: The Institutional Parameters of Constitutional Development

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

1. Constitution-Making Power: The Rigidity of the Constitution

The Constitution is a rigid constitution. Its amendment proceeds as follows. First an Act of Parliament adopted by both Houses must formulate the proposed amendment to the Constitution. After this, the Lower House elections are held. After the new Lower House has convened, the amendment is considered by each of the Houses in the so-called ‘second reading.’ In second reading, each House can only adopt an amending bill with at least two-thirds of the votes.⁵⁴ This is basically the procedure which has existed since 1848,⁵⁵ but, also before that, the Constitution was rigid. The Lower House elections prior to consideration at second reading has required a dissolution by royal decree, but this formal requirement is expected to be dropped in 2021 as a consequence of a constitutional amendment bill which,

⁵⁰ *Lage Drempeles, Hoge Dijken: Democratie en rechtsstaat in balans*, Final Report of the *Staatscommissie parlementaire stelsel* (Boom, Amsterdam, 2018) English translation at <https://archieff06.archiefweb.eu/archives/archiefweb/20210508020000/https://www.staatscommissieparlementairstelsel.nl/documenten/rapporten/samenvattingen/072019/18/download-the-english-translation-of-the-final-report-of-the-state-commission> (last accessed on 7 April 2022).

⁵¹ Kamerstukken TK, 2001–2002, 28 331, nn 1–3.

⁵² Kamerstukken EK, 2004–2005, A, is the definitive version of the bill.

⁵³ Kamerstukken TK, 2018–2019, 32334, n 13.

⁵⁴ Art 137 of the Constitution.

⁵⁵ Before 1995 not only the Lower House, but also the Upper House was dissolved before the second reading. Because the Upper House is elected by the *Provinciale Staten* (provincial councils) which themselves are not dissolved, the Upper House was usually re-elected with the same results as the previous House. This was considered being a meaningless ritualistic way of proceeding and was therefore abolished.

however, retains the existing requirement of a second reading in both Houses after Lower House elections (with adoption by qualified majority of at least two-thirds of the vote in both Houses).⁵⁶

The precise meaning of the dissolution within this procedure can be easily misunderstood. For various reasons it cannot be considered a plebiscitarian element. Firstly, dissolution traditionally coincides with regular elections of the Lower House (which was one reason behind the proposal to abolish it). This means that proposed constitutional amendments that were adopted by an Act of Parliament at the first reading have hardly ever played a role in those elections and electoral campaigns; the general political programmes and political issues of the day, not the proposed constitutional amendment, dominate the campaigns of political parties at general elections. Moreover, the dissolution of the Lower House was never meant to give the electorate the opportunity to vote on the text of the constitutional amendment as in a referendum. The election is merely the election of a House with constitution-making power, a power it exerts together with the Upper House and government.

In recent practice, the matter of which Lower House that has been elected after dissolution for reason of a constitutional amendment that was adopted at first reading, should adopt the bill at second reading, has become confounded. The reason for this was the sometimes rapid succession of general elections due to political instability, in combination with a late introduction of the bill in parliament, which prevented the second reading by the Lower House elected for the purpose. After 2003 this led to the practice of waiting with the actual second reading until the chances for adoption with the requisite majority of at least two-thirds of the vote were more auspicious. A solid body of opinion held this practice unconstitutional, but was initially condoned by an opinion of the Council of State, although it later retracted its initial view.⁵⁷ The amendment of the constitutional amendment procedure, envisaged for 2021 as just mentioned, will resolve the matter, as it determines unequivocally that only the Lower House elected after adoption of an amendment proposal at first reading, can deal with the proposal at second reading—not a subsequently elected Lower House.

The rigidity of the Constitution has been lamented by a long succession of constitutional lawyers from Thorbecke onwards.⁵⁸ No doubt the procedure for constitutional revision has made the adoption of some more far-reaching proposals difficult. This contributes to explaining why there have been some constitutional revisions on rather unimportant and uncontroversial issues, and which were often left over after the more substantial proposals were rejected.

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

⁵⁶ Act of 14 October 2020, *Staatsblad* 2020, 430. This act was at first reading adopted with overwhelming majorities in both Houses and is therefore expected to be adopted with the required two-thirds majorities at second reading in 2021.

⁵⁷ Advisory Opinion of the *Raad van State*, 17 October 2003, *Kamerstukken II* 2003/04, 29200 VII, nr 36, p 4, argued that it has never been the intention of the makers of the Constitution to let a later House than the one elected after the appropriate dissolution decide on the amendment in second reading; although previous language of the relevant provision excluded such a practice, an unintended rephrasing of 1995 did not literally exclude it; this the *Raad van State* considered decisive. Probably for purely political reasons, this view was embraced by government and parliament. Advisory Opinion *Raad van State*, 29 September 2017, *Kamerstukken II* 2017/18, 32334, nr 11, p 8, retracted on the unconditional view of 2003, and considered a second reading by a subsequently elected Lower House only acceptable in circumstances which make it practically impossible for the Lower House elected after a dissolution to consider and deal with the bill itself.

⁵⁸ E.g. Jit A Peters, *Wie beschermt onze Grondwet?* (Vossius Press, Amsterdam, 2003).

Unlike the constitutions of other European countries, the Constitution does not provide for certain unchangeable provisions. Usually, it is assumed that there are no such unchangeable provisions. Nevertheless, one author has argued that certain fundamental rights as found in the Constitution and in the European Convention of Human Rights are unchangeable even for the constitution-making power.⁵⁹

In an advisory opinion on the possibility of implicitly changing the Constitution in a treaty, the *Raad van State* took a similar position. It suggested that it was impermissible to diverge from the ECHR and the ‘Treaties establishing the European Union [*sic*]’ and from certain fundamental rights provisions in Chapter 1 of the Constitution if these were substantially infringed by the conclusion of a treaty.⁶⁰ This opinion referred to the power of the treaty-making power, not to the constitution-making power. However, the treaty-making power in the case of treaties which diverge from the Constitution is vested in the legislature by a majority of at least two thirds of the vote in both Houses of Parliament together with the government (article 91 para3 of the Constitution); just as the constitution-making power resides essentially in the ‘second reading’ of constitutional amendment, which is a majority of at least two-thirds of the vote in both Houses of Parliament. Thus, the opinion of the *Raad van State* may logically extend also to the limits which the constitution-making power has to observe.

2. The Role of the Government in Constitution Making

The overwhelming majority of constitutional amendments were passed at the initiative of the government, as agreed with the state of affairs in legislative matters generally. The Lower House (contrary to the Upper House) has the right of initiation, and this extends also to bills proposing a revision of the Constitution, but the Lower House has made relatively little use of its right of initiation. An exception to this is the (by Dutch standards) extremely rapid adoption of the initiative to introduce a civilian state of siege in 1948: it took only months to have it passed in two readings, which was helped by the fact that elections were due anyway.

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

As we noticed above, the government makes regular use of official advisory commissions especially established to investigate the desirability of major constitutional amendments, in recent decades after consultation and with the approval of parliament. These committees were initially chaired by a minister while also active politicians took part as well as constitutionalists, but on later occasions it was mainly an experienced elderly statesman who would chair such a committee together with a prominent constitutional lawyer (e.g. the *Cals-Donner* and *Biesheuvel-Prakke* committees mentioned above).⁶¹

This way of proceeding highlights the effort to seek broad consensus and expert input in the process of constitution-making and takes the issue of constitutional reform at arm’s

⁵⁹ GFM van der Tang, ‘Artikel 137’, in Piet Akkermans and Adriaan Koekoek (eds), *De Grondwet* (WEJ Tjeenk Willink, Zwolle, 1992) 1188.

⁶⁰ Advisory Opinion of the *Raad van State*, 19 November 1999 on foreign jurisdiction in the Netherlands (the Scottish court which had to adjudicate the *Lockerbie* case in the Netherlands pursuant to a Security Council Resolution), *Kamerstukken TK* (Parliamentary Documents of the Lower House) 1999–2000, 26 800 VI A, p 6.

⁶¹ The elderly statesman approach was recently adopted by the royal committee on the parliamentary system of 2017–2018, which was chaired by Johan Remkes, who had been minister in three cabinets, member of parliament and King’s Commissioner in the province of North-Holland.

length of day-to-day politics. Thus, it does justice to the nature of constitutional norms as requiring a large degree of consensus. On the other hand, this less ideological nature makes it duller and risks making the Constitution a matter for experts only.

3. The Role Played by Parliament

Apart from its role in the procedure of amending the Constitution, the constitutional activity in parliament is fairly low and constitutional culture is not very strong, particularly in the Lower House. Parliament has rarely initiated successful bills amending the Constitution. It does not have separate committee on constitutional affairs as this is considered to be part of the work of the standing committee for the Interior of the Lower House and that of the Upper House.

Unlike the British Lower House, which has a committee for scrutinizing the compatibility of bills with the Human Rights Act as well as a committee to scrutinize delegated legislation, or the Finnish parliament, which has a constitutional committee to review the constitutionality of bills (the famous *Perustuslakivaliokunta*, which has been retained after the prohibition of judicial review of Acts of Parliament was lifted in 2000), there is no parliamentary committee, nor any other parliamentary mechanism to guard the constitutionality of parliament's or the government's products.

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

This state of affairs is, to some extent, compensated for by the advisory opinions of the *Raad van State* which is always consulted on bills. On occasion, the *Raad van State* has shown an unwarranted degree of literalness in its interpretation of constitutional provisions, making the letter of the law more decisive than either the intention of the provision or the system of the Constitution,⁶² which removes it far from judicial canons of interpretation as used by most constitutional tribunals in Europe.

Together with the government, parliament has a role to play in the development of certain norms of customary constitutional law. In Dutch doctrine, there is consensus on the principle that the forming of a customary norm of constitutional law requires an *opinio iuris sive necessitates* and a practice expressing it. The *opinio iuris* must exist among the relevant actors which are to be bound by the rule or to whom it applies. Thus, for customary norms concerning the parliamentary system to exist, *opinio iuris* must exist both with parliament and the government. There is some academic controversy on the element of *necessitas*: some argue that the continuity of state government or the coherence of the constitutional system must be at risk should the rule not exist; if the coherence of the system or the continuity of state government is not affected by the absence of the rule, then the relevant practice, even if desirable, is not a rule of customary law, but merely a practice or non-legal convention of the constitution. On the whole, there is a reticence to accept too easily the existence of a customary or unwritten rule of constitutional law,⁶³ but a number have been recognized in constitutional practice and in the case law.

⁶² See Tang, 'Artikel 137' (n 59).

⁶³ See Constantijn AJM Kortmann, *Constitutioneel recht* (7th edn, Kluwer, Deventer, 2016) 132–133.

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

This alternative of dissolving the Lower House instead of offering the resignation of the cabinet has not been practiced since the 1930s for two reasons. Firstly, cabinets are coalition cabinets of which the members entertain close relations with their respective political groups in parliament. Consequently, when conflict occurs between coalition partners *in* parliament, this split will spill over into the cabinet, whilst a split between coalition partners within the cabinet will spill over to parliament. If the conflict is 'put to the country' by dissolution and elections, the cabinet-split will be a fact and independent from the outcome of the elections. In other words, dissolutions are used to solve the political crisis by the formation of a new cabinet after elections; the elections are not a test for a cabinet to see if it could stay on if the results of the elections are favourable. Secondly, since 1922 cabinets offer their resignation on the eve of elections for the Lower House, thus clearing the way for forming of a new cabinet after the elections. In practice, the dissolution of the Lower House when a political crisis exists is a matter on which the leaders of all groups in the Lower House are consulted by the King (who upon the fact that the cabinet has offered its resignation always consulted the leaders of the political groups in the Lower House on how to proceed).⁶⁴ Thus, although informally, consent of the majority of the House on a dissolution is sought. All this makes the customary constitutional norm that, in case of a motion of censure, the government can resort to the Lower House's dissolution at best theoretical.

This practical state of affairs also affects the relevance of another late nineteenth century unwritten norm that in case of a crisis of confidence between parliament and the cabinet, the cabinet cannot dissolve the Lower House more than once: if a crisis leads to a dissolution of the Lower House, and elections do not lead to support for the cabinet in that crisis, the cabinet will have no alternative but to resign. A situation of conflict in which the cabinet could even contemplate dissolving parliament twice over the same issue can hardly be conceived in practice considering that coalitions with narrow political relations between the individual ministers and their political constituency in parliament are necessary. This renders the rule theoretical.

4. The Role of Courts: The Unwritten Rules and Principles of Constitutional Law

Since 1848, the Constitution prohibits courts from reviewing the constitutionality of Acts of Parliament (since 1953 also of treaties) as is now provided for in article 120.⁶⁵ Yet, courts, particularly those of highest instance, play an important role in constitutional development and constitute sources of constitutional law. After all, courts can establish the constitutionality of all acts other than Acts of Parliament (and treaties), unless in case judging such other

⁶⁴ Until 2012 the King retained a role in the forming of a cabinet, by consulting the political forces, most prominently the political groups in the Lower House on who to appoint with what mandate to form a cabinet. Clearly, the King could never take a personal view, but had to go by majority opinion in the Lower House, given the parliamentary system of government. The King's role was taken over by the Lower House itself, personified by the Speaker of the House.

⁶⁵ Presently art 120 of the Constitution: 'The compatibility of Acts of Parliament and treaties with the Constitution [*Grondwet*] shall not be reviewed by the courts.'

acts unconstitutional necessarily implies the unconstitutionality of the Act of Parliament which is at the basis of that act—this will be the case if the content of the delegated legislation is actually determined by the Act of Parliament on which it rests.

The power to interpret the Constitution and adjudicate constitutional issues is not concentrated: the system of constitutional adjudication is diffuse.

Many courts have interpreted the scope and meaning of constitutional rights. Case law on other provisions of the Constitution, however, is relatively scarce, but not absent. This case law developed certain principles of the Constitution, as well as unwritten principles of constitutional law.

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

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

We will say a few words about each.

The rule of unwritten constitutional law that treaties can be invoked as treaties before courts, and do not need specific transformation into national law, is derived from the case law of the *Hoge Raad* in a standard case which dates back to 1919.⁶⁶ The case law has, since this judgment, assumed that international law, which has become binding on the Kingdom under public international law, is binding in the national legal order.

This monist view is reinforced by the constitutional provision that self-executing, or directly effective, international provisions have priority over conflicting national law (see below D.1.d).⁶⁷ The *Hoge Raad* interpreted this provision to mean *a contrario* that courts cannot review Acts of Parliament against international provisions that are not directly effective.⁶⁸

A further example of an unwritten principle of constitutional law established by case law is the principle of legality which the *Hoge Raad* derived from the general system of the Constitution in the *Meerenberg* case of 1879.⁶⁹ The case concerned a royal decree containing a general rule that mental hospitals were to hold a register of its patients, on pain of a penal fine determined by an Act of Parliament. The *Meerenberg* institution had failed to comply and was prosecuted. In the highest instance the matter turned on whether the government had the power to issue the said royal decree, although there was no basis for that decree in an Act of Parliament, other than the Act of Parliament which imposed a fine on the transgression of royal decrees in general (the *Blanketwet* of 1818). In its judgment concerning the powers of the executive versus those of the legislature, and hence the powers between government and parliament, the *Hoge Raad* found that the Constitution did not grant a general legislative or regulative power to the government, and that it followed from the scheme and structure of the Constitution that legislative power can only be derived either from the Constitution itself or from an Act of Parliament delegating such power to the government. In

⁶⁶ HR 3 April 1919, NJ 1919, 371.

⁶⁷ At present art 94 of the Constitution.

⁶⁸ HR 6 March 1959, ECLI:NL:HR:1959:131 (*Nyugat II*); reiterated in HR 14 April 1989 ECLI:NL:HR:1989:AD5725 (*Harmonisatiewet*), paragraph 3.2, and HR 18 September 2001, ECLI:NL:HR:2001:AB1471 (*Desi Bouterse*).

⁶⁹ See n 15.

this case it found such an act or direct basis in the Constitution itself was absent, while also the Blanket Act did not provide a basis for the said royal decree.

From this judgment, which was phrased in broad and general language, the unwritten constitutional principle of legality was derived according to which legislative power can only be exercised by the executive if it has a specific basis in an Act of Parliament. This found partial expression in a constitutional amendment of 1887 according to which royal decrees containing general administrative regulations can only be enforced with criminal sanctions if it has a basis in an Act of Parliament.⁷⁰

The principle was further elaborated in a judgment of the *Hoge Raad* of 22 June 1973 on fluoridizing drinking water in which it held that not only measures enforced with penal sanctions, but any measure which imposes a burden on citizens or are otherwise burdensome, must have a basis in an Act of Parliament.⁷¹ This is the unwritten part of the principle of legality.

Also, regarding the interpretation of the division of powers between the legislature and courts, the case law developed relevant constitutional rules and principles.

As already mentioned, the Constitution prohibits courts from reviewing the constitutionality of Acts of Parliament (article 120 of the Constitution). The text of the provision does not cover review of the legality of bills, nor the question whether a failure to legislate can be adjudicated. Nevertheless, the case law of the *Hoge Raad* has made clear that courts are not allowed to intervene in the legislative process, nor can courts order parliament (or directly elected decentralized representative bodies) to legislate in a particular manner. This not only applies to purely national cases. Courts may not order parliament to legislate in case it has failed to adopt an Act of Parliament in order to implement an EU Directive (Directive 91/676, the Nitrate Directive).⁷² This broad prohibition of court orders to legislate, inspired as it was by considerations of not entering too far into the political domain, was narrowed down recently. In a case concerning an old and small orthodox-protestant political party which has traditionally held about two out of 150 seats in the Lower House (and one in the Upper House), SGP (*Staatkundig Gereformeerde Partij*), which has always had a prohibition for women to be part of representative or executive bodies as this would contravene the biblical order of creation, the civil chamber of the *Hoge Raad*, having established a contravention of the non-discrimination clauses in the Constitution (article 4), the ICCPR (articles 25 and 2), and in particular the Convention on the Elimination of All Forms of Discrimination against Women (article 7), narrowed down the prohibition to a judicial order to take judicially specified legislative measures. It, however, upheld the view of the Court of Appeal that the State has to take measures with the effect of the SGP to grant the right to stand for election to women. These had to be measures that are both effective and make the least possible infringement of the fundamental rights of the political party and its members, without further specifying the nature or substance of such measures would need to be.⁷³ In the recent *Urgenda* judgment of the *Hoge Raad* on the emission reduction targets for greenhouse gases

⁷⁰ The present art 89 para 1 and 2 of the Constitution.

⁷¹ HR 22 June 1973, ECLI:NL:HR:1973:AD2208 (*Fluoridering*).

⁷² HR 19 November 1999, ECLI:NL:HR:1999:AA1056 (*municipality of Tegelen*) on an alleged infringement of a procedural rule contained in an Act of Parliament, which affects the merger by Act of Parliament of two municipalities; HR 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*), see (2004) 41 CMLRev 1429–55; this approach was confirmed as regards an injunction to a provincial council to pass a provincial byelaw in order to comply with an EU Directive, HR 1 October 2003, ECLI:NL:HR:2003:AO8913 (*Frisian Fauna Protection*).

⁷³ HR 9 April 2010, ECLI:NL:HR:2010:BK4549.

for 2020, it confirmed that the prohibition of court orders to legislate only concerns the particular content of the legislation.⁷⁴

This case law must be understood from the perspective of the separation of powers between the legislature and the judiciary. The considerations in these cases refer to the inherently political nature of legislating, and—in case of failure to comply with an EU Directive—of the political nature of the choice either to legislate or to let it come to infringement proceedings under article 258 TFEU.

The case law just mentioned suggests a doctrine of separation of powers which seems to hinge on the dividing line between discretionary decisions to be left to the legislature and legal issues which are the domain of courts of law. There is a tendency in the case law of the *Hoge Raad* of the 1990s towards a restrictive interpretation of the competence of courts in cases in which political issues are prominent in the area of foreign affairs.

This tendency is similar to a *political question doctrine* that mainly concerns issues of foreign policy. It was developed in cases concerning the use of nuclear weapons (in a case concerning the threat or use of nuclear weapons)⁷⁵ and the use of armed force in international interventions (in the case on *NATO bombardments in Kosovo*).⁷⁶ Such use of Dutch armed forces hinged on the question of their lawfulness under public international law, but another dimension to this question involved an interpretation of article 90 of the Constitution, which imposes on the government the obligation to promote the development of the international legal order, in the case of the Netherlands' participation in international operations in Afghanistan.⁷⁷

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

This political question doctrine has also been extended to later case law of lower courts.⁷⁸

5. The Role of Foreign Constitutional Law

In the context of constitutional development, foreign constitutional law has been used heuristically, though altogether the role of foreign examples has been limited throughout Dutch constitutional history. In its design, the Republic of the United Provinces followed no clear contemporary or ancient example consciously, although ancient examples were idealized to legitimate the Republic.⁷⁹ The French influence at the end of the eighteenth century was

⁷⁴ HR 20 December 2019, ECLI:NL:HR:2019:2006; unofficial English version ECLI:NL:HR:2019:2007.

⁷⁵ HR 21 December 2001 (*Nuclear Weapons*) ECLI:NL:HR:2001:ZC3693.

⁷⁶ HR 29 November 2002 (*Nato bombardments Kosovo*) ECLI:NL:HR:2002:AE5164.

⁷⁷ HR 6 February 2004, ECLI:NL:HR:2004: AN8071.

⁷⁸ E.g. Rb Den Haag 4 May 2005, ECLI:NL:RBSGR:2005:AT5152, refusing a request to arrest President Bush upon his entry into the Netherlands; Gerechtshof Den Haag 22 November 2019 (*Repatriation of ISIS Women and Children*), ECLI:NL:GHDHA:2019:3208.

⁷⁹ In the seventeenth century, literature references were made to Ancient Israel, Greece, and Rome, for instance in the early work of Grotius; later on, references to the Venetian republic and the Helvetic confederation abound.

evident in the Constitution of the Batavian Republic of 1798, but this lasted only briefly, and its successors were basically dictated by Paris. Throughout the nineteenth century, the French Revolution and its aftermath formed a dreaded example, rather than a constitutional model. In practice the constitution developed in many ways in the manner of the British parliamentary model, ending up in a kind of Westminster model of parliamentarism though with its own distinct traits in terms of political representation. Even during the general revision leading to the Constitution of 1983, no direct comparative exercises of any substantive scope were undertaken. The codification of a catalogue of fundamental rights as a first chapter to the Constitution of 1983 was obviously inspired by the German example. Traces thereof, without explicit reference to German constitutional law, can be found in the parliamentary documents from the government.⁸⁰

Since 1983, comparative constitutional law has become more important. Discussions on constitutional change are now often accompanied by explicit comparisons with other countries, mainly for informing the discussion, but also heuristically. This has been the case for instance in the report by the *staatscommissie Biesheuvel/Prakke* on introducing a corrective referendum. Also, more recent discussions on reforming the electoral system are partly based on and informed by explicit discussions of foreign examples.⁸¹

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

D. Basic Structures and Concepts

The Constitution provides the political system with little more than a framework which is largely dominated by the political system itself. Courts have no role to play in this regard. The Constitution is an epiphenomenon: it is more the reflection of the political system as opposed to the political system being the reflection of it, notwithstanding attempts at political reform through constitutional amendment.

The shift in European constitutionalism from focusing on the political system (and electoral rights) in the long nineteenth century, towards individual, judicially enforceable fundamental rights beyond political rights in a strict sense (in the twentieth century) had a different character in the Netherlands from most other European countries: rights are to a considerable extent located outside the Constitution itself.

To understand this, we first describe the place of the Constitution in the broader context of the Netherlands constitutional order by looking at its place in the hierarchy of norms and its relation to the national and international/European legal order, and the political system, respectively.

In further sections we briefly discuss the idea of the *Rechtsstaat* and its manifestation in the Netherlands.

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

⁸⁰ On the history of the chapter on fundamental rights of the 1983 Constitution, see Jan J Pelle, *In de staatsrechtsgelerde wereld: de politieke geschiedenis van hoofdstuk 1 van de Grondwet van 1983* (Gouda Quint, Deventer, 1998) (hereafter Pelle, *politieke geschiedenis*).

⁸¹ Jan A Van Schagen and Henk R B M Kummeling, *Proeve van een nieuw kiesstelsel* (WEJ Tjeenk Willink, Deventer, 1998), which looked at Germany in particular; also, the report of the Royal committee looks consciously at foreign examples, see n 48.

1. The Relation of the Constitution to Other Parts of the Legal Order

The Constitution, *Grondwet*, is a nucleus of the broader constitution. But the totality of legal norms making up the constitution (the substantive *bloc de constitutionnalité*) is larger than the total of the provisions of the Constitution alone. It extends figuratively speaking both ‘upwards’ and ‘downwards’.

This state of affairs is intimately connected with the nature of the formal constitution as a textual instrument which registers and articulates a state of affairs in a legally binding manner as it normatively operates in a wider political reality. As already mentioned, the unwritten constitutional law also plays its part in this. This is another expression of the particular character of the Netherlands’ Constitution which does not even contain some of the most important constitutional norms.

To the extent that there is a certain ‘constitutionalization’ of private law in the Netherlands, this may be explained from the place of international human rights treaties, rather than from the position of the Constitution.

a) Supra-Constitutional Norms

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

It is beyond doubt that the Constitution, *Grondwet*, has a superior rank vis-à-vis ordinary legislation, that is to say, Acts of Parliament and delegated legislation. The fact that courts cannot review the constitutionality of Acts of Parliament does not change the hierarchical order between Constitution and Acts of Parliament. There can be no doubt that parliament and government, together acting as the legislature,⁸² are bound by and subjected to the Constitution; parliament is not sovereign.

Although the Constitution has a higher rank than Acts of Parliament, it does not have highest rank in the hierarchy of norms. Two sets of norms have higher rank than the *Grondwet*, and at least some of these must substantively be considered constitutional norms—this is the ‘upward’ extension of the constitution.

The first is the Charter for the Kingdom, *Statuut voor het Koninkrijk* of 1954, which governs the relations between the four countries which make up the Kingdom: the Netherlands (which since 2010 includes three very small islands in the Caribbean⁸³), and the three autonomous Caribbean islands of Aruba, Curaçao, and St Maarten respectively. The former has some seventeen million inhabitants, the latter a total of 350,000 inhabitants.

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

The *Statuut* provides that it is of higher rank than the Constitution: ‘The Constitution shall have regard to the provisions of the Charter.’⁸⁴ As a consequence, the Constitution

⁸² Art 81 of the Constitution.

⁸³ Bonaire with approximately 19,000 inhabitants, St Eustatius with nearly 3,000 inhabitants, and Saba with approximately 2,000 inhabitants.

⁸⁴ Art 5 para 2 of the Charter.

provides for a simplified amendment procedure to adapt it to changes in the Charter (article 142 Constitution). In as far as matters concerning legislative and executive powers, the organs of the Kingdom, Kingship and the succession to the Throne, have not been provided for in the Charter, the relevant provisions of the Constitution apply in affairs for the realm.⁸⁵

b) The Constitutional Rank of International Law

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

It is generally assumed that the expression 'legislative provisions' includes the provisions of the Constitution itself, and this was also the opinion of the government in the lead up to the Constitution of 1983.⁸⁶

There is a more nuanced opinion in the literature. It places the issue whether constitutional provisions can be trumped by directly effective international provisions in the context of the requirement that a treaty, which diverges from the Constitution, be approved with a majority of two-thirds of the vote in both Houses of Parliament (article 91 para 3 of the Constitution). Whether there is such divergence from the Constitution is exclusively for the legislature to decide, and not for courts; courts cannot review the constitutionality of treaties as article 120 of the Constitution provides since 1953 (the moment of the introduction of article 91 para 3 of the Constitution) and therefore must assume that an incompatibility between a constitutional provision and a treaty provision can only exist for treaties approved under article 91 para 3 of the Constitution.⁸⁷ Although this view is better compatible with the system and structure of the Constitution, it has so far not been followed by courts.

The consequence of articles 93 and 94 of the Constitution is that directly effective self-executing provisions of treaties prevail over contrary legislative provisions. To the extent that directly effective international provisions are substantively of a constitutional nature, they are mostly considered to have superior status. Such provisions are typically the provisions on classic human rights provisions. As these primarily aim to regulate the relations between the state organs and individuals, they are sources of constitutional law of the Netherlands. This is true of e.g. the provisions of the European Convention for Protection of Human Rights and Fundamental Freedoms and of its Protocols to which the Kingdom is a party, and the provisions of the International Covenant on Civil and Political Rights.

Precisely because courts have to give priority to these provisions over conflicting norms, the constitutional importance of human treaties is very great, all the more because courts cannot review Acts of Parliament for their compatibility with the fundamental rights contained in the Constitution itself; they can, and do, review Acts of Parliament against directly effective human rights treaties.

The superior status of directly effective provisions of treaties and of decisions of international organizations is usually taken in a hierarchical sense. Also, at the time of the constitutional amendments of 1953 and 1956, public international law, either in general or the

⁸⁵ Art 5 para 1 of the Charter.

⁸⁶ TK 1977–1978, n 15 049, n 3, 13.

⁸⁷ Camilo B Schutte, *'De stille kracht van de Nederlandse Grondwet. Beschouwingen rond het verbod aan de rechter om verdragen aan de Grondwet te toetsen'* (2003) 2003-1 RM Themis 26–40; Leonard F M Besselink and Ramses A Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht* (Kluwer, Alphen aan den Rijn, 2009) 52–55.

specific provisions intended here, was taken to be ‘higher’ law. The alternative view, in which article 94 of the Constitution is understood as a conflict rule designed to solve a collision between non-hierarchically ranked norms (*Anwendungsvorrang*), not often considered. In the literature, there is only one authoritative writer who seems to take this view, and even here this has gone largely unnoticed.⁸⁸

c) The Constitutional Position of EU Law

Articles 93 and 94 were introduced in the early 1950s into the Constitution with a view to guarantee the effect of international treaties and of decisions of international organizations that were established after the Second World War, especially the European Coal and Steel Community. These provisions are a matter of constitutional principle, but also in judicial practice since the 1980s, have facilitated the primacy of EU law in the Netherlands. *Van Gend & Loos* and *Costa/ENEL* were in a sense an analogical application of the constitutional ideas of the Netherlands’ Constitution to the European Communities. *Simmmenthal II* did not cause a stir since the dominant interpretation of our constitutional provisions on the rank and effect of international law in the national legal order already took on board the primacy also over constitutional provisions. That this would in foreign eyes be something of a paradox—the Constitution contained a principle concerning its own disapplication—did not occur to predominant constitutional doctrine in the Netherlands. In a sense, it only brought to light again the relative meaning of the Constitution within the broader constitution, which encompasses also international norms of a constitutional nature (like human rights treaties).

It was only in the 1980s, though, that the more extreme view entered into constitutional doctrine, and later in some of the case law, that, given the autonomy of the EC/EU legal order propounded in the case law of the European Court of Justice, article 93 and 94 of the Constitution were irrelevant to the operation of European law in the national legal order. This was also translated into some of the case law of the Council of State⁸⁹ and of the penal chamber of the *Hoge Raad*.⁹⁰ Although not all courts seem to accept this view—which is predominant in the Dutch doctrine—it is an extraordinary overturning of the explicit intention of the makers of the Constitution.⁹¹

d) Infra-Constitutional Norms

The totality of constitutional norms (*bloc de constitutionnalité* in a substantive sense) also extends, figuratively speaking, downwards to norms which are established in instruments which take the form of an act, which is usually of ‘lower’ rank than the Constitution. In the general revision of 1983, many matters which were previously regulated in detail in the Constitution have then been delegated to the legislature. For instance, the manner of approval of treaties and the exceptions to the principle that the Kingdom cannot become a party unless parliament has approved the treaty, was regulated in detail from 1953 until 1983.⁹² Since 1983, the Constitution provides in article 91 that the manner of and the exceptions to the requirement of prior approval shall be laid down by an Act of Parliament.

⁸⁸ Constantijn AJM Kortmann, *Constitutioneel Recht* (5th edn, Kluwer, Deventer, 2005) 364.

⁸⁹ Afdeling bestuursrechtspraak Raad van State 7 July 1995, AB 1997/117 translation in (1995) 2 *Maastricht Journal* 15–9; reprint in Andrew Oppenheim (ed), *The Relationship between European Community law and National Law: The Cases*. Volume 2 (CUP, Cambridge, 2003) 401–406.

⁹⁰ HR 2 November 2004, ECLI:NL:HR:2004:AR1797.

⁹¹ Although approved with at least two thirds of the vote, the legislature is assumed to have held that the Treaties do not diverge from the Constitution at least when the issue was discussed at the time of the approval of the Treaty of Maastricht.

⁹² Arts 60–64 Constitutions 1953–1972.

The subsequent Act regulating this matter must be considered ‘organic’ law. Several other examples could be given.

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

More complicated is the status of organic law created by other instruments than Acts of Parliament. These are usually considered to be of lower rank than Acts of Parliament, like royal decrees and ministerial decrees. The assumption used to be that their rank was not changed due to their material status of organic law. However, the fact that these instruments have a direct basis in the Constitution may put them on par with Acts of Parliament or even at a higher level than normal Acts of Parliament. Recent case law suggests that this view is correct.

The relevant judgment concerned an Act of Parliament which named the Minister of one ministerial department (Welfare, Public Health and Culture) as the competent minister under whose responsibility asylum seekers were to be provided with certain facilities. After a reshuffle of tasks among ministries, this matter was brought under the competence of another Minister (Justice) by royal decree based on article 44 of the Constitution.⁹³ The *Afdeling bestuursrechtspraak Raad van State* (Administrative Law (Judicial) Division of the Council of State) decided in the highest instance that the royal decree could change the internal division of tasks between ministers because, if this were to require an amendment of all relevant legislation, this would obviate the purpose of article 44 of the Constitution. It held that an Act of Parliament cannot detract from the power of the government under the Constitution, although the exercise of such power remains subject to the normal principles of the parliamentary system—and thus a royal decree based directly on a constitutional provision has priority over a normal Act of Parliament.⁹⁴

e) Constitutionalization and Private Law

The relation of the Constitution to the legal order can also be viewed from the perspective of the manner in which constitutional norms permeate the rest of the legal order which itself is not of a constitutional nature—it concerns ‘constitutionalization’ of areas that are not primarily constitutional law, both those that concern the relations between public authorities and citizens but between private persons (legal and natural).

The phenomenon mainly focuses especially on the role of fundamental rights in the relevant field of the law, such as the role of fundamental rights and principles in criminal procedure and in administrative proceedings, but also particularly in private law.

The modern literature on the constitutionalization of private law extends further than the nineteenth century view of fundamental rights as establishing civil society, a sphere of freedom as against the State, which the civil code regulates in terms of that freedom among citizens, i.e. fundamental rights and freedoms enabling civil law. It is about the penetration of constitutional rights and freedoms as goods that must be upheld also *within* the civil relations regulated by private law. As a consequence, much of the relevant literature still concentrates on the direct or indirect ‘horizontal’ effect which can be attributed to constitutional fundamental rights in relations between citizens *inter se*.

⁹³ Art 44 of the Constitution, which provides that ministries are established by royal decree.

⁹⁴ ABRvS, 10 October 2004, ECLI:NL:RBAMS:2001:AB0942.

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

A standard judgment⁹⁵ of the *Hoge Raad* is the *Aidstest* case,⁹⁶ concerned a civil case between a victim who asked for a court order to submit her rapist, X, to an HIV test, both in order to limit the damage she suffers as a consequence of the rape and to spare her a further traumatic experience. The legal basis adduced for this is reparation in kind. The *Hoge Raad* held that:

On the basis of the rules [on tort] under article 1401 [now: 6:162] *Burgerlijk Wetboek* [Civil Code] [the victim] has a right to the consequences being limited as much as possible by the offender, and that these are relieved as much as possible by a suitable form of compensation. . . . [She] has a right to cooperation by X in the form of him taking a blood test. In this respect, X cannot successfully rely on his right to physical integrity derived from article 11 of the Constitution, as this right has its limits in restrictions by or pursuant to an act of Parliament. At any rate between citizens *inter se*, such a restriction can in principle be founded on article 1401 [of the Civil Code], this also in connection with the norms of propriety which must be respected in social intercourse which inhere in this article.

In the light of the [established facts], such a restriction must here be assumed. The interest of plaintiff in X having to take a blood test is of sufficient weight in relation to X's interest protected by his fundamental right, to justify this restriction. Moreover, this restriction, which is obvious in the framework of the relevant norms, can be deduced with sufficient clarity from these norms.

How can we understand this 'constitutionalization' of private law?

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

The context of at least the *Aidstest* judgment, however, is the civil law duty to limiting the damage caused by an unlawful act. Also, the interpretation of the restriction clause is entirely

⁹⁵ In an earlier case about a judicial order restraining religiously inspired discriminatory speech HR 2 February 1990, ECLI:NL:HR:1990:AB7894 the HR held 'that art 6 para 1 Constitution, art 9 para2 European Convention on Human Rights and art 18 para 3 of the International Convention on Civil and Political Rights permit certain restrictions imposed on the exercise of the freedom of religion, and that art 1401 *Burgerlijk Wetboek* [Civil Code], which protects against utterances which are offensive, unnecessarily aggrieving or which invite discrimination, must be considered to provide such a justified restriction.' This suggests direct horizontal effect.

⁹⁶ *Hoge Raad* 18 June 1993, ECLI:NL:HR:1993:ZC1002, *Y v. X* [*Aidstest*] (interim injunction proceedings).

specific to the private law context. It is one element in the balancing of a number of interests in a private law context of tort law which works with 'open' norms. This may lead one to conclude that the fundamental right is given indirect effect only, in as much as the effect is mediated by principles of private law.⁹⁷

Although the case cited article 11 of the Constitution only, this is rather exceptional, and should not lead one into thinking that this 'constitutionalization' is mainly steered by the Constitution. The case law on horizontal effect shows it is at least as much dominated by the ECHR and similar human rights treaties, which are predominantly understood to have supra-constitutional rank.

2. The Relation of the Constitution to Politics and Democracy

The relation of the Constitution to politics is mainly considered to be one of providing the framework for the political system. Substantive notions of democracy are implicit in the provisions of the Constitution. The term 'democracy' does not appear in the text of the Constitution. In the Dutch context, democracy has been taken to refer not only to the political institutions, but also to the manifold varieties of citizens' participation in the public domain through the institutions of civil society and direct participation. We make a few remarks first about the Constitution as a political constitution,⁹⁸ second about the representational nature of the political institutions and finally about the broader concept of democracy of civil society's and citizens' participation within public law.

The Constitution is still very much a political constitution like it was in the nineteenth century. It provides primarily a framework for politics to function.

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

The framework in the Constitution itself is quite sketchy for that matter, which deliberately has not codified the fundamental rule of the parliamentary system, the rule of no confidence, which exists only as a rule of customary constitutional law. It is kept that way to retain some flexibility in the system. Should there arise new political relations, the system can adapt to that and does not require constitutional amendment, so the reasoning goes.

Although certain elements of the political system related to the parliamentary system have been codified in the Constitution, such as accountability through ministerial responsibility,⁹⁹ and the system of proportional representation within the limits set by Act of Parliament,¹⁰⁰ there are some examples of political conventions which are so closely involved with the functioning of the system of government that they may have constitutional status. Moreover, they exhibit potentialities of change and development which confirm the relative flexibility of the system.

⁹⁷ This was the conclusion of Advocate General Koopmans in his opinion to the *Hoge Raad* in the *Aidstest* case (ibid).

⁹⁸ John A G Griffith, 'The political constitution' (1979) 42 *Modern Law Review* 1, 21.

⁹⁹ Art 42 para 2.

¹⁰⁰ Art 129 para 2.

There are several examples of this flexibility. One of them was sketched above, where the development of the governmental right to dissolution of the Lower House in the direction of a right of 'self-dissolution' was sketched (section C.3).

Another example is the increased profile of the Prime Minister. His position has in practice gradually developed from one among equals towards one above equals (though not unambiguously). This has also left traces in the *Reglement van Orde van de ministerraad* (Rules of Procedure of the Council of Ministers). The Prime Minister is not merely chairing a meeting of equals but has—usually in coordination with ministers concerned but sometimes without his cooperation—agenda-setting powers.¹⁰¹ Thus, he can push decision-making in the council of ministers against the wishes of individual ministers.

Perhaps more significant is a recent development in the practice of large political parties during elections. The Prime Minister is not directly elected because the elections are elections for the members of the Lower House only. Since the convention of 1922, according to which cabinets offer their resignation on the eve of elections for the Lower House, elections for the Lower House imply the forming of a new cabinet, based on the results of the elections. Nowadays, in electoral campaigns of political parties, the name of their candidate for the post of Prime Minister, should the party win in the elections, is put forward. The *Partij van de Arbeid* (Labour Party) failed to do so in the elections of 2003. Under huge pressure from other parties, who ridiculed the unclarity and unforthcoming position as to their candidate Prime Minister, it was forced to reveal to the electorate their candidate. If one persists with this practice, as has been the case, the Lower House elections informally also become elections on Prime Ministerial candidates, without any formal rule on elections for the Prime Minister being included in the text of the Constitution.¹⁰²

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

At the national level, the Constitution gives legislative power to parliament and government acting together. A binding referendum is by many considered to be an interference with this clear attribution of legislative power. Hence, it is argued, the introduction of a binding referendum on legislative acts requires constitutional amendment. The same applies *mutatis mutandis* for provincial and municipal referenda because the Constitution locates the legislative power at provincial and municipal level in the provincial and municipal councils.¹⁰³ As mentioned above, the *staatscommissie Biesheuvel/Prakke* proposed the introduction of a corrective and binding legislative referendum at the national level in 1985,¹⁰⁴ but this was not taken up at the time. Two attempts to follow up on this, one in 1999 and one in 2004, were aborted. In both proposals the thresholds for holding a referendum were high.

Without constitutional amendment, only *consultative*, legally non-binding, referenda are constitutional. In 2001 a Temporary Referendum Act, *Tijdelijke referendumwet*, made the organization of a consultative referendum possible, but never led to a referendum, and expired

¹⁰¹ Arts 6, 7, and 16 of the Rules of Procedure of the Council of Ministers.

¹⁰² Griffith as the proposal of the *Cals-Donner* committee, above section B.4.b.

¹⁰³ Art 127 of the Constitution. Some municipalities have byelaws which make the calling of a consultative, non-binding referendum possible.

¹⁰⁴ *Eindrapport van de staatscommissie van advies inzake de relatie kiezers-beleidsvorming: Referendum en volksinitiatief*, 1985; a later committee established by the Lower House endorsed the earlier commission's referendum proposals: Rapport Tweede Kamer externe commissie vraagpunten staatkundige, bestuurlijke en staatsrechtelijke vernieuwing «Het bestel bijgesteld», Kamerstukken TK 1992/1993, 21 427, nn 36–7 and TK 1993/1994, 21 427, nn 64–5.

on 1 January 2005. The infamous national referendum on the EU Constitutional Treaty of 1 June 2005, was made possible by the adoption of a special act at the initiative of the Lower House. It was consultative and preceded final political decision-making. The high turn-out (63 per cent) and the clear negative of some 62 per cent of the voters made any further consideration of ratification impossible. Thus, merely consultative referenda turned out to be politically binding.

This was confirmed in two later consultative referenda that were based on an Act on the Consultative Referendum of 2014. In order to organize a referendum, an introductory request of 10,000 people had to be supported by at least 300,000 people with the right to vote. A referendum had to concern an Act of Parliament and would have to be called within eight weeks after an act received royal consent, for which purpose the entry into force would have to be postponed until after the referendum. Two referenda were held, one concerning the Act of Approval of the Association Agreement of the EU with Ukraine in 2016 and on the Act on the Intelligence and Security Services in 2018. In both cases a majority rejected the Act in question. In both cases the government and parliament followed the outcome, in the sense that the government negotiated an interpretative declaration to the Association Agreement and changed the Act on the Intelligence and Security Services on points on which most concern was expressed in the referendum campaigns.

In 2018, based on the coalition agreement between the Christian Democrat party, CDA (against referenda), the Liberal Party, VVD (also against referenda), the orthodox Christian party CU (against referenda), and the centre-left liberals D66 (in favour of referenda), the Act on the Consultative Referenda was rescinded, and a pending amendment of the Constitution to enable the introduction of a legally binding referendum, which had passed on first reading, was withdrawn in 2018. Far from ending the debate on binding referenda, a member of the Lower House introduced a bill to introduce binding legislative referenda at national and decentral level in 2019, which acquired a majority in both Houses at first reading (in the Lower House with a nearly two-thirds majority, but in the Upper House with only a very small majority of three votes).¹⁰⁵ This constitutional amendment sets the majority required for rejecting an adopted piece of legislation by referendum in such a manner that it does not undermine the representative nature of parliament, but acts as an at least equally representative popular correction: the number of votes required to reject legislation must comprise at least a majority of the number of validly cast votes by citizens in the last elections for the Lower House. Thus, the majority of citizens required to correct a bill adopted by parliament is aligned to the number of citizens having cast a vote for the Lower House. This is a numerical alignment of direct democracy to representative democracy that may be understood as a guarantee of the representative nature of democracy in the Netherlands. It reinforces instead of weakens representative democracy.

As we discussed above (section C.1), the dissolution of the Lower House with a view to amendment of the Constitution is not a referendum in disguise, nor does it introduce a plebiscitarian element in the constitutional system. Quite to the contrary, the election of a new Lower House guarantees the *representative* nature of the constitution-making power which is to decide on the amendment proposed by the legislature in 'first reading'.

The explanation for this emphasis on the representative nature of democracy in the political institutions is historical. Before secularization struck, Dutch society was composed

¹⁰⁵ The act containing the proposal adopted at first reading is, the Act of 1 February 2021, *Staatsblad* 2021, 58.

of minorities of political and religious denominations which acted in the political system through their political elites in a strictly representative manner.

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

Precisely this representative nature enhanced the respect for minority positions in an electoral system based on proportional representation in which no particular political group could claim a majority position. Since denominational politics waned, the floating vote has increased and so has the request for introducing features of direct democracy within the political system at national level.

The historic background of the social composition of the Netherlands also explains the constitutional status granted to what are essentially institutions of civil society, like the public bodies of professions, trade, and industry under article 134 of the Constitution.¹⁰⁶ These have been given powers to legislate and carry out executive tasks; for instance, those public industrial bodies involved in agriculture have an important role to play in implementing EU legislation.¹⁰⁷

So, as already pointed out,¹⁰⁸ in the Dutch context, representative democracy is not the same as parliamentary democracy. It is consociationalism, and was expressed by reference to the public bodies we just mentioned in 1938, not because of quasi-fascist corporatist thought (which had little support in those days in the Netherlands), but because of the historical situation in which denominational and political minorities were not only organized in political parties, but organized the whole of their social and religious life in 'pillars' of own organizations, some of which in relation to the economy were given a status under public law for which a constitutional basis was created.

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

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

At the central level, there had developed over the years an enormous culture of consultation. Usually (but not exclusively) this consultation was through a very large number of official advisory bodies in nearly every field of government activity in relation to any topic; some say over a hundred of such bodies existed. In those advisory commissions and committees,

¹⁰⁶ Art 134 para 1.

¹⁰⁷ Art 134 para 2:3. Supervision of the administrative organs shall be regulated by an Act of Parliament. Decisions by the administrative organs may be quashed only if they conflict with the law or the public interest.

¹⁰⁸ See Section B.4.a.

most social interests and experts were represented, thus creating a firm basis of social consensus and support for government measures in the field.

In 1996, an act was passed by which most of the consultative commissions of experts and social actors at national level were abolished and channelled into a limited set of advisory commissions, in principle one per ministerial department. This Act was referred to in popular parlance as the 'Desert Act' (*woestijnwet*).¹⁰⁹ Simultaneously, an Act was passed streamlining whatever advisory committee was left and determining that their members could only be experts and not civil society's representation.¹¹⁰ Arguably, this reduces social input in the early stages of the decision-making process. Studies have suggested that there are still many ad hoc commissions and committees, but now mostly manned with politically selected persons.¹¹¹

Also, individual citizens were consulted in decision-making at decentralized levels. This was often based on municipal and provincial byelaws, later codified in the *Algemene wet bestuursrecht* (General Administrative Law Act), which entered into force in 1994. In its chapter on dealings between citizens and administrative authorities, it originally included two procedures of citizen participation in decision-making, a simplified one and a (very) extensive one. In July 2005, these two procedures were simplified into one uniform procedure for the preparation of decisions.¹¹²

The norms regulate the way citizens are informed of applications for decisions, the publication of draft decisions and the moments and manners in which citizens can state their views on these to the relevant public authorities, and how public authorities must take these into account. A public authority can decide if these norms apply, unless its application has been prescribed by statutory regulation, as was done e.g. in legislation on decision-making in the fields of urban and rural planning and concerning the environment.

In the Netherlands, democracy is a broad concept which is not restricted to the political system in the narrower sense of the term. This might one lead to expect there to be theories of popular sovereignty. But this proves not to be the case.

In the literature, several traces of early ideas of popular sovereignty have been identified.¹¹³ After the definitive demise of French revolutionary ideas after the ousting of the French in 1813, however, a theory of sovereignty of the people was impossible to sustain, if only because protestant political thought in a principled manner rejected the French Revolution for its alleged denial of God's sovereignty. This was so for the two major protestant Christian-democrat parties, the *Christelijk-Historische Unie* and the oldest political party in the Netherlands the *Anti-Revolutionaire Partij*, both of which merged with the catholic party into the Christian-Democrat Party, *CDA*, in the early 1970s.

In other words, neither sovereignty nor popular sovereignty were clearly articulated in constitutional theory, beyond the notion of influence of the people or democracy, and this concept taken in a much broader sense than in, for instance, German constitutional theory (and practice).

¹⁰⁹ Act of 3 July 1996, *Stb.* 377.

¹¹⁰ Act of 3 July 1996, *Stb.* 378.

¹¹¹ Wijnand Duyvendak and Rinus van Schendelen, *Schaduwmacht in de schijnwerpers* (Sdu Uitgevers, Den Haag, 2005).

¹¹² Art 3:10–3:17 of the *Algemene wet bestuursrecht*.

¹¹³ See for instance Martin van Gelderen, *The Political Thought of the Dutch Revolt 1555-1590* (CUP, Cambridge, 1992). Some of the sources are published in Martin van Gelderen (ed and trans), *The Dutch Revolt [Cambridge Texts in the History of Political Thought]* 1993.

3. *Rechtsstaat*: Fundamental Rights and Legality

The idea of the *rechtsstaat*—the Dutch is borrowed from the German—is part of the vocabulary of political and sometimes popular discourse. Its content and meaning within this discourse are very diverse, as we shall presently see.

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

The concept of the *rechtsstaat* has various connotations in the Dutch context. In the constitutionalist sense the term refers to the public legal order being governed by the rule of law. In the literature it is taken to comprise legality, division of powers and, last but not least, the protection of fundamental rights.¹¹⁴ When it is also taken to comprise democracy, it becomes a quite broad concept.

In popular and political discourse, the concept becomes even more stretched, as shorthand for a desired material content of legal norms or the political order, a normative concept which does not refer to a present state of law, but to a desired state of law. Also, the concept of *rechtsstaat* is frequently not used for indicating the limits to the exercise of public authority, but, to the contrary, as the principle that citizens are bound to observe the law.¹¹⁵ This suggests that the notion is not merely relevant to the behaviour of public authorities, but as much to citizens' behaviour. The conclusion must be that the notion of the *rechtsstaat* is much broader than the notion of the rule of law which binds public authorities. From a liberal concept which aims to protect citizens against infringement of his liberty by the state, it has become a (neo-)republican concept in which it is assumed to bind the citizen as much as state organs to the major principles and norms of political society. A less optimistic view would be that this approach risks turning the concept upside down.

There is very little case law which uses the notion in any significant manner. When they do, it is sometimes used to indicate the particular position which an independent court of law or a judge takes within the legal order, sometimes to restrict his competence,¹¹⁶ but sometimes also to enhance his jurisdiction.¹¹⁷

¹¹⁴ Thus, for instance MC Burkens, Henk RBM Kummeling, Ben P Vermeulen, and Rob Widdershoven, *Beginselen van de democratische rechtsstaat* (8th edn, Wolters Kluwer, Deventer, 2017) is a textbook which is used in several law faculties as a first-year textbook introduction to constitutional law.

¹¹⁵ For instance in Rb Alkmaar, 15 June 2005 ECLI:NL:RBALK:2005:AT7611, to qualify the seriousness of a punishable delict of stalking and threatening of a judge; Rb Alkmaar (interim injunctions), 19 May 2005, LJN: AT5806, holding that 'it is not in accordance with modern ideas of the *rechtsstaat* to publicly put to shame a person in an *ad hominem* manner' by publishing a person's photograph on a public website, accompanied by derogatory text; Rb Arnhem, 26 April 2005, ECLI:NL:RBARN:2005:AT4651: 'To try to escape from detention by taking a public prosecutor and an interpreter hostage, is a flagrant infringement of the principles of the *rechtsstaat*'; Gerechtshof Arnhem 7 June 2002, LJN: AN8937 and LJN: AN 8932, political motives 'cannot within the *rechtsstaat* be a justification of proven cases of arson'. Rb Amsterdam, 15 July 2005, ECLI:NL:RBAMS:2005:AT9532. The case concerned an immediate expulsion of an imam for reasons of national security, which did not allow the person involved to await the outcome of a complaint's procedure, and which was based on an intelligence report concerning this person which had not been verified by the Minister of Justice. The court noticed that each of the parties to the conflict accused the other of acting in a manner which fundamentally infringes the *rechtsstaat*.

¹¹⁶ For instance Gerechtshof 's-Hertogenbosch, 5 August 2003, ECLI:NL:GHSHE:2003:AI0847: the fact that courts are bound to Acts of Parliament and cannot adjudicate their inherent merits or their fairness is 'one of the pillars of the democratic *rechtsstaat*, in which the judicial and legislative power are separate'.

¹¹⁷ For instance the fiscal chamber of the Hoge Raad, as well as the judicial branch of the Raad van State, decided that on the basis of the position and role of courts in the *rechtsstaat*, the impossibility to pay a court fee cannot deprive access to an appeal court, and is not to be regarded as a default on the part of the person involved, see HR 28 March 2014, ECLI:NL:HR:2014:699; RvSt 21 August 2019, ECLI:NL:RVS:2019:2810.

A more precise notion associated with the *rechtsstaat* is the protection of fundamental rights. This has become in many ways the main core of the constitutional system. Fundamental rights protection has two different sources: rights formulated in the Constitution, and rights formulated in human rights treaties to which the Netherlands is a party and which, on the basis of the rule of monism, form an inherent part of the national legal order, or, more precisely, of the constitutional order.

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

- the prohibition of discrimination and the right to equal treatment,
- the right to leave the country,
- the equal right of Dutch nationals to appointment in the public service,
- the right to vote and stand for election,
- the right to petition,
- freedom of religion,
- freedom of expression,
- right of association, assembly and demonstration,
- the right to privacy,
- the right to physical integrity,
- protection of the home,
- privacy of correspondence, telephone and telegraph,
- the right to compensation for expropriation in the public interest,
- personal liberty and *habeas corpus*,
- *nulla poena sine lege praevia*,
- access to courts according to the law,
- legal representation,
- the right to free choice of work,
- the right to provide education,
- the right to equal public financial support of public and private education,
- prohibition of imposing capital punishment.

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

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

Many, but not all, fundamental rights provisions in the Constitution contain a clause regulating the restriction of their exercise, particularly regarding the classic fundamental rights.¹¹⁸ In most cases, they define the public authority which can legitimately restrict the

¹¹⁸ The prohibition of discrimination and the right to equal treatment of art 1 of the Constitution. Other examples are the right to petition (art 5 of the Constitution) and the prohibition to impose the death penalty (art 114 of the Constitution).

exercise of a right. This body is invariably the legislature. By an Act of Parliament, it can restrict the exercise of a right. Often this power can also be delegated to other legislatures by an Act of Parliament. Sometimes it is reserved to the legislature itself, as is the case with:

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

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

No proportionality principle comparable to those in articles 8–11 ECHR can be found in the Netherlands Constitution. Worse, the *Hoge Raad* has confirmed the view that a restriction imposed is not subject to the principle of necessity as in the ECHR, and therefore neither to the proportionality principle.¹¹⁹ This is controversial because it implies that the makers of the Constitution are supposed to have allowed unnecessary and therefore disproportional restrictions to be imposed.

In principle the classic rights are justiciable, while many of the social, economic, and cultural rights are framed as policy objectives that cannot easily be invoked in court.¹²⁰ This is not to say that they have no legal value. The literature submits that under certain circumstances these can be considered as standstill-provisions, i.e. that they would prohibit acts of public authorities which aim to reach objectives which are the contrary to the objectives formulated in these provisions.¹²¹ And, in some cases,

¹¹⁹ HR 2 May 2003, ECLI:NL:HR:2003:AF3416, paragraph 4.3.4, where it states that art 7 of the Constitution 'does not require a restriction of the freedom of expression to be necessary in a democratic society'.

¹²⁰ For instance, art 19 para 1: it shall be the concern of the authorities to promote the provision of sufficient employment; art 20 para 1: it shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth; art 21: it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment; art 22: 1. The authorities shall take steps to promote the health of the population. 2. It shall be the concern of the authorities to provide sufficient living accommodation. 3. The authorities shall promote social and cultural development and leisure activities; art 23 para 1: Education shall be the constant concern of the Government.

¹²¹ Aalt W Heringa, *Sociale grondrechten – hun plaats in de gereedchapskist van de rechter* (dissertation RULeiden, 1989); Henk RBM Kummeling, 'Grondrechten en de taak van de overheid in het licht van zelfregulering', in Henk RBM Kummeling and Sophie C Van Bijsterveld (eds), *Grondrechten en zelfregulering* (WEJ Tjeenk Willink, Deventer, 1997) 31–50; Frank MC Vlemminx, 'Het juridisch tekort van de sociale grondrechten in de Grondwet' (1996) NJB, 1201; Frank MC Vlemminx and Henk RBM Kummeling, 'Algemene situering van sociale grondrechten in de Nederlandse rechtsorde', in Bernard Hubeau and Roel De Lange (eds), *Het grondrecht op wonen* (MAKLU, Antwerp, 1995); As to the equivalent provisions in international treaties, Godefridus JH van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of some Traditional Views', in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Nijhoff, The Hague, 1984) 97–111.

courts have referred to them as an additional element in construction of other legal norms.¹²²

One barrier to review against constitutional fundamental rights is the prohibition for courts to review the constitutionality of Acts of Parliament (article 120 of the Constitution). This has two important consequences.

Firstly, a large number of constitutional-rights provisions allow restrictions by or pursuant to Acts of Parliament. The constitutionality of such acts cannot be reviewed. Also, the constitutionality of delegated measures which restrict the exercise of a fundamental right cannot be reviewed to the extent that the restriction by delegated instrument is determined by the Act of Parliament; in this case, reviewing the constitutionality of the delegated instrument implies the review of the Act of Parliament on which it depends. Just to avoid misunderstanding: if the actual restriction is imposed by a delegated act and does not substantively derive from the Act of Parliament, courts can indeed review their constitutionality, which is why courts have reviewed municipal byelaws, e.g. against the constitutional right of freedom of expression.

Secondly, the prohibition for courts to review the constitutionality of Acts of Parliament under article 120 of the Constitution shifts judicial review towards review against human rights contained in treaties under article 94 of the Constitution. This is the only possibility as regards an alleged infringement by an Act of Parliament.

As article 94 of the Constitution implies the priority of directly effective provisions of human rights treaties, human rights treaties are of enormous constitutional importance in the Netherlands legal order.

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

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

¹²² Thus, in one case concerning a seriously ill mother and her three children, of which one had psychiatric problems, who had no housing and which the municipality of Utrecht had refused to provide a dwelling, the concern of public authorities to provide sufficient living accommodation under art 22 para 2 of the Constitution was taken as the key starting point for interpreting other legal instruments and the duty of the municipality to act lawfully; Pres. Rb Utrecht 18 June 1991, NJ 1992, 370. Another case concerned the access to a special primary school for handicapped persons, which had been refused due to lack of sufficient staffing, in which the President of the *Afdeling Rechtspraak Raad van State* found an additional argument to nullify this refusal in the principle behind the duty of public authorities to provide sufficient primary education in all municipalities (art 22 para 4 of the Constitution), President *Afdeling Rechtspraak Raad van State*, 10 May 1989, AB 1989, 481.

4. Horizontal and Vertical Division of Powers

The horizontal division of powers is no longer apparent from the text of the Constitution. Until 1983 the Constitution used the language of the *trias politica*. The fifth part of chapter V of the Constitution was entitled 'On the legislative power', '*Van de wetgevende macht*', and its first article read: 'The legislative power is exercised jointly by King and States General.'¹²³

The executive power was also mentioned: 'The executive power is vested in the King.'¹²⁴ The matter with the judiciary was more subtle. One provision stated that 'the judicial power is to be exercised by the judges that an Act of Parliament indicates',¹²⁵ while another provision attributed the settlement of disputes over property and related issues to 'the judicial power'.¹²⁶

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

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

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

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

One can say that even though in the Constitution the chapters on the King and the government come before that on the parliament, the legislative power has dominated the executive power. This was affirmed in the nineteenth century process of the liberal constitutional reforms and the development of a parliamentary system of government, culminating in the *Meerenberg* case of the *Hoge Raad* (see Section C.4). The executive is thus subjected to the laws enacted by the legislative power, that is the power whose exercise requires the cooperation of parliament.

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

The growth of executive dominance in government has been compensated by forms of judicial control beyond what was usual before the 1960s. In the Netherlands, this has taken two forms.

¹²³ Art 119 of the Constitution of 1972: 'Legislative power is exercised by the King and States General jointly.'

¹²⁴ Art 56 of the Constitution of 1972: 'Executive powers shall lie with the King.'

¹²⁵ Art 169 of the Constitution of 1972: 'Judicial power shall be exercised only by the judges indicated by act of Parliament.'

¹²⁶ Art 167 of the Constitution of 1972.

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

Parallel to the expansion of administrative litigation, the civil courts have become quite active in reviewing cases against public bodies, which they are competent to do whenever administrative courts had no competence to hear the case. Thus, the review of regulations issued by the executive has become a full review not only on points of *vires* and legality, but also substantively against principles such as reasonableness and proportionality, which are sometimes applied with less reservations than in administrative courts.

While the relation between judiciary and executive has seen a steady increase of the role of the judiciary and administrative courts,¹²⁷ no very fundamental change has occurred in the relation between the legislative power and the judiciary since 1848, or at least since the power to review the compatibility with self-executing treaty provisions was introduced.

We briefly indicated above (Section C.4) that the prohibition under Article 120 of the Constitution concerns primarily the division of powers between legislative and judicial power.

It is standing case law that regulatory acts can be reviewed for their compatibility with higher law,¹²⁸ including both the Constitution and unwritten general principles of law; but such review does not extend to Acts of Parliament.

This was confirmed in the important *Harmonisatiewet* judgment of the *Hoge Raad* in which the scope of the prohibition of article 120 of the Constitution regarding acts of parliament was reassessed.¹²⁹ The case concerned the allegation that an Act of Parliament, which aimed at reducing the number of years during which students could receive a grant, was in conflict with the principle of legal certainty because it also affected students who had already begun their studies under the assumption that they would profit from such grants for the full duration of their studies. One of the central questions was whether article 120 of the Constitution, which in its 1983 reading speaks only of review of the 'constitutionality' of acts of parliament, should be understood as also prohibiting review against unwritten fundamental legal principles. This question arose all the more because, *before* 1983, the provision spoke of the 'inviolability' of acts of parliament, which was taken to cover any form of judicial review.

¹²⁷ In the Netherlands, except for the administrative law sections in district courts, and the tax chamber at the *Hoge Raad*, the members of other administrative courts are not constitutionally members of the judiciary in the sense of art 116 para 1 and 112 para 2 of the Constitution; art 116: '1. The courts which form part of the judiciary shall be specified by act of Parliament'; art 112: '2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by act of Parliament'. Judges and the procedure in administrative courts live up to all requirements for judges who formally are part of the judiciary.

¹²⁸ HR 16 May 1986, ECLI:NL:HR:1986:AC9354.

¹²⁹ HR 14 April 1989, ECLI:NL:PHR:1989:AD5725.

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

In using this language, the *Hoge Raad* indicated that the relevant Act was indeed considered to infringe the principle of legal certainty.¹³⁰ It may be inferred from this that courts are only unable to attach to a judgment on the infringement of such a principle the legal consequence of the inapplicability or invalidity of an Act of Parliament, but that they can indeed pass judgment on the compatibility with unwritten fundamental principles. As such unwritten principles are covered by the prohibition of article 120 of the Constitution, one may also assume that a judgment of incompatibility with a provision of the Constitution could be made by a court, as long as the court does not disapply the relevant Act of Parliament. This would bring the situation very close to the situation in the UK under the Human Rights Act 1998, where such declarations of incompatibility have been formalized. It should be emphasized, however, that the *Hoge Raad* has never ever since this one judgment repeated a similar declaration of incompatibility.

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

As we pointed out in Section C.4, the *Hoge Raad* has confirmed that orders to legislate in a specified manner are impossible, even when it regards legislative acts of territorially decentralized legislatures.¹³¹ That would infringe the separation between the legislative and the judicial powers.

The *Hoge Raad* does allow court orders *not* to apply executive legislation (so any regulations issued by any instrument other than an Act of Parliament) and legislation by territorially decentralized bodies when this legislation conflicts with higher norms. Such an order cannot, of course, apply to Acts of Parliament if it concerns an alleged infringement of provisions of the Constitution or unwritten general legal principles, since this is the very essence of the prohibition of article 120 Constitution, as explained in the *Harmonisatiewet* judgment. The exception remains article 94: a conflict with provisions of treaties and of decisions of international organizations which are ‘binding on all persons’. In this case, also Acts of Parliament can be reviewed, and an order not to apply them is indeed possible.

Also, there is the possibility of damages for legislative executive decisions which infringe on unwritten principles of law or other higher norms including constitutional norms.¹³² *Francovich* damages can no doubt be awarded under the law of the Netherlands without infringement of the separation of powers, and this extends to Acts of Parliament (*Factortame* liability), although no case has yet occurred in practice, as fits with the separation of powers and the intention of Article 94 of the Constitution.

¹³⁰ Ibid: ‘3.1. The first part of the grounds adduced in this appeal, raises the question whether art 120 of the Constitution leaves courts the freedom to review the conformity of acts of Parliament with fundamental principles of law. In the judgment of 16 May 1986, NJ 1987, 251, it has been implied that according to the Supreme Court this question ought to be answered in the negative. In that judgment the Supreme Court wishes to persist B however strongly it considers the provisions of the so-called Harmonization Act (Act of 7 July 1987, *Stb.* 334) to be in conflict with the justified expectations of the students involved and hence with the principle of legal certainty.’

¹³¹ See Section C.4.

¹³² HR 24 January 1969, ECLI:NL:HR:1969:AC4903 (*Pocketbooks II*).

As far as the country of the Netherlands within the Kingdom is concerned, the vertical division of powers is based on a model of decentralization within a unitary state. The Kingdom itself, comprising the country of the Netherlands, the three countries of Aruba, Curaçao, and St Maarten in the Caribbean, is better characterized as federal in nature.

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

As regards territorial decentralization within the Netherlands (in Europe), the Constitution speaks of the powers of provinces and municipalities to regulate and administer their domestic affairs, which ‘shall be left’ to their administrative organs.¹³³ This constitutionally guaranteed ‘autonomy’ has the flavour of federalism. But this is misleading. In fact, the tasks which municipalities and provinces carry out in practice are mainly tasks which have been required by higher legislation.¹³⁴ Also, the constitutionally founded mechanisms of supervision, which may extend also over autonomous decision-making, highlight the unitary guarantee of the exercise of decentralized powers. Thus, not only may the government quash provincial and municipal decisions for conflicting with law, but also with the general interest. Obviously, the government determines what is in the general interest.¹³⁵

Most effectively, the unitary element is retained through controlling the financial position of municipalities (which is the more important of the two territorially decentralized bodies, the other being provinces). Although municipalities have autonomous taxation powers, regulated by an Act of Parliament, and the most important of autonomous taxes (the tax on immovable property) accounts for over eighty per cent of the municipal taxes and levies, these in turn form less than nine per cent of the total municipal income.¹³⁶

5. The Absence of an Overarching Concept of Political Unity

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

The Constitution is in character not foundational, as we pointed out above at several places, although recently, politicians have suggested that immigrants should be taught ‘the

¹³³ Art 124 para 1 of the Constitution.

¹³⁴ Art 124 para 2 of the Constitution.

¹³⁵ Art 132 para 4 of the Constitution.

¹³⁶ For a critical analysis of recent tendencies, see the Council of Europe Report: Local and regional democracy in Netherlands, Kathryn Smith, Odd Arild Kvaloy and Dian Schefold (rapp), CG(12)16 PART2 Conseil de l’Europe. Congrès des Pouvoirs locaux et régionaux de l’Europe. Strasbourg.

principles and values of the Constitution'. But this suggestion is conspicuous for its strangeness to the constitutional culture.

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

Some inklings of a stronger concept of citizenship have become discernible though. Since the debate on the 'multicultural society' and the 'failed integration' of minorities took shape, nearly synchronous with the successful campaign of the unfortunate Pim Fortuyn,¹³⁷ official government policy has shifted the meaning of citizenship. Whereas previously the principle seemed to be that citizenship was a consequence of or at least attendant to long-term residence and nationality, now this relation has reversed: first one must show that one can be a citizen, who must be shown through the passing of 'integration' tests, *inburgeringsexamens*, which guarantee a certain knowledge of the language and society of the Netherlands, as a condition for long term residence, citizenship rights, and nationality. This may suggest a tentential inversion towards a (neo-)republican view, this time of citizenship.

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

E. Constitutional Identity

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

These characteristics can be explained on the one hand from the geographic and geopolitical position of the Netherlands within Europe, and from historical developments on the other. The geographic and geopolitical position of a relatively small country in the delta of great rivers, its location at crossroads between the United Kingdom to the West, Germany to the East, and (with Belgium as a buffer in between) France to the South, explains to a large extent the political and economic orientation, and the openness towards the outside world. Historically, the country had its *floruit* in the seventeenth century, when it was a confederation of provinces which claimed sovereignty—a confederation which functioned for over two centuries. The period immediately after the French Revolution was in a sense an interim period of centralism, initially national centralism with strong French influence, via indirect French rule to incorporation of the country into the Napoleonic Empire in 1810. This

¹³⁷ This was not merely Pim Fortuyn's work; in the conservative liberal party it was Frits Bolkestein, the later EU Commissioner, who had already repeatedly insisted on more active integration policies, while from Labour circles, it was Paul Scheffer who in January 2000 published an influential essay on the new 'social question' which was posed by lax and failed integration policies.

centralism was abandoned in the nineteenth century when the Prince of Orange was made the monarch three years later, in favour of a decentralized unitary state.

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

With secularization since the end of the 1960s, the tenability of this system of government became more controversial, when reforms towards a majoritarian system with more quasi-presidential features were proposed. None of these proposals proved successful, but the constitutional debates did lead to an overall revision, leading to a modernized Constitution in 1983—a Constitution which was novel mainly in placing a fuller catalogue of fundamental rights at the opening of its text (Chapter I of the Constitution).

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

The introduction of 'new' migrant minorities in the 1970s has created problems of accommodation. These minorities, though quite small, find themselves in different circumstances than the denominational minorities of the nineteenth and twentieth centuries. They are, on the whole, socially more disadvantaged and adhere to a 'stranger' religion which organizes itself differently from the 'old' religious and secular denominations. They also are characterized by weak structures of social and political representation and are confronted with a new largely homogeneously agnostic or secularized majority. This has fed both into mutually opposed forms of fanaticism in the fringes of both sides, which an increasingly fragmented mainstream politics has had difficulty to accommodate in terms of constitutional values or principles.

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

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

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

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

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

The first is the role of the ECHR. Precisely because of its supra-constitutional importance in the Netherlands, the fact that the European Union is not formally a party to this human rights instrument is viewed as a disadvantage.¹³⁸ This view found broad support in the Lower House.

Secondly, the *Hoge Raad* did draw a line on the role of the national judiciary in enforcing EU law by prohibiting courts from giving court orders that enjoin the legislature to pass specific legislation, even when it concerns the implementation of EU law. Thus, looking at the 'deep structure' of the relevant issues, the separation of powers between the judiciary and the legislature might be a battleground for a principle of democracy to be enforced in the face of EU law—even though such a principle of democracy is not made explicit in the relevant case law, and even though we do not see much battle on the frontiers of the national and EU legal orders in the Netherlands.

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

¹³⁸ For that very reason, in an advisory opinion to the government the *Raad van State* was exceedingly critical of the (then: draft-) EU Charter of Fundamental Rights. It 'strongly advised' not to make it a binding text because of possible divergences with the ECHR; Kamerstukken TK, 2000–2001, 21 501–20, A, p 8.