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Editor: *Alexander Kornezov*

General Rapporteur: *Miguel Poiares Maduro*

Institutional Rapporteurs: *Clemens Ladenburger, Yona Marinova  
and Jonathan Tomkin*

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**MUTUAL TRUST,  
MUTUAL RECOGNITION  
AND THE RULE OF LAW**

**CONFIANCE MUTUELLE,  
RECONNAISSANCE MUTUELLE  
ET ÉTAT DE DROIT**

**GEGENSEITIGES VERTRAUEN,  
GEGENSEITIGE ANERKENNUNG  
UND RECHTSSTAATLICHKEIT**

**THE XXX FIDE CONGRESS IN SOFIA, 2023  
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# THE NETHERLANDS

*Mielle Bulterman<sup>1</sup> and Jerfi Uzman<sup>2</sup>*

*Contributors: Victor van Ahee, Leonard Besselink, Monica Claes, Elise Filius, Lynn Hillary, Roel de Lange, Jurian Langer, Justin Lindeboom, Jannemieke Ouwerkerk, Barbara Schenk, Maarten Stremler.*

## Chapter 1. Concept of the Rule of Law

### Question 1

Given its continental legal tradition, the Dutch constitutional system has particularly been shaped by the concept of the *Rechtsstaat*: a concept that remains undertheorised in Dutch law. Until very recently, neither the term ‘Rechtsstaat’ nor the term ‘rule of law’ figured in the Dutch Constitution. It was thought that the Constitution embodies the principles of democracy and the rule of law by virtue of its normative content, rather than through abstract stipulations.<sup>3</sup> Moreover, the Dutch Constitution is traditionally thought to provide a framework for open constitutional development, rather than a document set in stone.<sup>4</sup> In 2022, the Constitution was, however, amended to include a new provision, stating that it protects ‘fundamental rights, democracy and the rule of law’.<sup>5</sup> According to the government this ‘*Rechtsstaat à la Hollandaise*’ includes at least four pillars: the principle of legality, separation of powers, judicial independence, and the protection of fundamental rights.<sup>6</sup> These pillars are instrumental to achieve a set of ‘rule of law values’: legal certainty, equality, and individual freedom.<sup>7</sup> These are widely accepted as the core principles of the rule of law in the Netherlands.<sup>8</sup> However, within these broad terms, the constitutional legislature left room for

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<sup>1</sup> Head EU law division at the Dutch Ministry of Foreign Affairs

<sup>2</sup> Professor of Constitutional Law, University of Amsterdam

<sup>3</sup> See e.g. Parliamentary debates, *Handelingen I* 1936/37, 7 april 1937, no. 105, p. 530.

<sup>4</sup> M. Adams & G. van der Schyff, ‘Constitutional Culture in the Netherlands: A Sober Affair’, in M. Adams et al (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2017, pp. 358-385, at p. 363.

<sup>5</sup> Literally: the ‘democratic *rechtsstaat*’. See *Kamerstukken II* 2020/21, 35786, no. 2.

<sup>6</sup> *Kamerstukken II* 2015/16, 34516, no. 3, p. 6.

<sup>7</sup> F.J. van Ommeren, ‘De rechtsstaat als toetsingskader’, in F.J. van Ommeren & S.E. Zijlstra (eds.), *De rechtsstaat als toetsingskader*, Deventer, Kluwer, 2003, pp. 7-22, at 18.

<sup>8</sup> See e.g. Council of State Yearly Report 2019, *Evenwicht in de rechtsstaat*, Den Haag, RvS, 2019, pp. 4-5; Netherlands Scientific Council for Government Policy (WRR), *Future of the National Constitutional State*, report 63, The Hague, 2003, p. 24.

different interpretations. Moreover, the Dutch constitution is to a large extent a politically enforced constitution which explicitly facilitates political contestation about the content of constitutional values.<sup>9</sup>

Although a uniform conception of the *Rechtsstaat* has thus far been absent, it is fair to say that Dutch legal doctrine and practice assume a fairly broad understanding of the rule of law.<sup>10</sup> In terms of the widely used distinction, developed by Tamanaha<sup>11</sup> and others<sup>12</sup>, the concept in the Netherlands can be said to be both substantive and, to some degree also thick. It includes fundamental rights protection, and stretches towards the inclusion of socio-economic rights.<sup>13</sup> And although the *Rechtsstaat* and democracy are regularly considered to be separate concepts, it is often acknowledged that they come as a package deal.<sup>14</sup> It is customary to refer to the Dutch constitutional system as a ‘democratic *rechtsstaat*’, which is regularly translated as ‘constitutional’ or ‘liberal democracy’. This means that the Dutch understanding of the rule of law is indeed closely linked to liberal-democratic values such as limited democracy, and fundamental rights. With the possible exception of human dignity – which traditionally plays a very limited role in Dutch constitutional law<sup>15</sup> – liberal democratic values in the Netherlands thus broadly run parallel to the values mentioned in Article 2 TEU. This adherence to liberal-democratic values is enshrined in the Dutch political system. Liberal democracy cannot flourish without it being underpinned by a shared set of constitutional values which are part of the broader social culture. Social, economic and cultural diversity are part of Dutch society, and already for decades, the political culture has facilitated the recognition of minority rights.<sup>16</sup> Given the electoral system of proportionate representation, building coalitions is a necessity in constitutional politics. Basic consensus about the key substantive constitutional principles enables this kind of politics.

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<sup>9</sup> See e.g. J. Uzman, ‘Changing Tides: the Rise (and Fall?) of Judicial Constitutional Review in The Netherlands’, in G. Franco Ferrari et al (eds.), *The Dutch Constitution Beyond 200 Years Tradition and Innovation in a Multilevel Legal Order*, The Hague, Eleven, 2018, pp. 257-271, at 258.

<sup>10</sup> R. Janse, ‘Rechtsstaatscultuur’, *Netherlands Journal of Legal Philosophy*, Vol. 49, No. 2, 2020, pp. 143-148.

<sup>11</sup> B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004, pp. 91-113.

<sup>12</sup> See e.g. A. Bedner, ‘An Elementary Approach to the Rule of Law’, *The Hague Journal on the Rule of Law*, Vol. 2, No. 1, 2010, pp. 48-74.

<sup>13</sup> The inclusion of socio-economic rights as part of the rule of law has never been entirely uncontroversial, but they are included in Articles 19-23 of the Constitution.

<sup>14</sup> E.g.: E.M.H. Hirsch Ballin, ‘De rechtsstaat: wachten op een nieuwe dageraad?’, *Nederlands Juristenblad*, Vol. 86, No. 2, 2011, pp. 71-73.

<sup>15</sup> J.P. Loof, ‘Human Dignity in The Netherlands’, in P. Becchi et al (eds.), *Handbook of Human Dignity in Europe*, Heidelberg, Springer International, 2017, pp. 1-24.

<sup>16</sup> See e.g. E.M.H. Hirsch Ballin, ‘Constitutional Identity in the Netherlands: Sailing with Others’, in C. Callies & G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, CUP, 2020, pp. 222-242 (noting that the well-known Dutch ‘tolerance’ is not uncontested).

The Dutch *Rechtsstaat* also has a strong institutional dimension, in the sense that it recognizes the need for checks and balances and (independent) countervailing powers. Although the Constitution no longer mentions the principle of separation of powers, it clearly embraces this notion. However, the Dutch version is anything but strict, particularly in the demarcation of executive and legislative powers.<sup>17</sup> Rather than a strict model of separation of powers, the Dutch Constitution thus contemplates a system of checks and balances: of organizing mutual interdependence and control. Absent any formal constraints or mechanisms of constitutional dispute resolution, it is characterised by a strong dependence on a constitutional culture in which loyal cooperation and deference between the different organs of the state are crucial, yet not perhaps guaranteed.<sup>18</sup> Separation of powers in this context thus presupposes the existence of a constitutional culture in which officials walk a fine line between interinstitutional respect on the one hand, and providing counterweight on the other.<sup>19</sup> However, with the rise of party democracy, the administrative welfare state and its inherent complexity, the respective roles of the government and Parliament have transformed, thus affecting the classic separation of powers into what some have called *duas* or even *unitas* rather than *trias politica*.<sup>20</sup>

This is illustrated by recent developments with respect to the so-called Childcare allowances scandal, which concerned false and sometimes discriminatory allegations of fraud made by the Tax Administration in the distribution of childcare benefits. Although the Netherlands remains a well-functioning constitutional democracy with adequate safeguards in place the Venice Commission of the Council of Europe noted that the approach taken by officials, including the administrative courts, towards rule of law safeguards may have been too formal.<sup>21</sup> This has led to a renewed debate on the role of the courts, the interaction between the government and Parliament, and on substantive principles, most notably on the application of the principle of proportionality in administrative law.<sup>22</sup> At the

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<sup>17</sup> See e.g. L.F.M. Besselink, 'The Kingdom of the Netherlands', in L.F.M. Besselink et al (eds.), *Constitutional law of the EU Member States*, Deventer, Kluwer, 2014, pp. 1187-1242, at 1219-1220; C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional Law* (1st Ed.), The Hague, Kluwer Law Int., 2000, p. 59.

<sup>18</sup> J.J.J. Sillen & J. Uzman, 'Constitutionele hoffelijkheid als eis voor een weerbare rechtsstaat. Over loyale samenwerking, wederzijds respect en constitutionele conventies', in R.J.N. Schlössels et al (eds.), *Naar een weerbare rechtsstaat*, Deventer, Kluwer 2022, pp. 423-442.

<sup>19</sup> H.R.B.M. Kummeling, 'Evenwicht vereist tegenwicht', in Raad van State, *In gesprek. Bijdragen aan de dialoog over de rechtsstaat*, The Hague, RvS, 2020, pp. 27-33, at 27, 32

<sup>20</sup> T. Koopmans, *Courts and Political Institutions*, Cambridge, CUP, 2003, p. 247; A.F.M. Brenninkmeijer, *Nederlands juristenblad* 2012, p. 192.

<sup>21</sup> See Venice Commission, *Opinion No. 1031/2021 on the legal protection of citizens*, 18 October 2021, CDL-AD(2021)031.

<sup>22</sup> See e.g. the opinion of Advocates General Widdershoven and Wattel about proportionality review in administrative law: opinion of 7 July 2021, ECLI:NL:RVS:2021:1468, Judgment of the Council of State Administrative Division of 2 February 2022, ECLI:NL:RVS:2022:285.

same time, one might argue that the willingness of Parliament to proactively invite the Venice Commission to review the matter is also illustrative of this specific Dutch constitutional culture.

This brings us to the absence of judicial constitutional review. The Dutch concept of the rule of law traditionally contemplates a modest role for the judiciary within the separation of powers. For over a century, courts have – on the basis of Article 120 of the Constitution – been prohibited from reviewing statutory legislation against the Constitution, unwritten legal principles, and the Kingdom Charter.<sup>23</sup> Consequently the Netherlands, unlike many other EU member states, lacks a constitutional court. This does not mean that the Dutch concept of the rule of law denies the importance of judicial review by independent courts. The role of Dutch courts as guardians of the constitution has arguably always been more tangible than Article 120 of the Constitution would suggest. Moreover, the courts are empowered to review legislation against norms of international law, which in the monistic Dutch context, take precedence over domestic law. Particularly since the 1980's, Dutch courts have developed their own jurisprudence on the basis of this 'transnational *bloc de constitutionnalité*'.<sup>24</sup> Today, the Dutch *Rechtsstaat* would be unthinkable without this constitutional role of the courts as independent watchdogs. Moreover, a classic trait of the Dutch *Rechtsstaat* is also its commitment to the development of the international legal order.<sup>25</sup> This partly explains fundamental friendliness and a highly pragmatic attitude towards the relationship between the domestic and the EU legal order, and a willingness to approach the rule of law concept of legality from a distinctive international perspective.<sup>26</sup>

All in all, the conclusion would be that the Dutch concept of the rule of law is both relatively substantive and thick: it recognizes both fundamental rights and democracy as linked to the rule of law. Moreover although it has a somewhat unique tradition with the concept of judicial review of legislation, it envisages independent safeguards within the rule of law framework. The courts form a crucial part of these safeguards, but they are supplemented by other independent advisory or supervisory bodies.

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<sup>23</sup> See e.g. Uzman 2018; L.F.M. Besselink, 'Constitutional Adjudication in the Netherlands', in A. von Bogdandy et al (eds.), *The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions*, Oxford, OUP, 2020, pp. 566-618

<sup>24</sup> Besselink 2020, p. 567.

<sup>25</sup> See Article 90 of the Constitution.

<sup>26</sup> See e.g. Supreme Court of the Netherlands (HR), judgment of 2 November 2004, ECLI:NL:HR:2004:AR1797 (demonstrating the kind of reasoning that is totally incomprehensible for an outsider: see D. Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance', in M. Avbelj & J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart 2012, pp. 85-126, at 96).

## Question 2

It should be noted at the outset, that there is no single solid ‘Dutch’ understanding of the rule of law in the Union legal order. Having said that, the EU law concept of the rule of law seems to run parallel to the way in which the concept is perceived in the Netherlands.<sup>27</sup> Like the Dutch *Rechtsstaat*, the EU rule of law includes reference to well-known principles such as legal certainty, legality, effective legal protection and independent courts, protection of fundamental rights, and separation of powers.<sup>28</sup> However, a few qualifications can be made.

First of all, the rule of law in the EU context was primarily developed by the ECJ, given its specific function as a catalyst of integration.<sup>29</sup> This role of the judiciary in the development of the rule of law differs fundamentally from its domestic counterpart in the Netherlands. There, rule of law values are laid down in norms, which have, at least historically, primarily been shaped by the legislature. Article 120 of the Constitution is a clear expression of the political nature of these norms. This is not to say that Dutch courts have played no role in the development of either rule of law or constitutional values, but they are traditionally somewhat reluctant to engage in ‘constitutional matters’. It should be pointed out though that the influence of European law (in a broad sense- of including both EU and ECHR law) and comparative law has, to some extent, led to a ‘judicialisation’ of rule of law norms.

Furthermore, the rule of law notion as developed in the case law of the ECJ initially focused mainly on typically court-centered principles such as legality, judicial review, and effective legal protection.<sup>30</sup> Already in 1986, in its landmark judgment of *Les Verts*, the Court emphasised that the EEC is a community based on the rule of law, which basically means that neither the Member States nor the EU institutions could escape judicial review of their actions.<sup>31</sup> Thus, the concept of the rule of law in the EU context has a strong link with the Court’s qualification of the EU as a community based on the rule of law (*communauté de droit*) and with principles such as primacy, direct effect and effective legal protection.<sup>32</sup> This also

<sup>27</sup> Hirsch Ballin 2020.

<sup>28</sup> See e.g.: L. Pech, ‘The Rule of Law as a Well-Established and Well-Defined Principle of EU Law’, *The Hague Journal on the Rule of Law* 2022 (online publication, 19 May 2022), p. 6.

<sup>29</sup> M.L. Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague, Kluwer, 1999, p. 106; D. Kochenov, ‘The EU Rule of Law: Cutting Paths Through Confusion’, *Erasmus Law Review*, Vol. 2, No. 1, 2009, pp. 5-24, at 16.

<sup>30</sup> See e.g. K. Lenaerts, ‘The Rule of Law and the coherence of the judicial system of the European Union’, *CMLRev*, Vol. 44, 2007, pp. 1625-1659.

<sup>31</sup> Judgment of 23 April 1986, *Les Verts*, C-294/83, EU:C:1986:166, para. 23.

<sup>32</sup> D. Spielmann, ‘The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union’, in M. Élosegui et al (eds.), *The Rule of Law in Europe*, Heidelberg, Springer, 2021, pp. 3-20, at 7; G. Palombella, ‘Beyond Legality – Before Democracy. Rule of Law Caveats in the EU Two-Level System’, in C.



explains why the effective application of EU law as such, is considered to be an essential component of the rule of law.<sup>33</sup> As compared to the Dutch version of the rule of law, the link between effective legal protection and the rule of law has thus always been more developed in the EU law context. As we explain below (Q4), Dutch law did not, until recently, expressly recognize a domestic right to effective legal protection or access to courts.<sup>34</sup> It relied mainly on EU law and Articles 6 and 13 of the ECHR. These have greatly influenced, and partly also transformed the way in which Dutch courts perceived their role within the separation of powers.<sup>35</sup>

### Question 3

It should be noted at the outset that the term ‘agencies’ in Dutch public law has a different connotation than the way in which it is used in the questionnaire. The term is applied to a narrow set of bodies enjoying a varying degree of organisational autonomy. However, unlike so-called independent administrative authorities, agencies in the Dutch context are usually part of the departmental hierarchy and their independence is limited.<sup>36</sup> When we refer to regulatory agencies here, we thus specifically aim at what is also known as ‘autonomous public bodies.’<sup>37</sup> These are defined as ‘entrusting entities distinct from the core administration with [regulatory public authority]<sup>38</sup> and allowing them to execute these powers with a certain degree of autonomy in relation to the politically responsible institutions.’<sup>39</sup> In the Netherlands these are formally known as ‘autonomous administrative bodies or authorities.’<sup>40</sup> These agencies sometimes perform a regulatory function in the broad sense of developing policy, either through formal rule-making powers or by setting substantive policy standards in the exercise of executive functions.

These autonomous bodies precede their promotion by the EU. They go back to the 1970’s-1980’s, when they became popular as a tool of New Public Management

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Closa & D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP, 2016, pp. 15-35, at 37.

<sup>33</sup> Order of 20 November 2017, *Commission v Poland (Forest of Białowieża)*, EU:C:2017:877, para 102.

<sup>34</sup> See J. Uzman, ‘Which In Our Case We Have Not Got. Naar een nationaal beginsel van effectieve rechtsbescherming?’, in L.W. Verboeket et al (eds), *Bestuursrecht in het echt*, Deventer: Kluwer 2021, pp. 255-270.

<sup>35</sup> Koopmans 2003, p. 81; Uzman 2018, pp. 263-267.

<sup>36</sup> S. Zijlstra, *Bestuurlijk organisatierecht*, Deventer, Kluwer, 2019, pp. 259-260.

<sup>37</sup> See e.g. S. de Somer, *Autonomous public bodies and the law: a European perspective*, Cheltenham, Elgar 2017.

<sup>38</sup> Insertion by authors.

<sup>39</sup> Slightly modified definition as used by S. de Somer, ‘The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective’, *Review of European Administrative Law*, Vol. 5, No. 2, pp. 93-130.

<sup>40</sup> In Dutch: ‘zelfstandige bestuursorganen’. See Article 1 of the Autonomous Administrative Authorities Framework Act 2006.

theories.<sup>41</sup> They grew into important features of the regulatory state at a time when the classic constitutional model, which envisaged detailed legislation carried out by the executive, was traded for open-ended norms and an emphasis of *ex post* control and accountability.<sup>42</sup> Over the last decades, the EU has promoted the use of independent agencies in different sectors, ranging from economic regulation to human rights monitoring.<sup>43</sup> Generally, the Netherlands has been receptive to this development. Particularly in the field of oversight, the importance of avoiding undue political interference is widely recognised, particularly as a way of promoting public trust.<sup>44</sup> Moreover it seems that, in practice, the creation of independent authorities, and their encapsulation in European networks of administrative authorities, has led to a culture of increased independence.<sup>45</sup>

Still, this European trend has been paralleled by a domestic development pulling in the opposite direction. Concerns<sup>46</sup> about democratic accountability, legality and separation of powers, led to the idea that the creation of autonomous bodies should be the exception rather than the rule, subject to very specific circumstances.<sup>47</sup> Thus the EU trend of agencification has not met with universal enthusiasm in the Netherlands. Particularly the ‘broad, teleological’ way in which the CJEU has interpreted independence requirements in the context of data protection and regulated markets, has led to friction and debate.<sup>48</sup> It has for instance been argued that the current Consumer and Markets Authority, formally an autonomous administrative body, does not fully meet the type of independence as envisaged by the CJEU.<sup>49</sup> The strong emphasis in EU law on independency has also led to an ongoing debate about the desirable scope of regulatory powers exercised by

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<sup>41</sup> J.A.M. de Kruijf & S. van Thiel, ‘Zelfstandige bestuursorganen: een ongrijpbaar fenomeen?’, in H.R.B.M. Kummeling et al (eds.), *Instituten van de staat*, Deventer: Kluwer, 2020, pp. 273-306; M. Scheltema, *Zelfstandige bestuursorganen* (inaugural lecture Groningen), Groningen, H.D. Tjeenk Willink, 1974.

<sup>42</sup> J.G. van Erp & H.B. Winter, ‘Toezichtsautoriteiten en inspecties’, in Kummeling et al (2020), pp. 307-330, at 309.

<sup>43</sup> S. Lavrijssen, ‘Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator’, *Carbon & Climate Law Review*, Vol. 16, No. 1, 2022, pp. 25-40.

<sup>44</sup> Netherlands Scientific Council for Government Policy (WRR), *Toeziën op publieke belangen. Naar een verruimd perspectief op rijksstoezicht*, Amsterdam: Amsterdam University Press, 2013, pp. 110-111.

<sup>45</sup> O.A. Danielsen & K. Yesilkagit, ‘The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities’, *Public Organization Review*, Vol. 14, No. 3, 2014, pp. 353-371.

<sup>46</sup> S.E. Zijlstra, *Zelfstandige bestuursorganen in een democratische rechtsstaat*, The Hague, VUGA, 1997, p. 139; J. L. W. Broeksteeg, ‘De regelgevende bevoegdheid van zelfstandige bestuursorganen, mede in het licht van het EU-recht’, *RegelMaat*, Vol. 30, No. 3, 2015, pp. 170-181; L.R.M.A. Beurskens, ‘Heeft u nog wensen? De wetgevingsbrieven van de financiële toezichthouders in staatsrechtelijk perspectief’, *TvCR*, Vol. 10, No. 3, 2019, pp. 211-226.

<sup>47</sup> See Article 3 of the Autonomous Administrative Authorities Framework Act 2006. The concerns where extensively discussed in a well-known government report by the so-called Scheltema Commission, ‘Steekhoudend ministerschap’, *Kamerstukken II 1992/93*, 21427, no. 41.

<sup>48</sup> Lavrijssen 2022, p. 32, 34.

<sup>49</sup> L. Schouten & A. de Moor van Vugt, ‘De onafhankelijkheid van de Autoriteit Consument en Markt’, *SEW* 2015(2), pp. 62-75; Lavrijssen 2022.

independent agencies within the framework of the democratic *Rechtsstaat*. The possible negative impact of the EU independency requirements on the position of independent administrative bodies within the Dutch constitutional structure has for instance been addressed in an advice of the Dutch Council of State. Two lines of reasoning can be discerned: one argues for a restrictive use of the concept, allowing for as much political accountability as specific circumstances will allow, the other advocating the development of innovative ways of understanding democratic accountability, for instance in the context of transparency and judicial review.<sup>50</sup> Yet consensus is hard to discern in this field.

#### Question 4

The right to an effective remedy or access to justice before an independent court is considered a core rule of law value in the Netherlands.<sup>51</sup> Yet the Dutch Constitution *strictu sensu* did not, for a long time, contain any such subjective right. It was mainly protected by Articles 6 and 13 of the ECHR and Article 47 of the EU Charter. Much of the case law and the work of scholars thus focused on ECHR and, to a lesser extent, on EU law in this field. Recently, in 2022, the Constitution was amended to explicitly protect the right to a fair trial before an independent court.<sup>52</sup> According to the government, this right also includes the broader right to an effective legal remedy.<sup>53</sup> Moreover, the principle that individuals should have access to legal protection before a court has, albeit implicitly, a long history in the case law of, particularly, civil courts.<sup>54</sup> The connection between this domestic principle and Article 13 of the ECHR was emphasised by the Supreme Court in 2019.<sup>55</sup> Furthermore, this principle is fleshed out in different constitutional provisions about the competence of civil, criminal and administrative courts.<sup>56</sup> The Constitution thus does envisage a system of legal protection. As we noted, a distinct particularity of the Dutch legal system is however that it lacks a constitutional court and explicitly excludes direct actions against legislation before the administrative courts.<sup>57</sup> This gap in the legal protection of individuals and NGOs is to some extent filled by tort actions with the civil courts on the basis of the aforementioned principle that civil courts should be empowered to provide redress when alternative avenues to the administrative courts are not available.<sup>58</sup>

<sup>50</sup> See, *inter alia*, Lavrijssen 2022, pp. 37-40.

<sup>51</sup> P van den Eijnden, *Rechterlijke onafhankelijkheid in constitutioneel perspectief*, Deventer, Kluwer 2011, p. 3.

<sup>52</sup> Act of July 6, 2022, *Stb.* 2022/331.

<sup>53</sup> Parliamentary debates Senate, *Handelingen I* 2017/18, no. 19, 10, p. 14.

<sup>54</sup> Uzman 2021, pp. 255-270.

<sup>55</sup> HR 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*), para 8.2.1.

<sup>56</sup> Mainly Articles 112 and 113 Constitution.

<sup>57</sup> See Article 8:3 of the General Administrative Law Act.

<sup>58</sup> W.J.M. Voermans, Y.E. Schuurmans & R. Stolk, 'Judicial Organization', in L. van den Herik et al (eds), *Introduction to Dutch Law*, The Hague: Kluwer International 2022, pp. 102-113, at 105.

## Chapter 2. Normative Foundations for the Role of the EU in Protecting the Rule of Law

### *Question 5*

Dutch scholars actively contribute to the rule of law debate in the EU, publishing both in Dutch and in English.<sup>59</sup> In line with the primarily positive attitude towards European integration in the Netherlands, the role of EU law in protecting the rule of law in the Member States is generally perceived as important and legitimate. Furthermore, the focus on and support for this role seems to be mainly motivated by concerns about legal and political developments in other Member States, such as Hungary and Poland. When rule of law concerns in the Netherlands are discussed (such as *e.g.* the childcare allowance case, see Questions 1 and 2), the role of EU law is not really addressed.

In addition to the formal argument that the rule of law is a binding value included in Article 2 TEU, scholars tend to emphasise the fact that adherence to the rule of law is essential for the proper functioning of the EU.<sup>60</sup> There is general acceptance for the Court's view that compliance with the rule of law is the basis for mutual trust, which is a prerequisite for mutual recognition, the basic principle underlying both the internal market and the Area of Freedom, Security and Justice (AFSJ).<sup>61</sup> Also the EU's support for the rule of law in the Member States is not perceived as an external matter, but as necessary to protect the constitutional basis of the EU itself in view of way EU law interacts with the legal systems of the Member States.<sup>62</sup> Some legal scholars consider rule of law protection a necessary defence of the EU identity.<sup>63</sup> This positive view on the role of the EU in protecting the rule of law also prevails in the political debate: a majority in Parliament views the EU explicitly as a community of values and wants the EU to act forcefully to protect the rule of law at national level.<sup>64</sup> Compliance with the rule of law is also seen as

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<sup>59</sup> Thus there is no strict distinction in the Netherlands between a national and a broader, European/international debate.

<sup>60</sup> J.W. de Zwaan, 'De waarden van de Europese Unie, en de handhaving daarvan', *SEW*, Vol. 70, No.1, 2022, pp. 16–18; L. Heuveling van Beek, 'Poland and the democratic rule of law; Catch 2022?', *NJB Blog*, 29 April 2022, [www.njb.nl/blogs/poland-and-the-democratic-rule-of-law-catch-2022/](https://www.njb.nl/blogs/poland-and-the-democratic-rule-of-law-catch-2022/).

<sup>61</sup> E.M.H. Hirsch Ballin, 'Mutual trust: The virtue of reciprocity: Strengthening the rule of law through peer review', in C. Closa & D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, pp. 133–146.

<sup>62</sup> L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab & D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 128–144.

<sup>63</sup> R. Janse, 'The evolution of the political criteria for accession to the European Community, 1957–1973', *European Law Journal*, Vol. 24, No. 1, 2017, pp. 57–76.

<sup>64</sup> For a recent debate, see: Eerste Kamer [Senate], 'Report of the plenary session of Tuesday 8 February 2022', <https://www.eerstekamer.nl/verslag/20220208/verslag>.

a necessity to ensure free movement.<sup>65</sup> Maybe due to this positive perspective, issues such as the limitations to EU competence to promote the rule of law and the obligation of the EU to respect national identity, are hardly discussed.<sup>66</sup>

### Question 6

As explained in response to Question 1, within the context of the monistic Dutch legal system norms of international law, including the ECHR, have always been important for the judicial review of national laws. There is no fundamental difference between EU Law and the ECHR as far their role in guaranteeing the protection of the rule of law in the Dutch legal order is concerned. Furthermore, as stated in response to Q5, the debate in the Netherlands on EU rule of law enforcement generally focuses on other Member States, in particular Poland and Hungary. Also in this context, the role of EU law is mostly conceived as a mechanism to address legal, moral and political externalities. In response to the European Commission's 2021 Rule of Law Report,<sup>67</sup> the Dutch government, for instance, emphasised that 'respect for the rule of law in all Member States is [...] an essential precondition for a proper functioning of the EU and to maintain the trust of citizens and companies in government institutions.'<sup>68</sup> The Dutch government also explicitly mentioned the need for 'critical self-reflection' regarding the functioning of the rule of law system and addressed the shortcomings and points for improvement mentioned by the Commission.<sup>69</sup> From a substantive perspective, the EU role in enforcing the rule of law in the Netherlands can thus also be considered as a form of external discipline. The acceptance of this role is also perceived as relevant to legitimise the support of the Netherlands for EU action to enforce the rule of law in other Member States.

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<sup>65</sup> 'Report of a committee debate of the permanent committees for European Affairs, for Foreign Affairs, and for Justice and Security', 24 November 2021, Records of the House of Representatives 2021–2022, 21 501-02, no. 2438, contributions of Member of Parliament Kamminga (p. 3) and Minister of Foreign Affairs Knapen (p. 26).

<sup>66</sup> M. Stremler, *Constitutional Oversight of the Member States by the European Union*, PhD thesis Tilburg University, 2021, 330-343.

<sup>67</sup> European Commission, '2021 Rule of Law Report: The Rule of Law Situation in the European Union' (21 July 2021).

<sup>68</sup> 'Response to the European Commission's 2021 Rule of Law Report by the Netherlands government', 1 October 2021, Records of the House of Representatives 2021–2022, 21 501-02, no. 2413, p. 1 (our translation).

<sup>69</sup> 'Response to the European Commission's 2021 Rule of Law Report by the Netherlands government', p. 7. Similarly, although not pertaining to rule of law enforcement *by the EU*, the House of Representatives asked the Venice Commission's opinion on the causes of the childcare allowance case. Venice Commission, 'The Netherlands – Opinion on the Legal Protection of Citizens', 128th Plenary Session, 15–16 October 2021.

### Chapter 3. Instruments for enforcing and protecting the rule of law and the role of the CJEU

#### *Question 7*

The legal debate in the Netherlands on the classical instruments available to the EU in enforcing the rule of law in its Member States (such as the accession criteria, Article 7 TEU and Article 258 TFEU) mainly focusses on the use of these instruments in order to enforce compliance with the rule of law in other EU Member States.<sup>70</sup> With respect to the EU Charter, on the other hand, the focus is primarily on the application of the Charter within the Netherlands. The limited scope of the Charter is generally accepted and not really considered from a rule of law perspective. Where the scope of the Charter is debated, the focus is mainly on the practical and legal difficulties that this entails for legal practice.<sup>71</sup>

Generally, in legal doctrine and political debate, the rule of law instruments are perceived as legitimate tools to enforce compliance with the rule of law by the Member States. This positive attitude reflects a general acceptance, also in public opinion, of the rule of law as a fundamental condition for EU Membership and the functioning of the EU. Criticism is expressed, however, on the effectiveness of the rule of law instruments in practice.<sup>72</sup> This is also true with respect to the infringement action, which is perceived as an important tool to ensure compliance with rule of law values in the legal as well as the political debate. However, there is criticism on the use of the infringement action as a tool to ensure compliance with the rule of law. For instance, in a motion adopted in 2020, the Dutch Parliament expressed the view that the Commission takes insufficient action to ensure compliance with judgments of the ECJ and also that the Article 7 procedure has not achieved anything. Making reference to the constitutional duty of the government to further the development of international legal order (Article 90 of the Constitution), Parliament requested the government to explore, preferably with other likeminded Member States, the use of an infringement action against Poland.<sup>73</sup>

The positive approach to the EU rule of law instruments is also clearly visible with respect to Regulation 2092/2020. This instrument is perceived as an important tool to further compliance with the rule of law by the EU Member States. For this

<sup>70</sup> See e.g. J. de Zwaan, *De waarden van de Europese Unie, en de handhaving daarvan*, SEW, 2022/2.

<sup>71</sup> See e.g. H. de Waele, 'Het toepassingsbereik van het Handvest: Akerberg Fransson in Nederland', in H. de Waele, J. Krommendijk & K. Zwaan (eds), *Tien jaar EU-Grondrechtenhandvest in Nederland – Een impact assessment*, Deventer, 2019, pp. 45-62.

<sup>72</sup> J. Krommendijk & N. Zamani, 'Naked of golden gun? Het Unierechtelijke handhavingsarsenaal om rechtsstatelijke achteruitgang aan te pakken', *Ars Aequi* 2022, pp. 471-479.

<sup>73</sup> Motie van het lid Groothuizen c.s., Tweede Kamer, vergaderjaar 2020-2021, 35 570 VI, no. 58.

reason, the judgment of the Court rejecting the annulment actions of Hungary and Poland, has also been welcomed.<sup>74</sup> Moreover, there seems to be general support for the use of other instruments to further compliance with the rule of law. Again this is the case both in legal doctrine and in the political arena. The Netherlands abstained from voting on the Commission's proposal to release 36 billion Euro from the recovery fund to Poland. Together with Belgium, Sweden and Denmark, the Netherlands called upon the Commission to carefully assess Poland's compliance with the milestones relating to the rule of law before any payment is being made.<sup>75</sup> In this respect, there seems to be a preference for hard law instruments (conditionality, infringement actions).

### Question 8

According to recent polls, support for judicial independence is very strong in the Netherlands, when compared to other Member States.<sup>76</sup> Moreover, judicial independence as a core component of the rule of law has long had the attention of the general public, political institutions, the judiciary and legal scholarship. As explained in response to Q5, there has been widespread parliamentary support for actions before the ECJ concerning judicial independence. Moreover, judicial independence in the European context is actively discussed in Parliament.<sup>77</sup> This connects to calls in the press for firm political responses against Member States following the ECJ's judgments over several rule of law concerns.<sup>78</sup> A review of scholarly reactions to the case law of the ECJ also reveals widespread support.<sup>79</sup> As we noted before, concerns usually only relate to the effectiveness of judicial approaches and their political follow-up (Q7).<sup>80</sup> Most of these reactions focus

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<sup>74</sup> See e.g. the letter to parliament on the ECJ judgment, Tweede Kamer, vergaderjaar 2021-2022, 21 501-20, no. 1795.

<sup>75</sup> <https://www.politico.eu/article/four-eu-countries-to-state-concerns-on-polish-recovery-plan-approval>, visited 21 august 2022.

<sup>76</sup> Special Eurobarometer Report, *Values and Identities of EU Citizens*, November 2021, p. 116.

<sup>77</sup> A search on key terms of judicial independence in relation to Poland revealed 116 documents (23.6.2019-23.6.2022).

<sup>78</sup> See e.g. J. Morijn, 'De Poolse rechtsstaat is ook onze rechtsstaat', *NRC Handelsblad*, 22.10.2020; M. de Werd, 'Zorgen om Poolse rechtsstaat blijven urgent', *NRC Handelsblad* 10.4.2022; J. Morijn & K. Sterk, 'Polen ondermijnt de rechterlijke onafhankelijkheid al jaren. Het had de miljarden aan EU-steun nooit mogen krijgen', *NRC Handelsblad* 31.5.2022.

<sup>79</sup> M. de Visser, 'De invulling van het Europese rechtsstaatsbegrip: reconstructie van een voortdurende queeste', *TvCR*, 2019, pp. 276-305; J. Morijn, 'De EU en de rechtsstatelijke crises in Hongarije en Polen', *Nederlands Juristenblad*, 2021, pp. 200-206; L. Heuveling van Beek, 'Further politicization of the Polish judiciary. A concerned view from the outside', *Nederlands Juristenblad* 2021, p. 211-214; See also the Case Notes of L.J.M. Timmermans and P.P.T. Bovend'Eert in *Jurisprudentie Bestuursrecht* 2022/ , and *Administratiefrechtelijke Beslissingen (AB)* 2019/74, 2021/329 and 2022/160 respectively.

<sup>80</sup> E.g. R.A. Lawson, 'De prejudiciële procedure als instrument ter verdediging van de rechtsstaat', *NTER*, 2022(3-4), pp. 96-104.

on judicial independence, and there is still little discussion, as far as we noticed, on extending the approach of the CJEU case law to other rule of law values, but there are some calls for heightened scrutiny in the field of fundamental rights protection (particularly the rights of LHBTIQ+), and the freedom of speech and information.<sup>81</sup> Lastly judicial attitudes towards the case law of the ECJ seem to be fairly positive. For instance, as we will discuss in response to Q10-12, Dutch courts have also responded to rule of law concerns, particularly in the field of the EAW.

Last but not least, it is worth mentioning that although the focus of debates on judicial independence is mostly on the situation in other Member States, the Court's case law has also catalysed discussions about independence at home. Two developments should be pointed out. First, in the context of new debates about constitutional resilience, Article 47 of the Charter, and the Court's case law about access to independent courts, seems to gain prominence as a source of inspiration at the national level.<sup>82</sup> This is particularly the case with respect to debates concerning reform of judicial appointments to the Supreme Court.<sup>83</sup> These appointments were, for a long time, generally apolitical, but there is a concern that the current procedure, laid down in Articles 117-118 of the Constitution may politicise under the influence of rising populism.<sup>84</sup> The government has initiated steps towards constitutional amendment, replacing the role of the Second Chamber of Parliament in nominating candidates by an independent commission. However, these have not been well-received.<sup>85</sup> In this respect it is important to note that although the government formally has the last word on Supreme Court appointments, this role in practice is limited by the nomination procedure and by a practice that the order of nomination is usually followed.<sup>86</sup> This seems roughly in line with the ECJ's approach in its *Repubblika*-judgment.<sup>87</sup> The second development concerns the position of public prosecutors after the *A.Z.*-judgment.<sup>88</sup> This judgment raised sensitive questions about the independence of prosecutors from the executive branch. The legislature has

<sup>81</sup> See De Zwaan 2022, p. 8.

<sup>82</sup> J. Krommendijk, 'Ook voor ons: het groeiend belang van het Unierecht voor de weerbaarheid van de Nederlandse rechtsstaat', in R. Schlössels et al (eds.), *Naar een weerbare rechtsstaat*, Deventer, Kluwer, 2022, pp. 77-94.

<sup>83</sup> E.g. the Case Note of P. van den Eijnden on the judgment of 20 April 2021, *Repubblika*, C-896/19, ECLI:EU:C:2021:311, AB 2021/211.

<sup>84</sup> G. Corstens, 'Bescherm onze rechters tegen de politiek', *NRC Handelsblad*, 9.1.2018; Staatscommissie parlementair stelsel (Advisory Commission on the parliamentary system), *Lage drempels, hoge dijken*, Amsterdam, Boom, 2018, pp. 216.

<sup>85</sup> The Council of State has expressed concerns about this bill: see Opinion W01.20.0485/I/K, of 16.06.2022.

<sup>86</sup> See: Bovend'Eert/Kortmann, *Rechterlijke organisatie, rechters en rechtspraak*, Deventer, Kluwer, 2013, p. 176.

<sup>87</sup> Judgment of 20 April 2021, *Repubblika*, C-896/19, ECLI:EU:C:2021:311.

<sup>88</sup> Judgment of 24 November 2020, *AZ*, C-510/19, ECLI:EU:C:2020:953.



responded to these concerns, but it remains to be seen whether this response is adequate.<sup>89</sup>

### **Question 9**

The increased role of the ECJ in ensuring rule of law and fundamental rights protection is usually accepted as being compatible with the EU judicial system. The ECJ judgments in this area have mostly been welcomed and approved of, both in political and scholarly circles.<sup>90</sup> This endorsement reflects the general positive perspective in the Netherlands of the legitimacy of the case law of the Court, as well as a broad acceptance of compliance with the rule of law as a fundamental feature of the EU legal order.

The legal and normative limits to the Court's role and competences seem to be of less concern. However, in academic literature it has been argued that the Court sometimes interprets the Treaties so broadly that tension may arise with the principle of conferral.<sup>91</sup> At the same time, the ECJ's teleological approach, as adopted e.g. in the *ASJP*-judgment<sup>92</sup> is generally supported.<sup>93</sup> Furthermore, the consistency of the Court's case law in the realm of rule of law and fundamental rights has been debated in the Netherlands. This concerns for instance the risk of a double standard on "court or tribunal" for the purpose of Article 267 TFEU and in the context of effective judicial protection safeguarded by Article 47 of the Charter.<sup>94</sup> This risk is noted but not really criticised, as it is understood that the ECJ tries to set the bar not too high when it comes to admissibility or competence regarding requests for preliminary rulings, by which it possibly can offer some protection to parties seeking justice or to judges whose independence is being limited, whereas the criterion of independence with regard to judicial protection of individuals is applied in a more severe manner.<sup>95</sup> Another area of case law that has been the object of debate concerns the surrender of persons on

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<sup>89</sup> See moderately critical: V.H. Glerum, 'Van stenen, monniken en kappen: het begrip 'uitvoerende rechterlijke autoriteit', het arrest Openbaar Ministerie (Valsheid in geschrifte) en de gevolgen voor de Nederlandse overleveringsprocedure', *SEW* 2021(6), pp. 232-246.

<sup>90</sup> See e.g. J. Morijn, 'EU moet Poolse regering isoleren én EU-burgers koesteren', *NRC Handelsblad*, 10 November 2021 and Stephane Alonso, 'Rutte in Kamerdebat: voorlopig geen Europees coronageld naar Polen', *NRC Handelsblad*, 12 October 2021.

<sup>91</sup> M. Stremmler, *Constitutional Oversight of the Member States by the European Union*, PhD thesis Tilburg University 2021, pp. 282-287 & 391-394. See also Matteo Bonelli & Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', *European Constitutional Law Review*, Vol. 14, No. 3, 2018, pp. 622-643.

<sup>92</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

<sup>93</sup> Matteo Bonelli & Monica Claes 2018.

<sup>94</sup> R.L. Lawson 2022; P.A.M. Verrest, *Zorgen om de rechtsstaat in Polen bij uitvoering van een Europees aanhoudingsbevel*, NTER, 3/4 (2021)81-89

<sup>95</sup> Matteo Bonelli & Monica Claes 2018, pp. 638-639 in particular.

the basis of a European arrest warrant (EAW), to Member States having systemic and generalised deficiencies concerning the independence of the judiciary. This subject will be analyzed further under question 11.

## Chapter 4. Impact on Mutual Recognition and Mutual Trust

### Question 10

The issue of enforcement of judicial decisions in the context of EU-level mutual recognition has arisen in Dutch courts primarily in the context of the application of the EAW mechanism. The District Court of Amsterdam, the competent court to deal with the executions of EAWs,<sup>96</sup> has referred various preliminary questions (e.g. *L&P*<sup>97</sup> and *X&Y*<sup>98</sup>). These references reflect the difficulties encountered by the District Court in applying the so-called *L.M.* test.<sup>99</sup> As the Court retained this test, the establishment of an individual risk is still maintained as a requirement by the District Court to refuse the execution of an EAW.<sup>100</sup> So far, this has happened only once. One of the relevant elements in that particular case concerned the fact that this case had attracted much attention in Poland at a political level as well as in the media. Consequently, the District Court ruled that the person concerned was no longer a ‘random Polish suspect’ and the ‘chilling effect’ on Polish judges of e.g. the Polish disciplinary system could have an effect in the criminal proceedings against him (para. 5.3.8).<sup>101</sup>

### Question 11

Legal scholarship on the *L.M.* test focuses mainly on the struggle to balance the protection of fundamental rights with the prevention of impunity.<sup>102</sup> Maintaining the individual step has been considered understandable by some authors as it allows the Member States to continue cooperating in the EAW system without massive

<sup>96</sup> *National courts and the enforcement of EU law: the pivotal role of national courts in the EU legal order, the XXIX FIDE congress in The Hague*, 2020 congress publications, p. 320-324.

<sup>97</sup> Judgment of 17 December 2020, *L&P*, Joined Cases C-354/20 PPU and C-412/20 (PPU), EU:C:2020:1033.

<sup>98</sup> Judgment of 22 February 2022, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission) (X&Y)*, Joined Cases C 562/21 PPU and C 563/21 PPU, EU:C:2022:100.

<sup>99</sup> Judgment of 25 July 2018, *Criminal proceedings against LM*, C-216/18 (PPU), EU:C:2018:586.

<sup>100</sup> DC Amsterdam, 6 April 2022, ECLI:NL:RBAMS:2022:1793 and DC Amsterdam, 6 April 2022, ECLI:NL:RBAMS:2022:1794; DC Amsterdam, 26 April 2022, ECLI:NL:RBAMS:2022:2582.

<sup>101</sup> DC Amsterdam, 10 February 2021, ECLI:NL:RBAMS:2021:420. See also J.W. Ouwerkerk & E. Filius, ‘Rechtbank Amsterdam weigert Poolse verdachte over te leveren: precedent of uniek besluit?’, 24 februari 2021, Forum: Nederlandrechtsstaat.nl.

<sup>102</sup> J. Ouwerkerk, ‘Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM’, *SEW*, No. 12, 2021, p. 616-627; Similarly, in the context of the Dublin system, see: E.R. Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’, *Utrecht Law Review*, 2013, p. 135.

disruption, and thus to prevent impunity.<sup>103</sup> However, other scholars have criticised the Court's case law on the *L.M.* test as it leads to 'unworkability and complete ineffectiveness'<sup>104</sup> or to surrender practices that have become more complicated, hence less efficient and swift, than traditional extradition instruments.<sup>105</sup> To reconcile the different interests that are at stake in this balancing exercise, several authors have proposed to consider the use of alternative cooperation mechanisms such as the transfer of criminal proceedings or the execution of sanctions<sup>106</sup>, or the use of the European Investigation Order<sup>107</sup>. So far, the *LM* line of case law has not sparked debates of similar intensity in other fields of law.<sup>108</sup>

## Question 12

Other areas of law have not been completely immune for the impact of rule of law concerns in other Member States. However the scarce instances in which a rule of law related argument was raised in other areas of mutual recognition, have not (yet) been successful. In migration cases for instance, the argument has been made that rule of law concerns should result in the suspension of Dublin transfers to Poland. In 2019, the Council of State rejected this argument.<sup>109</sup> Rule of law concerns have also been addressed, but rejected as a ground for the suspension of transfers to Poland, in several cases before various district courts. The reasons for turning down the arguments varied: the CJEU's case law regarding the EAW was not considered to be applicable in the context of the Dublin system;<sup>110</sup> reference

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<sup>103</sup> J. Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 29, No. 2, 2021, p. 87-101, at 87-93; S.M.A. Lestrade, 'X en Y (HvJ EU, C-562/21 PPU) – (Potentiële) berechting niet-onafhankelijk Pools gerecht blokkeert niet automatisch overlevering aan Polen', *EHRC* 22 February 2022, < [https://www.ehrc-updates.nl/commentaar/212034?skip\\_boomportal\\_auth=1](https://www.ehrc-updates.nl/commentaar/212034?skip_boomportal_auth=1)>, visited 21 June 2022.

<sup>104</sup> P. Bárd & J. Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU. Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I)', *Verfassungsblog*, 18 April 2020, <<https://verfassungsblog.de/luxembourg-unworkable-test-to-protect-the-rule-of-law-in-the-eu/>>, visited 21 June 2022; P. Bárd & J. Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU. Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II)', *Verfassungsblog*, 19 April 2020, < <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>>, visited 21 June 2022.

<sup>105</sup> A. Klip, 'The European Arrest Warrant, from Mutual Recognition to Mutual Supervision?', *European Criminal Law Review*, Vol. 12, No. 1, 2022, pp. 82-100.

<sup>106</sup> Ouwerkerk 2021, at 94-98.

<sup>107</sup> W.R. Jonk & R. Malewicz, 'Het Europees arrestatiebevel. Toch nog mogelijkheden voor een goede verdediging', *TBS&H*, 2020(6), pp 324-329.

<sup>108</sup> In migration: L. Hillary, 'Uitzonderingen op het interstatelijk vertrouwensbeginsel in het Dublinsysteem in navolging van strafrechtelijke jurisprudentie', *Asiel & Migrantenrecht*, No. 10, 2020, p. 500-504.

<sup>109</sup> Council of State 30 Januari 2019, ECLI:NL:RVS:2019:282, par 4.3.

<sup>110</sup> DC The Hague (Amersfoort) 2 November 2020, ECLI:NL:RBDHA:2020:11045, par 6; DC The Hague (Zwolle) 4 November 2020, ECLI:NL:RBDHA:2020:11096, par 3.5.

was made to the Strasbourg case law instead of the case law of the CJEU;<sup>111</sup> Article 4 CFR<sup>112</sup> instead of the ‘core’ of Article 47 CFR was applied; or, the *L.M.* step-test was applied but combined with an additional benchmark in light of Article 4 Charter.<sup>113</sup> The debate on this issue clearly has not yet ended. Recently, the district court of The Hague decided to refer a question related to the impact of rule of law concerns on the principle of mutual trust under the Dublin Regulation to the ECJ.<sup>114</sup> Outside of the context of migration law, there has been at least one case in which rule of law concerns were invoked to challenge the application of the principle of mutual recognition. This case concerned litigation in which a Polish company sought to enforce a European order for payment issued by a Polish court on the basis of Regulation 1896/2006 against a Dutch company. The competent district court dismissed the concerns invoked by the Dutch company regarding the independence of the Polish court, as no clear risk that article 47 Charter would be violated was established.<sup>115</sup>

### **Question 13**

Compliance with the rule of law by EU institutions themselves is not really debated in the Netherlands. The question may come up in specific instances, such as with respect to the Court’s judgement in the *Weiss*-case.<sup>116</sup> Most scholars however agreed with the ruling of the CJEU.<sup>117</sup> Neither is there any fundamental challenge of the rules and procedure of the CJEU and the EPPO in the light of rule of law requirements. Dutch procedural law is even influenced by the rules of procedure of the CJEU. In the substantiation of a new rule maximizing page numbers in court documents, reference is made to the CJEU where this is already the case. The Dutch Supreme Court approved this rule in a court proceeding initiated by lawyers.<sup>118</sup> Finally, in 2021 the national act that implements the EPPO-system into the national system was adopted. Scholars fear that some points may have been overlooked by the legislature and may spark additional discussion.<sup>119</sup> One point is

<sup>111</sup> DC The Hague (Den Bosch) 26 September 2019, ECLI:NL:RBDHA:2019:10607, par 14-17.

<sup>112</sup> DC The Hague (Zwolle) 4 November 2020, ECLI:NL:RBDHA:2020:11096, par 3.5.

<sup>113</sup> DC The Hague (Haarlem) 12 November 2020, ECLI:NL:RBDHA:2020:11769, par 6-6.1.2.

<sup>114</sup> Case C-392/22 (X/Staatssecretaris van Justitie en Veiligheid).

<sup>115</sup> DC Overijssel 1 December 2021, ECLI:NL:RBOVE:2021:4573.

<sup>116</sup> Judgment of 11 December 2018, Weiss, C-493/17, EU:C:2018:1000, and the subsequent German court case Bundesverfassungsgericht, 2 BvR 859/15, 5 May 2020.

<sup>117</sup> See e.g.: S. van den Boogaerd & V. Borger, ‘Hoog spel in Karlsruhe – Het Duitse Constitutionele Hof over het Public Sector Asset Purchase Programme van de ECB’, *NJB* 2020/2640.

<sup>118</sup> HR 3 juni 2022, ECLI:NL:HR:2022:824.

<sup>119</sup> E.g. Y. de Vries & S.J. Lopik, ‘Het Europees Openbaar Ministerie komt eraan: waakhond of papieren tijger?’, *NTER*(3-4) 2019; M.J.J.P. Luchtman, ‘Het Europees Openbaar Ministerie in Nederland’. *Delikt & Delikwent* 2021/63, 2021/54.

that in the Netherlands no clear authority is appointed to deal with competence conflicts between the EPPO and the national PPO. Also, there are concerns with respect to the possible expansion of the competence of the EPPO to crimes other than those impacting the EU budget, such as terrorist crimes.<sup>120</sup>

## Chapter 5. The Rule of Law and the Existential Requirements of EU Law

### *Question 14*

The principle of the primacy of EU law is generally accepted in the Netherlands, and there seem to be no judicial decisions explicitly challenging the primacy of EU law. This can be explained by the deeply rooted monist conception towards the reception of international law as mentioned under Q1. Indeed, Articles 93-94 of the Constitution, which, according to the widely accepted view, guide the implementation of international law *other than* EU law, were originally partially intended to facilitate Community law in the domestic legal order. Primacy thus is not specific to EU law, but applies to all provisions of international treaty law. This monist tradition explains why Dutch legal thinking generally accepts the view of the ECJ that the primacy of EU law derives from the very nature of EU law rather than from the Constitution.<sup>121</sup> Illustrative in this regard is the reaction of the Dutch government in response to parliamentary questions concerning the ruling of the Polish Constitutional Tribunal of 7 October 2021. Without any reservation, the government stressed that primacy of EU law is one of the foundations of European cooperation.<sup>122</sup> In any case, the rule of law debate has led the Dutch government to confirm the principle of primacy of EU law is essential for European cooperation.

### *Question 15*

It is important to stress that the concept of ‘constitutional identity’ does not play any role of significance in either case law or domestic legal scholarship. Indeed, the concept has never been mentioned by the (apex) courts at all. Neither has it ever been clearly defined under Dutch law or in legal doctrine. At the same time, a few ‘cornerstones’ of Dutch constitutionalism can be discerned.<sup>123</sup> It is perhaps a truism to say it, but the fact that the Dutch constitution adheres to the principles of democracy and the rule of law is an important point of departure in

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<sup>120</sup> W. Geelhoed, ‘Het Europees Openbaar Ministerie en het opportuniteitsbeginsel in Nederland’, *Strafblad* 2018, 54.

<sup>121</sup> HR 2 november 2004, NJ 2005/80, E.A. Alkema (*Verplichte rusttijden*).

<sup>122</sup> *Handelingen (aanhangsel) II*, 2021/22, no. 574 (in particular question 5).

<sup>123</sup> See e.g. Hirsch Ballin 2020.

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this respect. As we have seen, this is not to say that the rule of law *à la Hollandaise* is clearly defined. The same is, to some extent, true for the concept of democracy, although it could perhaps be argued that the parliamentary system, consociational democracy, and pluralism are inherent parts of our constitutional heritage. Furthermore, an important feature of the Dutch constitutional identity, seems to be its deeply rooted openness to the international legal order. This entails that the development of Dutch practice and doctrine on constitutional matters has been greatly impacted by the developments concerning the rules of law on the EU level. For that reason, the Court's ruling that "*the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times*"<sup>124</sup> does not seem to be controversial within the Netherlands.

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<sup>124</sup> Judgment of 16 February 2022, *Hungary v. Parliament & Council*, C-156/21, ECLI:EU:C:2022:97, para 234.