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1. This chapter is based in part on this author's *Grundstrukturen staatlichen Verfassungsrechts: Niederlande*, in: *Handbuch Ius Publicum Europaeum*, Band I: Nationales Verfassungsrecht, Armin von Bogdandy, Pedro Cruz Villalón, Peter M. Huber (hersg.), C. F. Mueller Verlag, Heidelberg 2007, pp. 327-388; some sections are totally revised versions of parts of the chapter by Karel Kraan in the previous edition of this book of 2004, with kind permission of the original author. The manuscript was written on the basis of the state of affairs in June 2012, but the most important later developments up to January 2013 have been incorporated.

I. Introduction: Constitutional development in the Netherlands

Though none of the actual constitutional provisions, institutions and constitutional practices under the Constitution of the Kingdom of the Netherlands (*Grondwet van het Koninkrijk der Nederlanden*, furthermore: Constitution) is in itself unique, their combination gives this Constitution its distinct character. The most distinctive features are the absence both of constitutional review of acts of parliaments by courts and of a doctrine of sovereignty of parliament, an openness to international law and international society, the overall lack of an explicit constitutionally relevant concept of sovereignty, and a low degree of ideology in the text of the Constitution: it lacks a preamble with its attendant rhetoric, and terms like "democracy", "people" or "nation" are absent. We describe and analyse the most salient features below. These must be placed in a historical perspective which brings out the character of the Netherlands Constitution.

1. Constitutional development

If constitutions can be distinguished in historical terms between, on the one hand, modern revolutionary, blue-print constitutions, which have their origin in an identifiable more or less revolutionary constitutional moment which is usually connected with some form of political cataclysm, such as a war or revolution which caused political and economic collapse, and on the other hand old-fashioned constitutions which are the product of incremental historical events and socio-political developments and evolutions which have gradually been consolidated in practice and codified in law, then the Constitution of the Netherlands is definitely to be grouped in the latter category. Its constitution is, one may say, more like the British and Nordic constitutions than like the German, Italian or French constitutions.

Due to its incremental nature, there is no self-evident historically original version of the present Constitution. The text which from a formal point of view is most probably the original one, which may be that of 1814 or that of 1815, no longer reflects present constitutional reality. The text which provides the framework of present constitutional reality, the text of the Constitution of 1983, was in substance not the product of major constitutional innovation at all, and is therefore by no means an "original" constitution ushering in a new constitutional era. Moreover, the Constitutions of 1814 and of 1815, as well as the 1983 Constitution, can only properly be understood in light of earlier developments: the early 19th century constitutions in light of the experience of two centuries of the Republic of the United Provinces have had a long-lasting influence in a number of constitutionally relevant respects; the 1983 Constitution can only be understood in light of the constitutional moments, transformations and developments which determined the intervening period.

1.1. *International parameters and national causes*

Transformative historical developments do not merely concern changes in the text of the document called Constitution (Dutch: *Grondwet*) but more importantly the political framework and practices which constitute the Constitution in a broader sense. Many (but not all) coincide with developments in the international context. Most of these are also shared by other European countries, but had their specific impact on constitutional development in the Netherlands.

This international influence reflects two fundamental external facts of Dutch political history: its geographical size and geographical location. Both have entailed openness towards the outside world.

The Netherlands is a relatively small European country, but for centuries possessed important overseas territories which were crucially important for its wealth: the Dutch East Indies were important for the trade in spices, later also coffee and tea and in the end also oil, and the West Indies for the slave trade. The country's geographically small size has been compensated by its location in the delta of main continental rivers, the Rhine and Meuse, so that large parts of the continent are Holland's hinterland, while its North Sea coast opened up the country to other parts of the world. Its economic potential and its colonial empire was based on its sea power and its favourable location for international trade.

This openness to the outside world was continued even after Indonesia, its major colony, gained independence after the Second World War.

Apart from the international context, there have also been purely endogenous reasons for a number of constitutional amendments, as we shall see below. It may be submitted that at the background of the (mainly abortive attempts at) constitutional reform since the 1960s, we can discern in constitutional affairs a certain primacy of national socio-political relations: while the world globalized, the constitutional debate in the Netherlands was gradually narrowed to national concerns.

1.2. *Transformations, adaptations and minor changes*

Within the process of constitutional development and change one can distinguish between moments of transformation, moments of constitutional adaptation and minor changes. If we generalize, we can say that in the Netherlands the transformations mainly took place in the "long 19th century" (i.e. from the French Revolution until the end of the First World War), 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 20th century (with the exception of that of 1917) are forms of constitutional change which can be characterized as adaptations. The second half of the 20th century has seen an ever increasing number of constitutional amendments but, paradoxically, few of these – if any – transformed the Constitution, even though 1983 saw an important overall revision of the text of the Constitution. We briefly elucidate these various changes in the next sections.

2. A Brief constitutional history

2.1. The Great Transformations

2.1.1. The Original Constitution: 1814 or 1815?

For various reasons, it is debatable whether the Constitution of 1814 or that of 1815 can be considered in any sense "original"; these are partly legal, partly a matter of semantics.

Legally, the formal continuity of the 1814 and 1815 Constitutions is problematic because the procedures for constitutional amendment were not followed at the time. The 1815 revision of the 1814 Constitution was necessary due to the decision of the Congress of Vienna (after the defeat of Napoleon) to make Belgium part of the Netherlands and turn the Netherlands from a principality into a kingdom. Instead of following the formal rules for constitutional amendment, the wholly new text of the Constitution was negotiated in a committee composed of equal numbers of Dutch and Belgian representatives, which, in accordance with Belgian desires, introduced such things as bicameralism (the Belgian nobility did not wish to assemble together 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 resultant text was adopted by the institutions of the Northern Netherlands with near unanimity, and next submitted in a referendum to Belgian noblemen and prominent citizens. The referendum was not provided for in the provisions on constitutional amendment of 1814 and to that extent implied discontinuity with the Constitution of 1814.

Semantically, the Constitution of 1815 is the first one of the "Kingdom of the Netherlands". In 1814, William I, son of the last *stadhouder* William V, accepted sovereignty but refused the title of King. By 1815, and particularly because of the void in Belgium which William I had filled by assuming royal authority over that country, this merely confirmed the prevailing state of affairs, as expressed in the Final Act of the Congress of Vienna, even if not explicitly decided upon. Thus the sovereign principality (officially "the State of the United Netherlands") became a Kingdom, and the Constitution of 1815 was necessarily the first Constitution of that new "Kingdom of the Netherlands".

The union with Belgium soon proved to be a temporary and constitutionally unsuccessful addition to the political formation of the Netherlands as it had existed as a polity from the 16th century onwards. The union was ended (in 1840) in formally the same "unconstitutional" manner in which it had begun, but this time without the Belgians participating in the institutions involved in the constitutional amendment. Politically, the real "revolution" was the Constitution of 1814, which established the political structure as we still know it, not the Constitution of 1815; aside from the failed union with Belgium, the latter's lasting importance is the fact that it made William I what he already was – a king – and the country what it in reality was: a kingdom.

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

2.1.2. The Republican pre-history of the Kingdom (1579-1795): Republic without a sovereign

The Constitution of 1814 had come about at the end of a period of more than 18 years of political instability in the aftermath of the French Revolution. This period of instability began with the ending of the Republic of the United Provinces. This Republic had its

constitutional foundation in the *Unie van Utrecht* of 1579, a Treaty of alliance between the Provinces, and had lasted until 1795. In 1795, formally in full accordance with the constitutional principles of the Republic, the States General (parliament) and the Provinces decided to end the Republic by calling for a constitutional assembly to deliberate and decide on the principles of a new Republic. Even the French Revolution did not interrupt formal constitutional continuity with the Republic.

By 1795, the confederal Republic had developed into an inefficient, not very successful polity, run by a quasi-hereditary or otherwise co-opting ruling elite, known as the *Regenten*. Also the highest office in the Republic, that of *stadhouder*, (literally, *locum tenens*) shared this fate to some extent. The importance of this office – each province had its own *stadhouder* – found its origin in the impossibility to find a permanent successor to King Philip II of Spain, who had been abjured in 1581, nine years after William of Orange called for a revolt. So in the meantime, each Province had itself appointed a *stadhouder*, a 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 of the United Provinces managed without a personified sovereign for more than 2 centuries – and during these centuries they even managed without the surrogate for nearly 75 years (the so-called *stadhouderloze tijdperken* from 1650 to 1672 and from 1702 to1747, when William of Orange-Nassau became hereditary *stadhouder* in all provinces, as he had already been for some of them).

That the Republic which was considered a state to all intents and purposes, but one which could not claim sovereignty, may explain why, to this day, neither in constitutional practice, nor in constitutional theory, nor in the Constitution of the Netherlands itself, there is any strong concept of sovereignty to be found.

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

The Batavian Republic which succeeded the Republic of the United Provinces was initially modelled on French Revolutionary ideas. Soon it came under the spell of French interference, leading to the Kingdom of Holland under the French puppet king Louis Napoléon in 1805, and ultimately ushering in direct French rule from 1810 until the end of 1813. Legally, this period ended with the proclamation of 21 November 1813 by which a triumvirate of prominent statesmen took upon themselves the provisional "general government" (*Algemeen Bestuur*) of the country at national level, and who were instrumental in calling the Prince of Orange from England to the Netherlands and bringing about the Constitution of 1814.

One lasting contribution of the settlement of 1814/1815 is the option for a decentralized unitary state, which was the result of the experience of over-emphasis on decentralized units during the Republic and of total centralization during the "French" period, both being at best inefficient and at worst ineffective. The combination of centralized government with the retention of a substantial degree of decentralization, to provinces and municipalities as original communities with certain autonomous powers of their own, exists to this day. The regulation of the exercise of political power at the national level in the Constitutions of 1814/1815, however, is far from a democratic state in the modern sense. To become so, the Constitution and constitutional practice had to undergo a radical transformation which began in the 1840s and was carried to its full constitutional conclusion only in 1922.

2.1.4. The 1840s and the liberal reform of 1848

William I had asked for a constitution as a pre-condition for accepting power as sovereign prince, *soeverein vorst*, in one of his first proclamations (2 December 1813). This constitutionalist stance did not transpire in the mode of exercising his powers. William I governed in an autocratic manner and largely by royal decree. His autocratic rule could only be considered constitutional by interpreting the Constitution's silence on the remit of the king's legislative powers as providing him full freedom to regulate matters by royal decree. In 1818 Parliament had adopted an Act (known as the *Blanket Wet*) on the basis of which infringing royal decrees was made a criminal offence. In the 19th century understanding of legislation, this rendered royal decrees equivalent to legislation proper, and the act was effectively interpreted as a blanket delegation of legislative power – a state of affairs which was changed, first, by a decision of the *Hoge Raad* (Supreme Court) in 1879, later confirmed by a constitutional amendment 1887, as we mention below (II.2.4). The autocratic rule of William I was the object of political dissatisfaction and exposed him to fierce political criticism. It had contributed to the revolt of the Belgians, who had never been happy with the union with the Northern Netherlands imposed by the Vienna Congress, and who effectively gained internationally recognized independence in 1830 after a 10-day military battle. The separation necessitated the constitutional revision of 1840 (yet another amendment caused by the international situation), which it took William I nine years to accept.

The revision caused debate about a broader modernization of the Constitution than the government was prepared to propose. Demands for ministerial responsibility were heard by the end of the 1830s, though initially they did not receive broad support. The actual reform achieved did not go further than the introduction of a limited form of criminal ministerial responsibility, which was urged by the Lower House much against the initial views of the government in 1840. It constituted a systemic change in the form of government. Henceforth, royal decrees and acts of parliament required countersignature by ministers, who thereby took on criminal responsibility, which meant in practice that the king could no longer take decisions without involving a minister. This was quite contrary to what William I had turned into a principle – the Constitutions of 1814 and 1815 only required him to hear the *Raad van State* (Council of State) and made no mention of a council of ministers, nor of the powers of ministers – thus circumventing the political influence of ministers. Further, the 1840 amendment increased the powers of the Lower House over the (as of then) two-yearly budget, but no democratic reform regarding its popular representation was proposed.

The 1840 reform was not to the taste of William I, and he abdicated in favour of his son William II, who in turn soon proved to be intent on preventing the council of ministers from developing into a politically homogenous governmental actor.

Economic and financial crisis was prevalent by the 1840s, with occasional rioting as a consequence. There was an ever increasing constitutional debate, kept alive by a fairly small minority of liberals. Although the king found it too early to propose constitutional amendments when rioting broke out once again in Amsterdam, the government decided to introduce a bill on local elections. This attempt at a very moderate modernization was narrowly rejected for being too moderate, during the parliamentary session of 1846-1847 – a defeat caused by the critical liberals being joined by a handful of so-called "moderate conservatives".

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

The moral pressure of events on the hesitating and undetermined king mounted. In January, the king had already introduced a series of minor amendments in the Lower House, which could hardly be termed liberal. 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 like 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 appointed 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, so it was no doubt unconstitutional.) The up and coming progressive liberal statesman 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 already on 11 April. The draft proposed, amongst other things, direct elections for both Houses of Parliament and full political ministerial responsibility, counterbalanced by a government right to dissolve the Houses of Parliament by royal decree. With some minor amendments (most important of which was the change of direct elections of the Upper House into indirect election by the parliaments of the provinces), it was adopted, although it required pressure by the king on conservative members of parliament and his appointment of liberals in vacancies in the Upper House (at that time the Upper House was appointed by the king).

In many ways, the 1848 Constitution was the product of the pressures of international developments in Europe. As William II is said to have put it on 16 March 1848 – in the middle of the crisis – in a speech explaining his actions to the ambassadors of Austria, England, Russia and Prussia, he "turned from very conservative to very liberal within 24 hours". The fear for what happened abroad inspired the king (acting not least in the dynastic interest) as well as the conservative majority to accept the domestic call for a liberal constitution. Once again, the European international context proved decisive for deciding on a constitutional amendment aimed at true reform.

2.1.5. Settling for a parliamentary system of government: the 1860s

The greater the intended transformation, the more important (and often difficult) is its achievement in practice. Though hugely important, the 1848 amendment of the Constitution was not the definitive settlement for a parliamentary system of government in practice. In the 1850s, some voices pleaded in favour of undoing the 1848 reforms. It was parliamentary events in the 1860s that definitively settled the parliamentary system of government. Two consecutive events in parliamentary history did so.

Firstly there was the conflict over the sudden resignation of the Minister for Colonial Affairs, P. Mijer, and his subsequent appointment as governor-general of the East Indies in 1866. Mijer was the most important man in a newly appointed cabinet, and Mijer's plans concerning colonial policy were crucial to the cabinet's political programme. His unexpected and unannounced resignation led to dismay in the Lower House. His appointment as governor-general was defended by referring to the prerogative of the king, thus suggesting the existence of government power residing in the king that needed no cover by a minister for its exercise. This caused a stir. A resolution was passed on 27 September 1886, which in so many words "disapproved of the line of conduct with regard to the stepping down of the minister of Colonial Affairs". The next day, the Lower House was dissolved by royal decree. The subsequent electoral results were possibly influenced by a royal proclamation sent to all voters together with the ballot papers, in which the king called upon the voters not to promote the "constant change of My responsible counsels" (i.e. his ministers) and to support the present government. Yet the

majority elected was still not conservative. Nevertheless, the new Lower House only debated the matter without passing a new resolution against the cabinet, which stayed in power.

A second affair concerned Luxembourg in the aftermath of the Franco-Prussian war of 1866. King William III was not only king of the Netherlands. Through a personal union he was also head of state – Grand Duke[2] – of Luxembourg. In the aftermath of the Franco-Prussian war, Napoleon III approached William III, suggesting he sell Luxembourg to France by treaty. Initially, such a transfer seemed to be tolerated by Bismarck, but when the latter was held 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, where 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, as the government 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 this and instead dissolved the Lower House (January 1868). The subsequent elections did not change the political composition of the Lower House, and this time the new Lower House passed a resolution expressing its opinion "that no interest of the country required the most recent dissolution of the House". Because after this motion of disapproval the ministers did not immediately resign, pressure was further stepped up by once again rejecting the budget for Foreign Affairs. Upon this, the ministers again tendered their resignation, and this time the king commissioned someone with forming a new cabinet, thus accepting the resignation.

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

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

The first remains an established interpretation of ministerial responsibility, the second and third rules remain customary constitutional law to this day (see Sections II.2.4 and III.4 below).

The practical confirmation of these rules brought the reform of 1848 to its logical conclusion. It meant the definitive end of attempts to undo the objectives of the 1848 reform. In that sense it is correct to say that the 1868 events confirmed rather than established the parliamentary system of government.

2.1.6. Towards democracy – 1917

The definitive settlement for a parliamentary system of government in the 1860s did not achieve democracy in its modern sense. Electoral rights were reserved to the wealthy few only. Although the basis of the right to vote was extended several times – with great controversy between (in a nutshell) those who found proposed extensions going too far and those who found they did not go far enough – the general franchise was not achieved

2. For the constitutional implications and parallels in Luxembourg, see the chapter on Luxembourg in this volume section I. 2-4.

until 1917 in practice, and was constitutionally entrenched only in 1922. The reason it took so long was the political linkage made with the other issue which dominated politics throughout the second half of the 19th century: the issue of state subsidies for protestant and catholic schools, the so-called "school struggle". Since 1848, the constitutional provision on liberty of education was initially interpreted as meaning the prohibition of state subsidies for schools which were not under public authority, and subsequently as meaning that such subsidies were politically undesirable. As a consequence of this particular issue, Protestants and Catholics, as they became separately identifiable from the various liberal and conservative groups in parliament, came to stand in opposition to the liberals (and later also socialists). As long as the issue of denominational education was not solved, the Protestant and Catholic groups in the Lower House pursued what they called a *non possumus* policy regarding the issue of the franchise. This was notwithstanding the fact that, particularly in certain Catholic circles – as the 19th century progressed, Catholics were very much in the process of social, cultural and political emancipation from earlier open and large scale discrimination – there was an awareness that the franchise would increase their presence and profile in politics. In 1887, they agreed to a constitutional amendment which extended the right to vote to male residents of Dutch nationality who fulfilled certain criteria of suitability and social welfare, these to be determined by act of parliament. This "*caoutchouc* provision" shifted the emphasis from constitutional amendment to electoral reform by act of parliament. Although this made it possible to extend the franchise, it did not silence the call for universal suffrage – an issue on which political parties remained internally split until the beginning of the 20th century. Even the socialists were at best lukewarm about the right to vote for women. It was only after the First World War had begun – the Netherlands remained neutral – that a breakthrough was made: an agreement was found on a constitutional amendment which granted denominational primary schools financial equality to public schools (those established and operated under responsibility of local government), which in turn led to 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, abolished the constituencies and introduced proportional representation. In 1919, women were granted the right to vote (and by implication to stand for election also, although this did not seem to be contemplated as a probable eventuality), and this was entrenched in the constitution in 1922.

The 1917 breakthrough after decades of deadlock was related to the war surrounding the country, the social pressures it engendered, and the socialist revolutionary zeal across Europe which was unleashed in its aftermath. This was not a one-to-one causal relationship, but the war 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 in the background of this constitutional reform.

2.2. The adaptations

2.2.1. 1922 and beyond: consolidating parliamentary democracy

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

mentioned above, and an amendment to restrict the succession to the throne to the descendants of Queen Wilhelmina (reign 1890/1898-1948), 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 States General (parliament). 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. The amendment concerning prior approval of treaties, though intended as a major 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 of parliament. This failure was to be corrected with the constitutional amendment of 1953, as of which the principle of prior parliamentary approval was extended to all international treaties, whatever their name or form.

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

It would be a mistake, however, to think that in the Dutch context representative democracy is the same as parliamentary democracy. Quite the contrary: parliamentary representation was only one aspect of a much broader concept of democracy, which was a consequence of the permanent minorities of which society was composed. As of approximately the 1870s, society began articulating itself into four religious and ideological streams: Protestant, Catholic, socialist, and neutral. These developed into four "pillars", each of them closed in themselves, each with its own sports clubs, trade unions, employers organizations, 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 the feats of such brokering. During the period stretching from secularization of the 1960s to the de-ideologized 1990s, the pillarized society was gradually dismantled.

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

2.2.2. After the Second World War: the failed constitutional reform (1954 to 1983)

During the Second World War, the Netherlands government was in exile from the beginning of the German occupation (May 1940). During her time in London, Queen Wilhelmina had vented ideas about a "renewal of the political order" of a rejuvenated country after regaining its liberty, personal ideas which were not entirely new. Reconsideration of the constitutional order – usually vague and undefined – was also a hobby for others during and immediately after the war. In the Speech from the Throne of 1946, the government announced a general revision of the Constitution, but this turned out not to be a very pressing concern. After the liberation, wartime ideas about a new constitutional system and parliamentary landscape were soon frustrated. The traditional political parties

regained the position they had before the war, and the return to previous constitutional relations was a fact.

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

The second half of the 1960s seemed at first to be a turning-point. Social and cultural movements and contestation of the "establishment", evidenced by beatniks in their Dutch version as *Provo's*, also affected the political environment. The announced marriage of the probable heir to the throne, Beatrix, with a German was one occasion around which socio-political and cultural contestation could converge, with smoke bombs and alternative "happenings" marking the royal 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 political system, the existing political parties and the parliamentary system. Direct election of the prime minister, abolition of proportional representation – the very cause of the prevalent culture of permanent compromise and unclear decision-making – were declared centrepieces of a proposed overhaul of the constitutional system. For the minister for the interior, in charge of constitutional affairs, it was reason to commission a *Proeve van een nieuwe Grondwet* (discussion draft for a new constitution) written by civil servants in consultation with a number of professors of constitutional law.

In 1967, the government had established another *staatscommissie*, which considered the various proposals and ideas about reforming the system of government, especially those concerning the electoral system and the manner of selecting a prime minister. This commission proposed to retain the principle of proportional representation, but wished to introduce a provision in the Constitution which would make it possible to divide the country into electoral districts in each of which at least 10 members of the Lower House would be elected, in order to enhance the relation between voters and elected.

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

These proposals were hotly debated. Two members of the Lower House introduced a bill which proposed a directly elected prime minister *tout court* – an option which had been rejected by the *staatscommissie*. But neither this nor the proposals of the commission were accepted by parliament.

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

This general revision of the Constitution was finally achieved in 1983, after a relatively minor adaptation in 1972, which among other things lowered the ages of the right to vote and to be elected. The revision, although its initial ambition was much greater, was in the end mainly cosmetic and confirmed the historically incremental and far from revolutionary 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 ("de-constitutionalization"). Some called it "a face-lift for an old lady".

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

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

2.2.3. *Adapting to the international environment: decolonization, international relations and the Fall of the Wall*

The major circumstance urging constitutional amendments after the Second World War was in the context of international relations, which had undergone drastic changes. Again, this was an adaptation to a changing political environment, rather than constitutional amendment changing the political environment. Three constitutionally relevant changes in the international environment occurred: the process of decolonization, the outbreak of the Cold War and later its end in 1989, and increasing 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 painful colonial war in the shape of two so-called *politionele acties* (July 1947 – January 1948 and December 1948 – January 1949), sovereignty was in the end officially transferred on 27 December 1949 to Indonesia. Of the Netherlands East Indies only Netherlands New Guinea was left. At the end of the 1940s and beginning of the 1950s, the relation with the West Indies, to wit Surinam (in South America) and what was subsequently called the Netherlands Antilles (in the Caribbean; on the situation now see below, section V.1.1), was also renegotiated, in terms of granting these countries autonomy within the Kingdom. The process of decolonization was well beyond the control of the constitutional provisions on the colonies.

The process led initially to adaptations of the Constitution by a number of amendments passed in 1948. These changed the names of the territories mentioned in various constitutional provisions, and made it possible to enter into a federation with Indonesia and to come to an arrangement granting autonomy to other parts of the Kingdom. As the federation soon proved stillborn, later amendments of the Constitution could only be adaptations to the new realities. This happened in 1956 and 1963. The first removed the mention of Indonesia in various places and revoked the provisions on the federation with

Indonesia. In 1954, relations with the Western parts of the Kingdom were resettled in a Charter for the Kingdom of the Netherlands, *Statuut voor het Koninkrijk der Nederlanden*, which has supra-constitutional status (in the sense that its provisions are hierarchically superior to those of the Constitution). The amendment of 1963 removed the mention of Netherlands New Guinea, sovereignty over which had been transferred to Indonesia under strong international pressure a year earlier.

More successful were the proposals the *Van Schaik* commission had made in its interim-report which built on the work of a parallel commission, concerning the conclusion of treaties and the status of treaties and of decisions of international organizations in the national legal order. The proposals to grant them direct effect in the domestic legal order were taken over by the government. An amendment initiated by Serrarens – member of the Lower House, later the first Dutch judge in the European Court of Justice – stipulating expressly also the priority of treaties and of decisions over any contrary national legislation, was adopted against the wishes of the government. A provision was adopted to the effect that the government "shall promote the development of the international legal order" – one of the few "ideological" provisions which can still be found in the Constitution today. 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.

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*.

The Cold War led to a number of bills on excluding members from representative assemblies (including the houses of parliament) who had been proved to strive after revolutionary aims. A somewhat similar proposal had been rejected in 1938, but the *staatscommissie Van Schaik* had re-included it in an interim-report of 1952; this was, however, not taken over by the government nor picked up by parliament. Earlier, 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 in 1948.

The radical change in the European context which came with the fall of the iron curtain was reflected in the constitutional amendment of the year 2000 which concerned defence. It achieved a change in the description of the tasks of the armed forces. These no longer only concern the "protection of the State's interests" but also "maintaining and promoting of the international legal order" (the new Art. 97(1) of the Constitution), thus adapting to the tasks which the armed forces – with a problematic constitutional basis – had already assumed in the 1990s. Also, a new provision was inserted which imposes the obligation on the government to inform parliament (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 (Art. 100 Constitution). This duty to give information is to enable parliament to debate such use of the armed forces and, within the normal rules of the parliamentary system, to influence the relevant decisions.

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

2.3. The Minor Amendments

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

1884 (abolition of the prohibition of constitutional amendments during a regency); 1938 (increase in the income of the king, members of the Royal Family, Lower House members; introduction of ministers without portfolio; extension of the provisions on public bodies for industry and the professions); 1972 (lowering of the age to vote and stand for elections, abolition of state subsidies for protestant ministers and catholic clergy, adaptation of income of members of parliament and of the members of the Royal House);

1987 (a technical redrafting of Article 12, concerning entering the home against the will of an occupant by public officials);

1995 (clarification that the armed forces do not need to have conscripts in active service);

1999 (removal of a large number of transitory provisions, which had lapsed; amendment of the provision on ombudsman institutions in order to make explicit mention of the National Ombudsman (established in 1981); amendment on guardianship and parental authority over the king who has not attained majority);

2002 (in order to allow further exceptions to the privacy of the home if necessary for the protection of national security);

2005 (provision enabling replacement of members of representative bodies in cases of pregnancy or illness);

2008 (abolition of the exclusion from electoral rights of persons who are legally incompetent as a consequence of a mental disorder; elision of the provision on the chairmanship of municipal and provincial councils).

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

3. 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 of the attempts at constitutional amendment which have so far failed or are pending.

For instance, the issue of reforming the system of government has remained controversial. The question of bridging the gap between elected and electorate has been the object of various official study committees, first the *Staatscommissie Biesheuvel/Prakke* which was established by the government by royal decree; next a parliamentary committee of the Lower House, *Commissie Deetman*, which commissioned a series of reports between 1898 and 1993. They produced many valuable analyses, but did not lead to concrete constitutional amendments. More recently, there were attempts at reform of the electoral system towards a German system, which might possibly lead to an easier articulation of majorities as well – as this was done in a manner which remained within

the boundaries of proportional representation, this did not require constitutional amendment. Also, attempts were made to introduce a facultative and binding corrective referendum, and to have mayors and provincial governors directly elected. None of the bills were passed, and many proposals did not even reach that stage.

Suffice it to mention the most far-reaching amongst pending proposals: the proposal to limit the constitutional prohibition for courts to review the constitutionality of acts of parliament – a prohibition on which we have more to say below. The bill, initiated by members of the Lower House, excepts judicial review against classical constitutional fundamental rights from the prohibition. It was passed with a large majority in the Lower House in 2004, but encountered great scepticism in the Upper House, but passed at first reading. It is pending in the Lower House at second reading, but it is highly uncertain whether a two thirds majority is available in both houses. If successful, it would put an end to one of the particular features of the constitutional system of the Netherlands.

II. The sources of constitutional law

Having described in broad outline the historical development of the Constitution, we now turn to a discussion of the various sources of constitutional law.

1. Hierarchy of norms

1.1. The Constitution and the constitution

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

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

For the sake of completeness, we point out that according to scholarly literature there is a certain "constitutionalization" of private law in the Netherlands. But this may be explained on the basis of the place of international human rights treaties, which we presently describe, rather than from the position of the Constitution.

1.2. The Constitution's relative superiority

It is beyond doubt that the Constitution 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 (Art. 120 Constitution) does not change the hierarchical order between Constitution and acts of parliament. There can be no doubt that parliament and government, together acting as legislature (see below section III.5), are bound by and subject to the Constitution. Unlike the situation in the United Kingdom, parliament is not sovereign, since it is constitutionally bound by the Constitution and other superior norms. In the context of the debate among lawyers on the prohibition of the judicial review of the constitutionality of acts of parliament, some have argued from a certain equivalence in effect to the existence of sovereignty of parliament, but this is a

misunderstanding both of the British doctrine and of the legal position in the Netherlands.

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

1.3. Superior constitutional sources: the Charter for the Kingdom

The first is the Charter for the Kingdom, *Statuut voor het Koninkrijk* of 1954, which governs the relations between the countries which make up the Kingdom: the Netherlands with approximately 16.2 million inhabitants, the Caribbean islands of Aruba, Curaçao and Sint Maarten, with an estimated total of 270 000 inhabitants. Since 10 October 2010, the Charter has provided that three smaller Caribbean islands (Bonaire, St. Eustatius and Saba) form part of the country of the Netherlands, in which they enjoy the status of an ad hoc public body under Article 134 Constitution.

The Charter basically reserves a series of issues to the Kingdom as matters for the whole realm, of which the most important are foreign affairs and defence (Art. 3 Charter). 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 (the instrument is called a *Rijkswet*, Act for the Realm). All matters which the Charter does not declare matters for the whole realm are left to the autonomy of each country.

The Charter provides that it is of higher rank than the Constitution: "The Constitution shall have regard to the provisions of the Charter" (Art. 5(2) Charter). As a consequence, Article 142 of the Constitution provides that "[t]he Constitution may be brought into line with the Charter for the Kingdom of the Netherlands by act of parliament."

However, insofar as matters of the kingdom concerning legislative and executive powers, the organs of the kingdom, kingship and the succession to the Throne, have not been provided for in the Charter, the relevant provisions of the Constitution apply (Art. 5(1) Charter).

1.4. Superior constitutional sources: directly effective international law and EU law

The second, more significant exception to the superior rank of the Constitution is a consequence of Articles 93 and more specifically 94 of the Constitution:

> Article 93
> Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents shall become binding after they have been published.
>
> Article 94
> Legislative provisions [*wettelijke voorschriften*] in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone.

The notion of international provisions which are binding on everyone intends directly effective, self-executing provisions. It is settled case law that although international provisions which are not directly effective are nevertheless part of the national legal order (and in particular bind public authorities), they have no overriding effect over conflicting provisions of national origin (*Hoge Raad* 6 March 1959, *Nyugat II*).

It is generally assumed that the expression "legislative provisions" includes the provisions of the Constitution itself, and this was also the opinion of the government during the revision leading to the Constitution of 1983. It is a point of controversy whether this only applies to provisions of, or based on, treaties which the legislature has judged to diverge from the Constitution and so has, as Article 91(3) Constitution prescribes, approved with at least two thirds of the vote in both Houses, or whether the constitutional superiority applies also if the legislature has not found the possibility of conflict between a provision of the Constitution and the relevant treaty at approval. The former view is based on the fact that Article 120 of the Constitution not only prohibits courts to review the constitutionality of acts of parliaments, but also that of treaties.

Unlike most European constitutional systems, both dualist and monist, customary international law (including uncodified *ius cogens*) has an inferior rank in relation to acts of parliament.

The penal chamber of the *Hoge Raad* (Supreme Court) has held that EC Regulations do not derive their validity in the Netherlands legal order in any manner from Articles 93 and 94 of the Constitution, which presumably means that these provisions do not apply to EU law – a view which since the 1980s has also been held by large sections of national constitutional scholarship (HR 2 November 2004, LJN: AR1797). This is at odds with the intention of the constitution-making powers, as they explicitly held that Articles 93 and 94 of the Constitution also apply to EU law. In other words, the *Hoge Raad* seems to hold that EU law may diverge from the Constitution, even though the approval of the constitutive treaties was not explicitly based on Article 91(3) of the Constitution.[3]

1.5. Human rights treaties as sources of national constitutional law

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

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

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

1.6. *Constitutional norms of lower rank*

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 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. Since 1983, the Constitution provides in Article 91 that the manner of and the exceptions to the requirement of prior approval shall be laid down by act of parliament. The subsequent Act regulating this matter must be considered "organic law".

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

The rank of some other organic instruments, such as the Rules of Procedure of the Houses of Parliament and the Council of Ministers, do not raise problems in practice, in as much as there are no examples of cases in which they conflict with other legal instruments; and as *interna corpora* they are not justiciable. More complicated is the status of *organic law created by certain other instruments* than acts of parliament, mostly royal decrees and ministerial decrees, which can also regulate matters covered by normal legislation. Their normal formal rank (i.e. below that of statute law) was considered dominant over their material status of organic law. However, the fact that these instruments have a direct basis in the Constitution, could be considered to put them on a par with acts of parliament or even at a higher level than normal acts of parliament. Recent case law confirms the latter view (ABRvS [Judicial section of Council of State], 10 October 2004, LJN number AD4637).

2. Some formal characteristics of the sources

2.1. *Rigidity of the Constitution*

The Constitution is a rigid constitution. Its amendment proceeds as follows (Art. 137 Constitution). First, by act of parliament adopted by both Houses the proposed amendment to the Constitution must be formulated. After this, the Lower House is dissolved. After the new Lower House has convened, the amendment is considered by each of the Houses in the so-called "second reading". Each House can in second reading only adopt the amendment with at least two thirds of the votes. This is basically the procedure which has existed since 1848, but even before then the Constitution was rigid.

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

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

The second reason concerns the nature of the dissolution and subsequent elections and of the newly elected Lower House. The dissolution of the Lower House had never been intended to give the electorate the opportunity to vote on the constitutional amendment as if it were a referendum when it was introduced in 1848. It is not a referendum at all, but merely an election of a House with constitution-making power (which it exerts together with the Upper House and government).[4] The actual wording of the relevant constitutional provisions on constitutional amendment confirms this view.

The rigidity of the Constitution has no doubt made the adoption of some more far-reaching proposals difficult. This also explains why there have been some constitutional revisions which concern rather unimportant and uncontroversial issues, and which were often the left-overs after the more substantial proposals were rejected. This state of affairs is inherent in the kind of entrenchment which is intended by the provisions on constitutional revision: only those rules which can count on the support of a large majority in two successive Lower Houses and in the Upper House can be raised to constitutional status.

Unlike the constitutions of other European countries, the Constitution does not provide for certain unchangeable provisions. Most authors assume that there are no such unchangeable provisions. Nevertheless, occasionally it has been argued that certain fundamental rights, as found in the Constitution and the ECHR are unchangeable even for the constitution-making power. In an advisory opinion on the possibility of diverging by treaty from the Constitution, the *Raad van State* took a similar position. It suggested that it was impossible to diverge substantively from the ECHR, the EU Treaties and from certain fundamental rights provisions contained in Chapter 1 of the Constitution.[5] This opinion referred to the competence of the treaty-making power, not the constitution-making power. However, the treaty-making power in the case of treaties that diverge from the Constitution is vested in the legislature by a majority of at least two thirds of the vote in both houses of parliament together with the government; essentially the constitution-making power resides in the "second reading" of constitutional amendment, which is a majority of at least two 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.

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

2.2. *The treaty-making power; parliamentary scrutiny of EU law*

The Netherlands has a monist system in the sense that international law forms part of the national legal order from the moment that the relevant rule or provision becomes binding on the Kingdom. This is based on case law.[6] Article 93 Constitution, quoted above, provides a restriction of monism in as much as directly effective provisions of treaties can only have effect after they have been duly published. This monism implies that the

4. The amendment procedure of 1848 built on that of 1815, which was to elect the number of members of the Lower House so as to double its size; this "double size chamber" was to decide on the amendment adopted at first reading.

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

6. Hoge Raad 3 March 1919, NJ 1919, 371.

involvement of parliament in the approval of treaties does not serve the objective of assenting to the relevant international instrument's entrance into the national legal order, but is only an instrument of parliamentary control over government action in the field of international relations.

In accordance with international law and practice, treaties are negotiated by the government. Although the government is under the legal obligation *ex officio* to provide parliament periodically with information on the treaties it is in the process of negotiating (Art. 1(1) Act on the approval and publication of treaties (*Rijkswet goedkeuring en bekendmaking verdragen)*), that information is extremely limited. As a rule it is only if parliament itself asks for more information, that the government will provide it.

Unlike in most other European countries, the Constitution contains the rule that "the Kingdom shall not be bound by treaties, and such treaties shall not be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament" (Art. 91(1) Constitution). Among the exceptions established by act of parliament the most important ones in practice are treaties which merely concern the execution of a treaty which has been approved, and treaties which do not entail important financial obligations on the part of the Kingdom and are concluded for at most a year. Unlike most other European countries, the question whether a treaty affects the legal rights and duties of citizens is not a relevant criterion either for prior approval or for the exceptions to prior approval, although precisely such treaties have priority over national (and constitutional) provisions.

The parliamentary approval can either be explicit, taking the shape of an act of parliament, or it can be tacit, which is by the passing of 30 days after the treaty is put before parliament without at least one fifth of the members of either House asking for explicit approval.

In the field of European decision-making, the practice of the Netherlands States General has been varied. Although the Lower House committees for agriculture and finance have been quite active scrutinizers of ministerial activity in the Council since the 1960s, the House started being active on a broader scale only in the 1980s. For a long time, the Upper House was relatively more alert and systematic in its approach to European decision-making: the Lower House has become more active since the approval of the Lisbon Treaty. Prior to that, there existed formal, legally binding procedures only for certain EU decisions, mainly the legally binding decisions taken in the field of justice and home affairs (pre-Lisbon: the "third pillar" decisions). These required the prior consent of both houses of parliament before the Netherlands representative could vote in the Council. Paradoxically, this requirement, which provided the Houses with effective powers to enforce the duty of the government to provide information to Parliament, was abolished together with the approval of the Lisbon Treaty, with the effect that the government no longer provides as much information to parliament as previously. Instead, the Act on Approval of the Lisbon Treaty contained a new provision, allowing either of the Houses to stipulate that the government makes a parliamentary scrutiny reservation in the Council to any legislative EU proposal which the House deems of special political importance, in order for it to scrutinize the proposal. This reservation is in principle valid for four weeks.

2.3. *The amendment of the Charter*

The Charter of the Kingdom was drawn up in a series of Round Table Conferences with representatives of the colonies in the Western hemisphere. It entered into force in 1954. It can be amended by *rijkswet*, that is to say an act of parliament for the realm under 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, but with two different extra safeguards. The first is that the relevant act has to be adopted in each of the Caribbean countries of the Kingdom by their local parliaments, which have to adopt it in two rounds of readings and votes, unless in the first round it is adopted with a majority of at least two thirds of the votes. Secondly, if an amendment of the Charter entails a divergence from the Constitution of the Netherlands, it needs to be adopted in the Netherlands under the procedure for constitutional amendment, albeit that in second reading it can be adopted by simple majority.

2.4. *Customary constitutional law*

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

The main norm accepted in parliamentary practice is the rule of confidence which holds that if the Lower House passes a motion of censure addressed to the cabinet or a minister, the cabinet or minister must offer its resignation to the king, who is under the obligation to grant the dismissal, unless the government decides to dissolve the Lower House. For reasons we explain below (section III.4) this alternative course of action (dissolution) has not been pursued since the 1930s. As we explain later, also the related norm that in case of a crisis of confidence between parliament and the cabinet, the cabinet cannot dissolve the Lower House more than once, has no practical relevance under present circumstances.

One of the most important rules of customary constitutional law is the above-mentioned rule of monism in the sense that international law forms part of national law from the moment it becomes binding on the Netherlands.

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.[7] The case concerned a royal decree containing a general rule prescribing that mental hospitals were to hold a register of their patients, on pain of a penal fine determined by act of parliament. The *Meerenberg* institution had failed to comply with this royal decree and was prosecuted. In highest

7. HR 13-01-1879, W 4330 (*Meerenberg*).

instance the matter turned on whether the government had the power to issue the said royal decree, although there was no basis for that decree in an act of parliament, other than the act of parliament which imposes a penal fine on the transgression of royal decrees (an Act known as the *Blanketwet* of 1818). In its judgment, which concerned the powers of the executive versus those of the legislature and hence the division of powers between government and parliament, the *Hoge Raad* found that the Constitution did not grant a general legislative or regulative power to the government, and that it followed from the scheme and structure of the Constitution that legislative power which is to be enforced with criminal sanctions can only be derived from either the Constitution itself or from an act of parliament delegating such power to the government. Such an act of parliament or direct basis in the Constitution itself was absent, while the *Blanketwet* did not provide a basis for the said royal decree either.

From this judgment, which was phrased in broad and general language, the unwritten constitutional principle of legality was derived, according to which legislative power can only be exercised by the executive if it has a specific basis in an act of parliament. This found an indirect expression in a constitutional amendment of 1887, according to which royal decrees containing general administrative regulations can only be enforced by criminal sanctions if they have a basis in an act of parliament (now Art. 89 (1) and (2) Constitution).

The principle was further elaborated by the *Hoge Raad* in a judgment 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 is "invasive", *ingrijpend*, must have a basis in an act of parliament.[8]

8. HR 22 juni 1973, NJ 73, 386 (*Fluoridering*).

III. Form of Government

1. The head of state as a hereditary office

The head of state in the Netherlands is a hereditary office, which falls to the House of Orange-Nassau, since 1814 (in 1815, the principality became a kingdom and the Sovereign Prince a King). During the Republic, in all provinces except Friesland the *stadhouders* had been princes of Orange, and in 1747 their office was officially declared to be hereditary (but as we noticed, the *stadhouder* could never claim sovereignty). After the interlude of the period 1795-1813, there was some logic to revert to the prince of Orange as the hereditary head of state.

The present rule is that the eldest eligible child succeeds to the throne (Art. 25 Constitution). This gender neutral rule favours the chances of women to reach the office in practice. Since 1890, women have exercised the royal authority. In 2013, Queen Beatrix abdicated in favour of her eldest son Willem Alexander, but all his children are female.

Even when the office of head of state is hereditary, however, the situation can arise that in the absence of a hereditary successor (for lack of eligible offspring) a new king must be elected. Under Article 30 of the Constitution, in the absence of a hereditary successor a new king is to be chosen (if the king is still in function) by act of parliament at the initiative of the government, which needs two thirds of the votes cast in Parliament; or (if the king has abdicated or died) not by act of parliament but by a simple vote in Parliament of at least two thirds of the votes cast. When there is neither a king nor a hereditary successor, under the Netherlands Constitution the powers of the king are exercised by a Regent; when there is no Regent either, they are exercised by the *Raad van State*, Council of State – which is the highest advisory council in the body politic (Arts. 37 e and 38 Constitution).

In the Netherlands the powers of the king are those provided for in the Constitution and a number of powers based on convention. Most importantly, since 1848 the king can only act under ministerial responsibility, which considerably reduces whatever discretion might still be left to him, and ensures the character of the parliamentary system of government.

Because the king is part of the government as defined in Article 42(1) of the Constitution, the king is to be involved in all matters reserved to that government. Moreover, the Constitution specifies that – as the instrument's name already suggests – the king has to sign royal decrees (Art. 47). Whenever the Constitution (for instance, in case of dismissal and appointment of ministers and state secretaries, the dissolution of parliament) or an act of parliament (in numerous instances) requires a royal decree, it involves an act of the king. In addition, the king signs acts of parliament (Art. 47). The king is involved in introducing government bills into Parliament (Art. 82) and in their ratification (Art. 87).

By convention the king plays the role which all heads of state are wont to do in international relations, for instance in receiving the credentials of foreign ambassadors, etc. This, however, is more an international than a constitutional convention.

It may be considered a convention that as part of the government the king has the right to advise, encourage and warn ministers – a "right" which is inherent in the relationship which exists between the king and his ministers. This relationship is determined by the rule of Article 42(2) Constitution: the king enjoys immunity; the ministers are responsible. Immunity means in essence no more, nor less, than that no force or enforcement can be legally used against the king. It does not, of course, mean that the person enjoying immunity is not bound by the law. This is meant when it is said that the institution is that of "constitutional" monarchy (although "monarchy" in its more literal, classical sense is a misnomer for the type of constitutional system of government).

It should be noted that since the Netherlands has become a party to the Statute of the International Criminal Court, it is clear that there is no immunity for heads of state as regards the international crimes prosecuted under the Statute. Although the king cannot under national criminal law (also that regarding warfare) be put on trial, he can (precisely because he cannot be tried by a national court) indeed be tried by the International Criminal Court. In this sense, the immunity asserted in Article 42 of the Constitution suffers an exception.

There are only two manners in which kingship comes to an end: death or abdication (Arts. 25 and 27 Constitution). Abdication has been practised by four of the six heads of state of the Kingdom (William I (reign 1814-1840), Wilhelmina (reign 1898-1948), Juliana (reign 1948-1980), Beatrix (reign 1980-2013); only William II (reign 1840-1849) and William III (reign 1849-1890) died as king. Articles 35 and 36 of the Constitution provide for the cases of the king's inability to exercise royal authority and his temporary relinquishment of the exercise of his powers. These do not put an end to the kingship of the king, but only to his competence to exercise his powers. The situation which results if such cases occur can be compared to the situation when the king is a minor: the king is king, but the royal powers are exercised by a Regent.

2. The government

2.1. Composition

The government comprises the king and the ministers (Art. 42(1) Constitution), but there are also state secretaries, who are considered members of the government. Unlike the situation in many other European countries, ministers and state secretaries are not allowed to be members of parliament, with the exception of ministers and state secretaries who successfully participated in parliamentary elections and have been elected while no new cabinet has yet been appointed (Art. 57(2 and 3) Constitution).

Ministers are appointed and dismissed by royal decree (Art. 43 Constitution) and, as we discuss below, this is done on the basis of a process which aims to ascertain that the minister involved has sufficient support in Parliament. The ministers together form the Council of Ministers (Art. 45(1) Constitution).

Ministers are normally appointed at the head of a ministry, but ministers can also be appointed who are in charge of a particular subject matter without heading a ministry (Art. 44(2) Constitution). Such "ministers without portfolio" are full members of the Council of Ministers. In practice they are associated with an existing ministry, so that they can enjoy the support of its civil service. They also find financial resources in the budget for this ministry.

Ministers can be assisted in the discharge of their political office by one or more "state secretaries", *staatssecretarissen*. Article 46(2) of the Constitution specifies six elements of the position of a state secretary:

1) the state secretary can act as a minister;
2) he acts in the place of the minister;
3) he acts in the cases in which the minister determines;
4) he takes heed of the minister's instructions;
5) he carries political responsibility;
6) his own responsibility does not diminish the minister's responsibility.

From this it must be deduced that the state secretary is subordinate to the minister, and although the Constitution specifies that a state secretary acts "as a minister", he is not a minister. He is therefore not a member of the Council of Ministers, although he may be called in during the meetings of the Council of Ministers. Under the Rules of Procedure of the Council of Ministers, a state secretary may represent a minister in the Council when he is temporarily absent. Although he is subordinate to a minister, the state secretary holds a political office, is politically responsible and therefore can be held to account towards Parliament. Practice confirms that he needs sufficient support in Parliament in the sense that he has to resign if a motion of censure concerning him is passed in the Lower House.

2.2. *Functioning of the government*

There is no constitutional provision stipulating who is head of government, and the general assumption is that there is no such position as a matter of constitutional law. Though the king may be said ceremoniously to head the government, in the political process it is the council of ministers that takes the decisions. Article 45(3) Constitution places this beyond doubt by specifying that the council of ministers decides on the general government policies to be pursued by the government. Political power within the government (king and ministers) therefore lies primarily with the ministers. The doctrine of ministerial responsibility is at the basis of this constitutional rule. It makes it imperative that for any act or omission of the king, also (and especially) in the exercise of powers for which he needs to act in person, there is the backing of the responsible minister. Since ministers can only function as long as they are not censured by Parliament, they will only want to be responsible for an act or omission of the king in such a manner as not to become the unwarranted object of a motion of censure in Parliament. This implies that in cases of persistent divergence of opinion between the king and the ministers, ultimately the king will have to back down; otherwise a constitutional crisis will ensue.

Article 45(3) Constitution implies that responsibility for general government policy is not a matter which only concerns individual ministers: collective responsibility also exists with regard to overall government policy. As a matter of fact, cabinet homogeneity is considered to be a constitutional rule. In essence this means that responsibility for general government policy is shared by all the ministers.

Homogeneity implies that every minister is bound by decisions of the council of ministers and to that extent the cabinet is homogenous (Art. 12, Rules of Procedure of the Council of Ministers). The provision means that each minister must ultimately be able to agree to bear responsibility for a decision of the council of ministers. If a minister deems it impossible to take responsibility for a decision and he cannot convince the council of

ministers to reverse its position, he will have to resign. Except for unimportant questions which do not pose the issue in such terms, consensus is ultimately required in the council. The procedural rule stating that decisions are taken by majority is therefore one which can only apply with respect to relatively unimportant issues, unless a rupture within the cabinet is forced. Because ministers who voted against a decision will have to be able to bear responsibility as well as those who voted in favour, the former will only do that for decisions they would ultimately be able to reconcile themselves to.

The rule of cabinet homogeneity means that in the Netherlands the system is based on "cabinet government", that is to say a system in which decisions are made by the members of the cabinet collectively. This should not obscure the fact that the Prime Minister has certain special powers, specified in the Rules of Procedure, including the power to set the agenda of the council of ministers. This, the prevailing opinion suggests, makes him *primus inter pares*, "first among equals".

The system of cabinet government has become exposed to pressures. There have been many proposals to grant the prime minister powers to make him either "first above equals", by giving him a stronger position and some powers over the other members of the council of ministers; also some have proposed to make him "first above unequals", that is to say by giving him strong powers over other ministers. The proposals ranged from having him directly elected by the citizens or by the Lower House, to simply granting him stronger powers, for instance in coordinating certain, or all, policies which are in the care of individual ministers, or by giving him powers to reshuffle the cabinet. These proposals, however, would require a major change in the operation of the political system, which is now based on power brokering among several parties, each of which has only a minority in parliament.

The other reason for pressure on the system of cabinet government lies in the fact that decisions on government policy are made in the council of ministers, but these can only be carried into practice by the several ministers involved. Decisions of the council of ministers have as such no legal force; the council of ministers does not have its own executive agency outside its members, the respective ministers and their ministries. Although government policies are decided in the council of ministers, they only become operative in practice because individual ministers and their ministries execute them. This means that ministers have a huge influence on the exact manner and timing of the execution of government policies when acting outside the council of ministers.

Individual ministers also bear a responsibility of their own which they do not share with other ministers. They bear such individual responsibility for acts which by their nature are individual, e.g. because they concern the personal acts or omissions of a minister, or – more importantly – because the responsibility concerns the minister in his function as head of his particular ministerial department. Legally, the acts and omissions of civil servants within a ministerial department are attributed to the minister heading the ministry.

2.3. The end of a cabinet and forming of a new cabinet

In order to distinguish the body of ministers and state secretaries from the government (the latter comprises the king), the term "cabinet" is used. The appointment of ministers and state secretaries by royal decree is based on a process of formation of a cabinet, usually after elections, although forming a new cabinet (either an interim cabinet or a more permanent cabinet) can also occur after a cabinet crisis which led to the resignation of the cabinet without there being elections (the last time this happened was in 1965).

Elections are held either periodically every four years or there are early elections due to a crisis in the cabinet. These are frequent, because under the party system and electoral system of near perfect proportional representation, only coalitions can govern. The convention is for the cabinet to tender its resignation on the eve of regular periodic elections, thus clearing the way for the forming of a new coalition or negotiations on the conditions for continuing the existent coalition.

The ordinary order of things is that the queen receives the prime minister, who tenders the resignation of the cabinet. The queen always then decides to consider the request and asks the cabinet to remain in the meantime in office and do all that is necessary in the interest of the country.

Until 2012, the queen would then consult the vice-president of the Council of State (she herself is president of the Council of State), the Speaker of the Upper House and the Speaker of the Lower House, and subsequently all the leaders of the political groups represented in the Lower House. She usually then appointed a person who is charged with the exploratory task of informing her of the possibilities to form a cabinet or about difficulties which stand in the way of forming a certain cabinet, the so-called *informateur*; and in the next stage, the person who is charged with the task of forming a certain cabinet, the so-called *formateur*. Their activities are all aimed at forming a cabinet which at the very least is not immediately voted out when it presents itself in the Lower House. To that effect, a text is negotiated and agreed between the relevant parliamentary groups, which contains the programme to be pursued by the new government: the so-called *regeerakkoord*, literally an "agreement to govern"; this is in fact a coalition agreement on the substance of the policies to be pursued by the coalition envisaged. This programme is usually highly detailed. It is a crystallization point for the confidence which a cabinet needs in order to function in a parliamentary system of government. The programme is concluded between the parliamentary groups, and commits these groups politically; after this has been agreed, the candidates for the posts of minister are discussed and approached; only after these candidates have agreed to become members of the new cabinet, does the agreement become a political factor between (members of) the cabinet on the one hand and parliamentary groups on the other. So, in first instance, the agreement to govern binds the parliamentary groups; in the second place, the cabinet members also commit themselves thereto. All this is a matter of mere political commitment: legally the document has no binding force. The agreements to govern have become extremely important documents politically. Negotiating the programme for the new cabinet is many a coalition MP's finest hour.

Since the Lower House elections of 2012, the Lower House no longer gives the king the role of having to appoint an *informateur* or *formateur*, but instead appoints a "reconnaisseur" or explorer, who consults the leaders of the political groups represented in the newly elected House to suggest the appointment of an *informateur* or *formateur*, who is then subsequently appointed by the Lower House and reports to the Lower House.

3. PARLIAMENT

Since 1815, the parliament, the States General, is bicameral: it is composed of the politically more important 150 member Lower House (confusingly called *Tweede Kamer*, literally Second Chamber) and the 75 member Upper House (*Eerste Kamer*, literally First Chamber).

Ever since the beginnings of the Kingdom in 1814, the States General has represented the entire people of the Netherlands (Art. 50 Constitution). Although the nobility was granted the right to a share of at least a quarter of the seats (Art. 55 Constitution 1814), they were to meet together in the States General with the commons. The Belgians, who were joined to the Netherlands by the Vienna Congress in 1815, insisted on having the nobility meet separately. Hence, bicameralism based on the distinction of birth was introduced. Bicameralism – although it was not based on distinction of nobility for long (throughout history, aristocracy based on social and commercial merit has been a more decisive distinction than nobility in the Netherlands) – has remained to this day. Nevertheless bicameralism has never rooted very deeply. The most one can say is that it has never been abolished. The main argument for retaining it, is that the Upper House can function as a *chambre de réflexion*, as a useful check by part-time politicians on the highly politicized decision-making by the Lower House. And this is how the Upper House actually functions.

3.1. Elections

The Lower House is directly elected by citizens of 18 years and older. The Upper House is elected by the members of the States Provincial within three months after the latter have been directly elected.

The Lower House is elected periodically, every four years. However, if a cabinet resigns as a consequence of a political crisis, frequently the Lower House is dissolved (see Art. 64 Constitution) in order to ensure that a new cabinet is formed on the basis of the political preferences as they exist among the electorate.

The Upper House can also theoretically be dissolved before it has served its regular term, but as the States Provincial cannot be dissolved, this could not possibly solve a political problem, should one arise between the government and the Upper House. As long as the political composition of the States Provincial, which elect the Upper House, has not changed, a new election is not likely to lead to a different political composition of the Upper House.

The power to dissolve the Lower House is a power of the government which is valuable for solving political crises. However, it is also obligatory in case of an amendment of the Constitution, as we mentioned above (Art. 137(3) Constitution). In practice, the moment of dissolution for the purpose of amending the Constitution is chosen in such a manner that it coincides with periodic elections.

It should be noted that in constitutional parlance in the Netherlands, the expression "dissolution" is not used when a House comes to the end of its term due to periodic elections; in this case, its term ends by virtue of the *Kieswet* (Elections Act).

The electoral system is one of strictly proportional representation on the basis of lists of candidates, one for each party. Electors can cast a vote on a candidate of the list of the political group of their preference. In the Lower House elections, the seats are allocated in proportion to the number of votes received for the lists. For Lower House elections there is a threshold of the number of total valid votes divided by the number of seats to be allocated (150), the national quota. The allocation of seats to lists or groups of lists[9] is on the basis of the quota of the number of votes cast for a coalition (or list respectively) divided by the number of seats available (or allocated). As on the basis of such a quota not

9. With a view to optimizing the leftover seats, political parties can combine their lists; this happens particularly with smaller parties within the same part of the political spectrum.

all seats will be allocated, the remaining seats are allocated on the basis of the largest average votes per seat for a list or group of list (D'Hondt system). When it comes to allocating seats to the candidates of the list, those candidates of a list are elected which have had a number of votes for them which is larger than 25% of the national quota, in the order of the number of the votes cast for a candidate. If there are remaining seats, these are allocated to candidates in the order of the list (which is determined by the political party handing in the list of candidates).

The Upper House is, as we said, elected by the States Provincial after these have been elected; the electoral results for the Upper House therefore reflect fairly accurately the political preferences of the citizens voting in the elections for the States Provincial. So in fact, elections for the States Provincial are elections for the Upper House, although few voters realize this, because the candidates for the Upper House do not campaign during the period leading up to elections for the States Provincial.

Both houses have committees, permanent ones in the form of standing committees for each ministerial department, and some permanent committees on other general affairs, for instance the standing committees on European affairs, while they also frequently establish temporary committees. There are also special committees, such as those for the Verification of Credentials and for Petitions. In practice, the committees are composed in proportion to the seats in the plenary, but during the Cold War communists were excluded; the special Lower House committee for the secret services is composed of the leaders of the parliamentary groups only, but the strict confidentiality of its work has in the past meant that some parties did not want to be represented in it.

3.2. Parliamentary powers

The Lower House exercises legislative powers, which are discussed below, and powers to hold the government to account. A constitutional basis for the latter powers is in Article 68 Constitution which provides that ministers and state secretaries shall provide each of the Houses orally or in writing with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State. This provision is elaborated in the rules of procedure of each of the Houses, which provide for the weekly question time, interpellations and the procedure for written questions.

An essential parliamentary power is the power of the purse. The yearly estimates of expenditures and revenues have to be submitted by the government to parliament in the form of a bill. The Lower House has no power of initiative in this respect. There are at present no rules concerning the balancing of the budget or the public debt enshrined in constitutionally binding manner at the national level; there are, of course, rules of EU law on the matter.

4. Parliamentary system of government

As has been mentioned several times above, the parliamentary system of government in the Netherlands is based on an unwritten rule of confidence. It dictates that a cabinet, minister or state secretary who loses the confidence of the Lower House, must resign. Theoretically, there is the alternative possibility that if a cabinet loses confidence, the cabinet does not tender its resignation but dissolves the House, so that elections follow.

This alternative of dissolution of the Lower House instead of offering the cabinet's resignation has not been practised since the 1930s for good reasons. Firstly, this is due to the fact that cabinets are coalitions and cabinet members entertain close relations with their respective political groups in parliament. This prevents a conflict arising between a cabinet which remains politically homogenous and a majority of the House holding a contrary view. Should such a conflict arise, this implies that at least one of the coalition partners disagrees with one of the other parties on continuing to support the view of the cabinet. Usually, a conflict between coalition partners in parliament spills over into the cabinet, while a conflict between coalition partners within the cabinet spills over to parliament. Secondly, since 1922 cabinets offer their resignation on the eve of elections for the Lower House, thus freeing the way for the formation 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 always consults the leaders of the political groups in the Lower House with regard to the cabinet's tendered resignation). Although this is done informally, the consent of the majority of the House is sought in practice. All this means that the customary constitutional norm whereby following a motion of censure the government can resort to the dissolution of the Lower House is theoretical and remote in practice.

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

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

It should be pointed out, however, that in case of a cabinet crisis, the Lower House is nearly always dissolved and elections are held. But these elections are not to solve the issue whether the cabinet can remain in power, but in order to solve the crisis by beginning afresh – this might well lead to a similar or identical coalition cabinet, but it is always a new cabinet.

There is some difference of opinion as to the question whether the unwritten rule of (no) confidence also applies between the Upper House and the government. There are two major reasons to think that it does not apply, or cannot apply in the same manner: firstly, the Upper House cannot usefully be dissolved in order to solve a cabinet crisis (see above section III.3.1), and secondly, up to the present day the Upper House has never been involved in the forming of a cabinet ("he who does not make a cabinet, should not break it"; see Section III.2.2 above). Moreover, the general perception of the role of the Upper House has been that it should not play too prominent a role as compared to the Lower House (see introduction to section III.3). There is also, however, an argument to support the contrary view, that the rule of no confidence also exists in the relation between the government and the Upper House, viz. that in practice individual ministers and state secretaries have lost the confidence of the House and resigned as a consequence. Moreover, it has happened that a cabinet threatened the Upper House that it would "consider its position" if the House were to vote down a government proposal; this would seem to imply that the Upper House has the power to force cabinets to resign. Although the Upper House is not supposed to dominate in the bicameral system, it is composed on

a political basis and has the constitutional power to vote down bills and to adopt political views of its own. Hence, it may thwart the policies a government is pursuing, and there is no self-evident reason to limit its constitutional powers to any particular point.

5. LEGISLATURE

In most European countries, the constitution vests the legislative power in Parliament. The Netherlands Constitution is an exception to this. Article 81 of the Constitution establishes that "[a]cts of parliament are enacted jointly by the government and the States General". This provision means exactly the same as the formulation in the Constitution before 1983, to wit, that "the legislative power is exercised by the King and the States General together", although the expression "legislative power" is no longer used. The main outlines of the procedure under which acts of parliament are made are as follows.

A bill can be initiated by the government (as is the case in a very large majority of cases)[10] or by a member of the Lower House (the Upper House has no right of initiative). If a bill is initiated by the government, it is prepared in the relevant ministry or ministries. After consideration and decision in the council of ministers, and after the Council of State (*Raad van State*) has been heard, it is sent with a standard message of the king to the Lower House. If a bill is initiated by a member of the Lower House, he drafts the text, but has in practice the informal facility to be given technical drafting assistance from the relevant ministry. After the text is presented to the Speaker, the House requests the Council of State for its opinion.

A bill must be introduced first in the Lower House; it is not possible to introduce it first (or simultaneously) in the Upper House. The Lower House considers the bill first in a committee, which formulates questions to be answered by the government in one or more rounds; this is mainly in writing but may include an oral deliberation with the responsible minister or state secretary, and even public hearings of experts or members of the public (which is rare). After the government's answers have been received and the preparation is deemed completed, the bill is considered in plenary session. Amendments can be made from the time the bill has been referred by the Speaker to a committee. Finally, the amendments and the bill are voted. If it is rejected, that is the end of the bill. A new piece of legislation on the same topic can only be brought about by beginning the procedure anew. If the bill is passed in the Lower House, it is transmitted by a letter of the Speaker of the Lower House to the Upper House.

The Upper House also first considers the bill in committee. Next the plenary session votes on the bill. The Upper House does not have the power of amendment, so can only accept or reject the bill. If the Upper House rejects the bill, that is the end of the bill. It cannot be sent back to the Lower House, or be reconsidered, nor can the veto of the Upper House be made undone in any other way. If the Upper House accepts the bill, it is sent by the Speaker of the Upper House to the king. In practice, the Upper House sometimes has problems with a specific provision in the bill, and makes it clear that it will reject the bill unless the provision is changed in separate legislation. If it convinces the government, the Upper House suspends proceedings while the government introduces a bill in the Lower House which amends the controversial provision. If the Lower House adopts the bill amending the relevant legislative provision in the first bill, the Upper House will next

10. In the period 2007-2011 a total of 1218 bills were introduced in parliament of which no more than 51 were initiated by members of the Lower House, data derived from www.tweedekamer.nl/images/Jaarcijfers_2011_118-227352.pdf.

resume the work on the initial bill together with the separate bill amending it, and then proceeds to adopt them both. In this way, the Upper House has achieved what a formal right of amendment would have achieved, but without actually possessing such a formal right. Such bills amending bills pending in the Upper House are known as *novelle*.

The king, as always acting under ministerial responsibility, has to ratify the bill (Art. 87 Constitution). This ratification, which requires the countersignature of a minister, turns the bill into an act of parliament. Acts of parliament have to be published in the *Staatsblad*, which is the most official of the two official journals of the Netherlands (the other being the *Staatscourant*).

6. Executive 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*. As we saw in the previous section, the language on the legislative power apparently no longer refers to the separation of powers. Until 1983 the executive power was also mentioned: "The executive power is vested in the King." The Constitution of 1983 brought change in as much as the most omnipresent of modern government power, the executive power, was no longer mentioned in the Constitution. The executive power was hidden both institutionally and substantively.

Despite the fact that in the Constitution the king and the government are treated before the parliament, this does not reflect the normatively subordinate position of the executive power in relation to the legislative power. This was fully affirmed in the 19th century process of the liberal constitutional reforms, culminating in the *Meerenberg* case of the *Hoge Raad* (see section II.2.4 above). The primacy of the legislature over the executive is thus the normative principle. Although a minor area of executive action is allowed without a basis in an act of parliament, i.e. action which does not affect citizens adversely, the executive is subject to the laws enacted by the legislative power.

However, as everywhere else in Europe, the legislative has granted very broad discretionary powers concerning the administration of the welfare state, and legislative power has become delegated to a large extent to the executive. In practice it is the government which takes the legislative initiative. In the ever increasingly important foreign relations, the government is nearly free to act and engage in formal and informal decision-making. EU decision-making is another hugely important playing field of the executive, which parliament still has difficulty to get a grip on. But also on the domestic scene, the sheer size and quantity of executive action is such that most of it will escape the attention of parliament and other elected representative organs.

In the parliamentary system of the Netherlands there is of course a great sense of the need not to imperil 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 debating chamber, 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.

7. Independent Bodies and Agencies

Apart from the States General, the council of ministers and the law courts, the Constitution mentions a variety of other permanent bodies. Chapter 4 of the Constitution contains provisions relating to the Council of State (*Raad van State*), the General Chamber of Audit (*Rekenkamer*) and permanent advisory bodies; it also has provisions relating to the National Ombudsman.

7.1. The Council of State

The Council of State was established by Charles V in 1531 as an advisory body to the Governor of the Netherlands. Since those days the Council has undergone major changes. In the first period of the Kingdom, ending in 1848, the Council was the main advisory body to the monarch, who ruled in person. With the introduction of political responsibility of ministers in 1848, the Council became the advisory body to the king and ministers jointly. Henceforth it became impossible for the king to consult the Council by himself, without involving the ministers.

The composition and powers of the Council are mainly regulated by the Council of State Act of 1962, revised as to its institutional structure per 1 September 2010.

The Council is composed of ten "members", the king and the vice-president. The king is the official president of the Council of State. Apart from the persons mentioned, the heir presumptive to the throne "holds a seat" on the Council *de iure* from the day of attaining the age of eighteen. Other members of the royal family in the line of succession may also be granted a "seat" on the Council on attaining the age of majority by royal decree and have no right to vote. In practice, the king only presides in ceremonial sessions, while the heir presumptive's membership takes the form of a kind of internship in his preparation for fulfilling the office of the head of state. Practically speaking, the typical duties of the presidency are entrusted by law to and performed by the vice-president, such as chairing the plenary and the Advisory Division and organizing the work of the Council in general as well as that of the supporting staff.

Apart from the members and persons mentioned, "councillors" and "councillors extraordinary" can be appointed. The latter perform the tasks entrusted to them by the vice-president; the others participate fully in the work of the Council or its divisions. Appointments are by royal decree and for life with a compulsory retirement age of 70. All members, councillors and councillors extraordinary enjoy immunity from prosecution for what they have said or written in their work for the Council (Art. 47 Wet op de Raad van State). They can only be dismissed by the Council itself, according to rules analogous to those governing the dismissal of members of the judiciary; the members of the judicial division can only be dismissed at their own request.

The powers of the Council of State are divided between the Council in plenary session, the Advisory Division (*Afdeling advisering*) and the Administrative Judicial Division (*Afdeling bestuursrechtspraak*).

The work of the Council mainly takes place in its two divisions. An advisory opinion must by law be given by the Advisory Division on bills and draft general administrative orders (*algemene maatregelen van bestuur*). They can also be sought by the Houses of the States General and the government.

The Administrative Judicial Division hears appeals from judgments given by the Administrative Divisions of the District Courts, except in cases where appeal lies to the

Centrale Raad van Beroep (Central Appeals Court for the public service and for social security matters) or to the *College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal). In a number of cases, the Administrative Judicial Division serves as administrative court of first and only instance. In order to live up to the requirements of judicial independence and impartiality under Article 6 ECHR, members, councillors and extraordinary councillors who are not exclusively part of the Judicial Division may not sit in cases in which the Advisory Division has tendered its advice while the person involved was a member of the latter Division. This follows from the case law of the European Court of Human Rights on councils of state and in particular their combination of the task of providing legislative advice with judicial tasks. This case law inspired the institutional restructuring of the Council of State in 2010 (see e.g. the ECtHR judgment of 28 September 1995 in *Procola v. Luxembourg*, and its judgment in *Kleyn and Others v. the Netherlands*, 6 May 2003).

7.2. The General Chamber of Audit

Like the Council of State, the institution of a chamber of audit boasts a long tradition. The Republic had a *Generaliteits Rekenkamer* (Chamber of Audit of the State Government) from 1602, while even long before that time separate chambers of audit had been functioning in a number of provinces. The designation "General Chamber of Audit" has been in use since 1814. The Constitution contains some safeguards for the autonomy of the Chamber of Audit (Art. 77). Otherwise its composition and powers are regulated by the Government Accounts Act 2001 (Stb. 2002, 413).

The General Chamber of Audit consists of three members and three deputy members. If there is a vacancy, the Chamber of Audit makes a recommendation of six candidates to the Lower House. This House in its turn submits a list of three persons selected from the original list to the government, which then appoints a person from the list to fill a vacancy. Members are appointed for life, subject to an age limit of 70. Dismissal of a member other than at his own request may only be given by the Supreme Court, in which case the rules applying to the dismissal of members of the judiciary for the most part apply mutatis mutandis. The president is appointed by royal decree from the members. Membership is incompatible with other public offices. The Chamber draws up its own rules of procedure.

The General Chamber of Audit is responsible for examining the State's revenues and expenditures (Art. 76, Constitution). Originally, its task was limited to regularity audits, including at most a so-called "minor efficiency audit" (pointing out cases of waste and the like). More recently, however, the emphasis has shifted towards efficiency auditing, taking the form of management and efficiency audits and policy evaluation (s. 85 Government Accounts Act, *Comptabiliteitswet*), although the regularity audit has been maintained.

The regularity audit uses as touchstones: conformity with the budget laws and other statutory regulations, and principles of an orderly and auditable financial management. If the Chamber of Audit has objections, the minister concerned is first given the opportunity to rectify the problem. If he fails to do so, he may be compelled to bring an indemnity bill before parliament (s. 89 *Comptabiliteitswet*). A more frequently used unofficial sanction consists of the publication of the flaws pointed out in the annual report of the Chamber of Audit.

The Government Accounts must be approved by the General Chamber of Audit (s. 83 *Comptabiliteitswet*). The Chamber of Audit is also authorized to examine the accounts of

private law corporations in which the state holds a substantial interest (s. 91 *Comptabiliteitswet*). In 2002 the supervision of European subsidies was added to the Chamber's responsibilities: the Chamber has authority to examine the books of all recipients of subsidies, focusing on how ministers carry out their European management, audit and supervisory powers (s. 92 *Comptabiliteitswet*).

7.3. *The National Ombudsman*

The institution of National Ombudsman has been operative since 1982. The Ombudsman has powers of investigation of acts by public authorities either upon complaint or at his own initiative, and establishes whether their actions and omissions live up to requirements of administrative propriety. He may recommend specific and general improvements and remedies for removing shortcomings which he has found to exist. The recommendations of the Ombudsman are not legally binding, but are authoritative and are followed in a large majority of cases.

The National Ombudsman is a unipersonal office and appointed by the ~~Lowe~~ House for a six-year term. His independence is guaranteed by Article 108 of the Constitution and various provisions of the National Ombudsman Act. He has three substitute-ombudsmen, one of whom is the ombudsman for children, who has the separate task of supervising the observance of the rights of the child as protected under the UN Convention for the Rights of the Child, providing information on and promoting those rights and who has investigative powers which he exercises either on complaint or at his own initiative.

The National Ombudsman's jurisdiction covers acts of administrative authorities. As far as administrative authorities of decentralized bodies are concerned, this jurisdiction exists only in as far as they do not have their own ombudsman institution.

7.4. *Other Bodies*

The Constitution provides that permanent advisory bodies in matters relating to legislation and the administration of the State must be established by or pursuant to act of parliament; the organization, composition and powers of such bodies must be regulated by act of parliament (Art. 79~~,~~ Constitution). Until the 1990s there was a very large number of advisory bodies, extending to hundreds. The large number was explained by the fact that they were the immediate consequence of pillarization, as the government always wished to hear the opinions of the various sections of society, which needed therefore to be represented in those advisory bodies. Also, and increasingly, government and administration required technical expertise, which is not always available within the government bureaucracy. In 1996, there was a large-scale clean-up of the hundreds of advisory bodies. A statute was passed (known as the "Desert Act" of 3 July 1996, Stb. 377), which suppressed virtually all existing advisory bodies. An Advisory Bodies Framework Act (Stb. 1996, 378) lays down a number of basic requirements for the establishment and composition of advisory bodies. The Act provides, for example, that advisory bodies must be composed of experts, and not, therefore, of persons representing an interest group: their proper place is not in advisory bodies but in consultative structures. A limited number of broadly-based advisory bodies in the new style has been established pursuant to the Framework Act. In addition to these, other more narrowly based advisory bodies are established fairly regularly, especially for the purpose of mobilizing expert knowledge in special fields.

A very large number of independent administrative agencies have existed of old. Their number has increased tremendously. Mostly, they do not have powers of regulation in a strictly legislative sense, but they do develop policies in the course of the executive tasks attributed to them by or pursuant to act of parliament, which affect the interests of the citizens who are confronted with their exercise of public authority.

IV. The Judiciary

1. Judicial organization

There is no specific constitutional court. Justiciable issues of constitutionality are therefore the competence of each and any court of law. Which those justiciable issues are, is explained in the next section.

The Netherlands has a partly dual and partly mixed system of ordinary courts and administrative courts.

The ordinary courts are constitutionally considered to belong to the judiciary, and their task is the adjudication of disputes involving rights under civil law and debts (Art. 112(1) Constitution) and the trial of criminal offences (Art. 113(1) Constitution). The special administrative courts are not considered part of the judiciary (Art. 112(2) Constitution).

The ordinary courts exist at three levels: the district courts (*rechtbanken*), the appeal courts (*gerechtshoven*) and the Supreme Court (*Hoge Raad*) as court of cassation.

The district courts also function as administrative courts of general jurisdiction and, as a rule, appeal against their judgments in administrative cases lies with the Administrative Judicial Division of the Council of State. Apart from this Division of the Council of State, specialized administrative courts include the *Centrale Raad van Beroep* (Central Appeals Court for the public service and for social security matters), which deals with appeals in civil servants and social security matters, the *College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal) for appeals in economic matters under public law.

2. Access to justice: division of judicial competence

The division of competence is such that ordinary courts can hear any claim of an infringement of a right under civil law. It has been established case law since the beginning of the 20th century that it is not decisive for a civil court's competence whether the nature of the underlying legal relation is a private law or public law relationship, but the nature of the claim presented. Moreover, in the Netherlands a claim to compensation for damage perpetrated by a public authority is a right under civil law (unlawful act in tort, Art. 6:162 Civil Code). A civil court will, however, not consider a claim admissible if an administrative court has competence to hear the claim.

Administrative courts are competent to adjudicate the lawfulness of any legal act of an administrative public authority (excluding legislative acts and judicial acts) in the exercise of a power under public law. So citizens cannot bring a case on an allegedly unlawful legislative act to an administrative court; hence, a civil court can hear such a claim. However, Article 120 of the Constitution prohibits courts from reviewing the constitutionality of acts of parliament.

3. Constitutional review

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

3.1. The prohibition to review acts of parliament against the provisions of the Constitution

Article 120 of the Constitution reads:

> "Courts shall not review the constitutionality of acts of parliament and treaties."

This provision's scope should be understood correctly, and in particular foreign scholars have often failed to do so. Contrary to what is often thought, there is no general prohibition for courts to review acts or omissions of public authorities against the provisions of the Constitution. Only acts of parliament and treaties cannot be reviewed. All other acts of public authorities can indeed be judicially reviewed, unless the review of those acts would amount to reviewing an act of parliament (which is the case if the act was enabled by an act of parliament in a manner which left no discretion). So in this regard the prohibition must be understood restrictively. And indeed, before the entry into force of the ECHR and ICCPR for the Netherlands, the Netherlands Supreme Court (*Hoge Raad)* developed an elaborate case law on the freedom of expression under Article 7 of the Constitution, mainly concerning municipal bye-laws and national executive legislation restricting this freedom.

The prohibition is in another respect more extensive than the text of Article 120 Constitution may suggest. It speaks of the prohibition to review acts of parliament against the *Constitution* (to judge their *grondwettigheid*), but the protection of acts of parliament is broader in as much as standard case law is that they cannot be reviewed against unwritten general legal principles, such as the principles of legal certainty or proportionality, either (*Hoge Raad*, 14 April 1989, *Harmonisatiewet*).

Moreover, it is clear from the case law that Article 120 also prohibits courts from establishing whether the constitutionally prescribed procedural requirements have been fulfilled.

Other forms of review by courts are allowed. Article 120 Constitution in Dutch speaks literally of the prohibition "to enter into the judgment of" ("*treedt niet in de beoordeling van*"). This seems to prohibit all forms of assessment of the relevant issue of compatibility with provisions of the Constitution. It is, however, established case law dating back to the 19th century that the interpretation of acts of parliament consistent with the provisions of the Constitution is allowed. In one case, the *Hoge Raad* made clear that under Article 120 Constitution it was not allowed to review an act of parliament, but nevertheless opened its judgment by stating that it did in fact find the act in conflict with what it called "the fundamental legal principle" of legal certainty, although it found it was unable to attach any consequences to this as a consequence of Article 120 Constitution; this makes clear that it found itself able to make this kind of "declaration of incompatibility", as it would be called in the UK.

3.2. *The competence to review acts of parliament (and other acts) against directly effective treaty provisions*

As we indicated earlier, the courts can review acts of parliament against directly effective treaty provisions. Human rights treaties on classical civil and political human rights can be said to be substantively constitutional in nature, since they impose obligations which public authorities have to observe in the exercise of their authority towards citizens. Individuals can rely on such directly effective treaty provisions in any court in the Netherlands. To the extent that substantively we are dealing with constitutional norms, courts reviewing against such human rights provisions can be said to engage in constitutional review and constitutional adjudication *lato sensu* (this is sometimes called, using a gallicism, *conventional review* and the Dutch courts as *conventional courts*).

This form of review takes place very often indeed, not only in cases in which review of an act of parliament is involved, but also in all other cases. Even if parties could have relied on constitutional rights provisions, courts have often applied human rights treaty provisions, in particular those of the ECHR and ICCPR. As regards the ECHR this is particularly evident in cases for which there is relevant case law of the European Court of Human Rights. Netherlands courts find guidance in such case law and prefer to rely on that over the application of constitutional provisions.

4. The role of courts in the separation of powers

4.1. *Judicial review and separation of powers*

Article 120 of the Constitution does not clearly answer the question whether review of the legality of bills is allowed, nor the question whether a failure to legislate can be adjudicated. Nevertheless, in a number of recent cases the *Hoge Raad* has made clear that the competence of courts does not extend to the power to grant an injunction to legislate. This power not only does not exist in purely national cases, but also as regards an injunction to legislate where the legislature has failed to adopt an act of parliament which was required to adapt national legislation to an EC Directive (Directive 91/676, the Nitrate Directive).[11] This prohibition to issue an injunction to legislate also applies to territorially decentralized legislatures, in particular municipalities and provinces.

Although some of the considerations adduced by the *Hoge Raad* are somewhat laconic, this case law can be understood from the perspective of the separation of powers between the legislature and the judiciary. The language of at least some considerations in these cases refers to the inherently political nature of legislating and, in the case on failing to comply with an EC Directive, to the political nature of the choice between legislating and letting it come to infringement proceedings under Article 226 EC (now 258 TFEU) et seq.

This case law is of prime importance for the national constitutional doctrine of the separation of powers. Although the dividing line between the judicial and legislative

11. HR 19 Nov. 1999, C98/096HR (*municipality of Tegelen*) on an alleged infringement of a procedural rule contained in an act of parliament, which affects the merger by act of parliament of two municipalities; HR 21 March 2003, Nr. C01/327HR, www.rechtspraak.nl, LJN AE8462 (*Waterpakt*), see CMLRev 41(2004): 1429-1455; this approach was confirmed as regards an injunction to a provincial council to pass a provincial ~~bye~~law in order to comply with an EC Directive, HR 1 Oct. 2003, C03/118HR, www.rechtspraak.nl, LJN AO8913 (*Frisian Fauna Protection*).

power is thin, it is quite clear. An injunction to legislate would form an infringement of the separation between the legislative and the judicial powers.

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

Also, there is certainty that a court can award damages for acts of executive legislation (other than acts of parliament) which infringe unwritten principles of law or other higher norms including constitutional norms.[12] It is certain that also *Francovich* damages can be awarded under the law of the Netherlands without any infringement of the separation of powers, and this will apply also to acts of parliament infringing EU law. As a matter of fact, there is no reason why an award of damages for the application of acts of parliament should be impossible, if they infringe directly effective public international law, as this fits well with the delineated separation of powers and with the intention of Article 94 of the Constitution.

4.2. *The political question doctrine*

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

This tends to a *political question doctrine*, and mainly concerns issues of foreign policy. It was developed in cases concerning the use of nuclear weapons (in a case concerning *the threat or use of nuclear weapons*)[13] on (cooperation in) the use of armed force in international interventions (in the case on *NATO bombardments in Kosovo*)[14] which hinged on the issue of lawfulness under public international law, but it was extended to an interpretation of Article 90 of the Constitution, which imposes on the government the obligation to promote the development of the international legal order, in the case of the Netherlands participation in international operations in *Afghanistan*.[15]

The reasoning in these cases followed a common pattern. First, the *HogeRaad* states that foreign policy decisions highly depend on political considerations related to the circumstances of the moment; next it holds that courts must show a large measure of restraint in adjudicating claims which aim at declaring unlawful and forbidden certain acts implementing political decisions in the field of foreign policy and defence; and finally it concludes that "it is not up to civil courts to come to such political decisions." Extending

12. HR 24 January 1969, NL 1969, 316 (*Pocketbooks II*).
13. HR 21 Dec. 2001, nr. C99/355HR, NJ 2002, 217.
14. HR 29 Nov. 2002, C01/027HR, www.rechtspraak.nl, LJN AE5164.
15. HR 6 Feb. 2004, C02/217HR, www.rechtspraak.nl, LJN AN8071.

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.[16]

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

V. The state and its subdivisions

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

1. The Kingdom and its countries

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

1.1. The composition of the Kingdom

Since 2010, the Kingdom comprises the country of the Netherlands and the countries of Aruba, Curaçao and Saint Maarten.

In 1954, when the Charter first entered into force, the Kingdom comprised the country of Surinam on the Latin American continent and the six Caribbean islands that formed the country of the Netherlands Antilles: Aruba, Bonaire, Curaçao, St. Maarten, St. Eustatius and Saba. In 1975, Surinam became independent. The Netherlands wished to impose independence on the Netherlands Antilles, but they did not wish this. Aruba acquired the status of an autonomous country within the Kingdom in 1986. Over the period from 2000 to 2005, in a series of referenda the populations of four out of the five islands voted for the dissolution of the Netherlands Antilles, Curaçao and St. Maarten being in favour of island autonomy within the Kingdom, Bonaire and Saba opting for a closer relationship with the Netherlands; the population of St. Eustatius (approx. 2700 inhabitants, 21 km^2) was the only one that wished to retain the Netherlands Antilles. After protracted negotiations, the Charter was revised to grant St. Maarten and Curaçao their desired autonomous status as a country, and Bonaire, St. Eustatius and Saba were incorporated into the Netherlands with each the special status of a *sui generis* public body under Article 134 Constitution.

These three islands, which are now referred to as "the Caribbean Netherlands", have in fact acquired a status which in most respects is that of municipalities in the Netherlands, but some institutions, such as the judiciary they share with the other Caribbean islands of the Kingdom. The currency is the US dollar. Most of the legislation of the Netherlands has been declared applicable to these incorporated islands, but the Charter contains a clause,

inspired by the provision on the "outermost regions" of the EU in the Treaty on the Functioning of the EU (Art. 349), which allows for special regulations and measures "with a view to the social and economic circumstances, the remoteness from the European part of the Netherlands, their insular character, small size and populations, special topographic circumstances and climate and other factors by which these islands essentially differ from the European part of the Netherlands" (Art. 1(2) Charter).

There is a constitutional amendment pending which abolishes the provisions on the Caribbean Netherlands in the Charter and provides a basis for the new situation in the Netherlands Constitution.

2. Decentralization within the Netherlands

Decentralization occurs in two forms: territorial and functional decentralization.

2.1. Territorial decentralization

As regards territorial decentralization *within* the Netherlands (in Europe), the Constitution uses language which somehow may suggest something more federal. It speaks of the powers of provinces and municipalities to regulate and administer their domestic affairs, which "shall be left" to their administrative organs (Art. 124(1) Constitution). This constitutionally guaranteed "autonomy" might have the flavour of federalism, but this is misleading. In fact, most of the tasks which municipalities and provinces carry out in practice are tasks which have been required by higher legislation, the so-called "shared powers" (Art. 124(2) Constitution). Also the constitutionally founded mechanisms of supervision, which may extend over autonomous decision-making,[17] highlight the unitary guarantee of the exercise of decentralized powers. Thus, the government may quash provincial and municipal decisions not only for being in conflict with law, but also with the general interest; and obviously the government determines what is in the general interest.

Most effectively, the unitary element is retained through controlling the financial position of municipalities. Although municipalities have autonomous taxation powers, regulated by act of parliament, and the most important autonomous tax (the tax on immovable property) accounts for over three quarters of the municipal taxes and levies, these in turn form less than 10 percent of the total municipal income.

The decentralized bodies are the provinces (of which there are twelve) and municipalities (of which there were 415 per 1 January in 2012). Of these the municipalities are by far the most important in practice, precisely because most central government legislation requiring decentralized administration is attributed to municipalities.

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

2.1.1. Institutional make-up of municipalities and provinces

Provinces and municipalities in the Netherlands each have three main organs. Municipalities have as supreme organ the directly elected municipal council; the directly elected representative provincial council is called *Provinciale Staten*, States Provincial (Art. 125(1) and 129 Constitution). These bodies have in principle powers of a legislative and executive nature, but their legislative powers are predominant. Their legislative products are called *verordening*, which means "regulation" but is variously translated also as "ordinance" or "bye-law".

In municipalities, the executive powers are vested mainly in the *college van burgemeester and wethouders*, the board of burgomaster and aldermen. The *burgemeester*, burgomaster, is appointed by royal decree after a consultative procedure which gives a primary role to the council. The council's preferences as to the candidate cannot, politically speaking, be overridden as easily these days as used often to be the case in the past. The aldermen are appointed by the municipal council from amongst the members of the municipal council or from outside it; if they are appointed from the council, their membership of the council ends *de iure* as of their appointment.

The executive powers in provinces are vested in the *Gedeputeerde Staten*, the States Deputies, which body is chaired by the *Commissaris van de Koning*, the King's Commissioner, as has been the case for over 120 years now. The *Commissaris* is appointed by royal decree; the States Deputies are appointed by the States Provincial had to be elected from their own ranks, but since 2003 can also be appointed from outside the States Provincial.

Some executive powers in municipalities and provinces have been reserved for the burgomaster and King's Commissioner respectively, mainly in the sphere of the maintenance of public order, with a major role for the burgomaster as concerns local public order, and for the King's Commissioner when disasters are concerned. They also have some procedural powers with respect to the central state supervision of the administration of municipalities and provinces respectively, in which context they can bring decisions within their municipality and province to the attention of the government whenever they deem them to be in conflict with the law or the public interest.

2.1.2. Supervision and judicial review

Two main forms of supervision over lower public bodies exist: the prior approval of certain decisions and the possibility of quashing decisions by royal decree after they have been taken. The former applies to specific decisions mentioned in rules contained in or made pursuant to an act of parliament (Art. 132(3) Constitution). The latter is a possibility provided for in the Constitution and actually found in all acts of parliament recognizing or establishing decentralized public bodies. A decision can be quashed on the ground that it conflicts with the law or the public interest.

The number of royal decrees by which autonomous decisions are quashed is quite low. This is usually considered a sign of reticence on the part of central government to interfere with the autonomous sphere of municipalities other than in cases of manifest infringements of the law and the public interest.

Ordinary courts usually only come into play when citizens deny the validity or legality of local bye-laws. Courts have in practice regularly been called upon to adjudicate whether a bye-law on the basis of which a person is prosecuted concerns a subject-matter which is within the boundaries of municipal competence, i.e. can be said to belong to the domestic affairs, of the municipalities. The case law has long been clear that in this respect autonomous municipal (and provincial) bye-laws may only concern matters which affect a public interest and may not at all concern cases which are situated only within the private domain. Moreover, municipal (and provincial) legislation must comply with higher

authorities' legislation. This has meant that whenever such higher legislation – for provinces: central government legislation; for municipalities: central government and provincial legislation – was intended to be exhaustive in regulating a particular matter, there is no scope for supplementary autonomous legislation by decentralized bodies.

2.2. *Functional decentralization*

The existence of the regional water authorities, *waterschappen*, both on account of their historical antiquity and the prominence of the public interest they serve – i.e. to control the quantitative and qualitative levels of water and all that is necessary therefore (dikes etc.) – is assumed in the Constitution. Although they do cover a certain territory, they are not seen as forms of "territorial decentralization". Their powers are defined functionally.

Strictly functional bodies are also the public corporations for the trades, which have received a basis in the Industrial Organization Act (*Wet op de Bedrijfsorganisatie*) of 1950, setting up what is mostly called Public or Regulatory Industrial Organization, a form of corporatism.

Public industrial organization is a corporate structure for trade and industry endowed with public powers, created after the Second World War. The public industrial organization envisaged public regulatory powers for industrial bodies, composed of delegates from management and labour, organized either for certain products (e.g. dairy products), the so-called *produktschappen* (commodity boards, of which there were 11 in 2012, all for products in the agro-industrial sector), or for industrial sectors, the so-called *bedrijfschappen* (industrial boards, of which there were 6 in 2012 in various sectors). These bi-partite structures were topped by one tripartite instance, the *Sociaal Economische Raad* (SER) (Social and Economic Council), of which a third of the membership (15 out of 45) is appointed by the government.

The number of boards in existence has remained low and is lower than it was in the past: the public industrial organization did not succeed at the scale expected. Their activity is both an interesting and an opaque mix of private and public functions such as the protection of common interests in the sector combined with quality supervision. The central Social and Economic Council has been used as an agent of concertation between labour and capital in the fight for wage and price control, but its success has been disputed. It has mainly functioned as an advisory body of government for economic policy, in general being successful as it has been able to bridge the interests of capital, labour and government.

VI. Fundamental Rights

1. Rights

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

- the prohibition of discrimination and the right to equal treatment (Art. 1 Constitution),
- the right to leave the country (Art. 2(4) Constitution),
- the equal right of Dutch nationals to appointment in the public service (Art. 3 Constitution),
- the right to vote and stand for election (Arts. 4 and 54 Constitution),
- the right to petition (Art. 5 Constitution),
- freedom of religion (Art. 6 Constitution),
- freedom of expression (Art. 7 Constitution),
- right of association, assembly and demonstration (Arts. 8 and 9 Constitution),
- the right to privacy (Art. 10 Constitution)
- the right to physical integrity (Art. 11 Constitution),
- protection of the home (Art. 12 Constitution),
- privacy of correspondence, telephone and telegraph (Art. 13 Constitution),
- the right to compensation for expropriation in the public interest (Art.14 Constitution),
- personal liberty and *habeas corpus* (Art. 15 Constitution),
- *nulla poena sine lege praevia* (Art. 16 Constitution),
- access to courts according to the law as *ius de non evocando* (Art. 17 Constitution),
- legal representation (Art. 18 Constitution),
- the right to free choice of work (Art. 19 Constitution),
- the right to provide education (Art. 23(2) Constitution),
- the right to equal public financial support of public and private education (Art. 23(7) Constitution),
- prohibition of imposing capital punishment (Art. 114 Constitution).

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

- the promoting of "sufficient" employment (Art. 19(1) Constitution),
- minimum subsistence and distribution of wealth (Art. 20 Constitution),
- protection of the environment (Art. 21 Constitution),
- public health (Art. 22(1) Constitution),
- sufficient living accommodation (Art. 22(2) Constitution),
- social and cultural development and leisure activities (Art. 22(3) Constitution),
- education and the right to sufficient primary education (Art. 23(1) Constitution).

2. Restricting the exercise of rights

Many fundamental rights provisions in the Constitution contain a clause regulating the restriction of their exercise, particularly regarding the classic fundamental rights, but not all of them (cf. Art. 1, the non-discrimination clause). Mainly, they indicate which public authority is competent legitimately to restrict the exercise of a right, and nearly always this is the legislature which by act of parliament can restrict the exercise of a right. Often this power can also be delegated to lower powers of regulation by act of parliament. Sometimes it is reserved to the legislature itself, as is the case with:

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

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

No proportionality principle comparable to those in Articles 8-11 ECHR can be found in the Netherlands Constitution. Worse, the *Hoge Raad* has confirmed the view that a restriction imposed is not subject to the principle of necessity (and therefore of proportionality).[18] This is controversial, because it implies that the makers of the Constitution must be supposed to have allowed unnecessary (and therefore disproportional) restrictions to exercise of fundamental rights.

3. Justiciability

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

18. HR 2 May 2003, www.rechtspraak.nl, LJN 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".

contrary to the objectives formulated in these provisions. And in some cases courts have referred to them as an additional element in construction of other legal norms.[19]

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

Firstly, a number of fundamental rights provisions delegate the protection of fundamental rights to acts of parliament[20] and also their restriction is often by act of parliament. The constitutionality of such acts and restrictions cannot be reviewed. Also the constitutionality of delegated instruments which restrict the exercise of a fundamental right cannot be reviewed if the restriction is determined by the act of parliament; in this case, reviewing the constitutionality of the delegated instrument implies the review of the act of parliament on which it depends.

Secondly, as we already had occasion to mention, 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.

4. International human rights

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

The human rights treaties to which the Netherlands is a party comprise, among others, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (except Protocol No. 7), the European Social Charter (the Netherlands is not a party to the Revised European Social Charter), the ICCPR and its two Protocols, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 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

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

effective, self-executing provisions against which courts can review all public acts, whereas provisions on social and cultural rights tend not to have that character and complaints of their infringement are therefore not justiciable.

5. Horizontal effect and collision of rights

Fundamental rights enshrined in the Constitution are rights which citizens can uphold against state authorities. Thus they essentially constitute a sphere of freedom (as against the State), while subsequently the civil code regulates that freedom among citizens. Hence the view that fundamental rights and freedoms make civil law possible. The question is whether constitutional fundamental rights and freedoms of citizens can be upheld also in the civil relations regulated by private law. This is the issue of the direct or indirect "horizontal" effect of constitutional fundamental rights in relations between citizens *inter se*.

The case law of the *Hoge Raad* and even more strongly that of lower civil courts suggests that it is possible to rely on rights such as the right to privacy, freedom of religion and of expression also in relations between citizens, or at least that one is able to invoke them before a court of law in cases between citizens. It is hard to distil from the language of the relevant judgments whether the effect of fundamental rights – both those of the Constitution and of human rights treaties – is direct, i.e. the relevant fundamental rights work *per se* in relations between citizens *inter se*, or whether these fundamental rights have only indirect effect, i.e. are mediated through the proper terms, concepts and norms of private law. Some horizontal effect seems to be accepted both in the case law of lower courts, particularly courts of first instance hearing cases on interim injunctions, and of the *Hoge Raad*. We mention briefly some cases of the latter to illustrate the point.

5.1. *Some case law*

The first case, *Goeree and Van Manschot* v *Van Zijl*,[21] concerned a couple of self-styled "evangelicals" who published an article under the heading "Sodom in the Netherlands". It contained statements to the effect that aids is the result of sin, that homosexuality leads to AIDS, an illness that results inevitably in a deserved death, and similar utterances. Van Zijl, a homosexual, sued them and asked the court for a series of interim injunctions, among which the prohibition to distribute the relevant publication any further, a prohibition to express themselves incorrectly and needlessly offensively towards homosexuals, and a prohibition to make statements to the effect that homosexuals are responsible for the existence of AIDS, and furthermore an injunction to publish a rectification in the periodical for homosexuals on pain of astreinte. In highest instance, the "evangelicals" invoked the freedom of religion as protected by the Constitution, the ECHR and the International Convention on civil and political rights. The *Hoge Raad* held their complaint to be unsuccessful,

> "because it ignores that Article 6 paragraph 1 Constitution, Article 9 paragraph 2 European Convention on Human Rights and Article 18 paragraph 3 of the International Convention on Civil and Political Rights permit certain restrictions imposed on the exercise of the freedom of

21. HR 2 Feb. 1990, nr. 13 727, NJ 1991, 298.

religion, and that Article 1401 *Burgerlijk Wetboek* [Civil Code],[22] which protects against utterances which are offensive, unnecessarily aggrieving or which invite discrimination, must be considered to provide such a justified restriction."

The second case by the *Hoge Raad* which we cite here, the *Aidstest* case,[23] concerned a civil case brought by a woman who had been raped twice at gunpoint, against her rapist, X. In highest instance it was an established fact that X through his rape had created the considerable risk of an infection of the woman with the HIV-virus as a consequence of the rape. She desired certainty on the question whether she was infected. Given the state of the medical art at the time, certainty could be attained only by having a second blood test six months after the rape in one of two manners: by testing the blood of the victim or the blood of X. If X's blood test were to demonstrate that he was not seropositive, the woman could be assumed not to have been infected. The test meant in this case an emotional burden of such magnitude that this was unbearable for the victim. She submitted that under the circumstances X was under the obligation to take the blood test, both in order to limit the damage she suffered 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

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

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

First of all, it is true that in the two cases cited above, the *Hoge Raad* refers in both cases also to clauses in constitutional fundamental rights provisions which restrict the exercise of such fundamental rights, and seems to be applying them directly in the private law context of the case. This suggests that those provisions have a direct effect and applicability in private relations of citizens *inter se*. The context of at least the *Aidstest* judgment, however, is the civil law duty to limit the damage caused by an unlawful act. Also, the interpretation of the restriction clause is entirely specific to the private law context. It is one element in the balancing of a number of interests in a private law context which works with "open" norms. This might lead to the conclusion that the fundamental right is given indirect effect only, in as much as the effect is mediated by principles of private law.

Most authors are extremely reticent in allowing direct horizontal effect and make a huge effort to avoid reading the case law in a manner which suggests such direct effect of

22. At the time, this article covered all major forms of tort, stating that damage due to wrongful acts must be compensated.
23. Hoge Raad 18 June 1993, nr. 15015, *Y v. X* [*Aidstest*] (interim injunction proceedings), NJ 1994, 347.

fundamental rights. Courts have never been quite explicit or clear as to what doctrinal approach they would be inclined to, nor is it in the style of Dutch courts and judges to have doctrinal inclinations at all. It would probably be safe to say that some of the classic rights have been according a meaning and importance which results in fundamental rights playing a determining role for the outcome of the relevant case.

5.2. Conflicts of rights

Particularly in cases of horizontal effect, the situation can arise of one private party invoking one right, for instance the freedom of expression, and another private party invoking the same right or another, for instance privacy, in its defence. This results in a conflict of rights. These are invariably resolved by a technique of balancing the importance of the rights invoked by the parties in light of the specific circumstances of the case. No court has so far indicated that some rights are preponderant over other rights.

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