THE CONSTITUTION IN THE LEGAL ORDER OF THE NETHERLANDS

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> "A constitution resembles a sharp pencil of light which brightly illuminates a limited area of a country's political life before fading into a penumbra where the features are obscured – even if that surrounding darkness may conceal what are the most potent and significant elements of the political process." S.E. Finer, Five Constitutions, Brighton 1979, p.15.

1 Introduction

The Constitution of the Netherlands is a normative constitution and has been so from the beginning. The present Constitution is the direct successor of the Constitution of 1814.[1] It has had a few general revisions, of which the revision of 1848 stands out as the most significant, and numerous partial revisions.[2] At present, a variety of amendments are being debated.[3]

During the course of almost 200 years, the Kingdom of the Netherlands has developed from an autocratic state to a liberal democracy, a constitutional monarchy with a full parliamentary system of government, and from a liberal state to a social welfare state. Decolonisation and the creation of a (more or less) federal structure in which the Netherlands and the remaining parts of the Kingdom overseas are united must also be mentioned. All these and other

1. Opinion differs as to whether the present Constitution is a successor to the 1814 Constitution which established the Kingdom of the Netherlands or to the 1815 Constitution, the year which marked the accession of the Southern Netherlands, i.e., the later Belgium, to the Kingdom of the Netherlands.
2. Revisions with varying degrees of significance have taken place in 1815, 1840, 1848, 1884, 1887, 1917, 1922, 1938, 1946, 1948, 1953, 1956, 1963, 1972, 1983, 1987, and 1995.
3. Changes have been proposed with respect to the provisions relating to the right to petition, the inviolability of the home, the confidentiality of mail/communication, the custody of the minor King, the Ombudsman, the Articles relating to defence, the appointment of the (provincial) King's commissioner and of the (municipal) mayor the introduction of the right to vote in provincial elections for non-national residents, a corrective referendum, and the introduction of a constitutional status for independent public bodies. In 1996, proposals relating to the protection of the Dutch language and the temporary replacement of pregnant parliamentarians were rejected.

changes are reflected in the content of the Constitution.[4] Among the landmarks in the field of constitutional law is the adoption, or rather confirmation, by the Constitution of the monist system of reception of international law into the national legal system in 1956, a decision which has proved to be of great significance with the growth of international law.[5] This is all the more true, in view of the lack of a system of constitutional judicial review of parliamentary legislation (see below).

The procedure for the revision of the Constitution has itself been the subject of revision on several occasions. Although over the course of time the procedure for amending the Constitution has been simplified, the Constitution is still a rigid one.

A characteristic of the Dutch Constitution is the absence of explicit statements of leading principles or ideological commitments.[6] Unlike the constitutions of other European countries, the Constitution has never had a preamble. There are no statements on the origins or sources of public authority or sovereignty. There is no reference in the Constitution to, and there is no accepted doctrine on, a particular value system contained in the Constitution, such as is found in Germany. Only in the general sense that this Constitution of such a liberal democracy incorporates the basic values and principles of a liberal democracy in a set of (predominantly) procedural mechanisms, such as limited and democratic government and the protection of fundamental rights, can it be said to contain any form of ideology.[7]

In stating that the Netherlands Constitution is a normative Constitution, the spectrum immediately becomes more diffuse. It is true, first of all, that the Constitution does not cover the whole range of issues of constitutional law. Although it deals with all the main areas of constitutional law in its 142 Articles,[8] the most important rule of the Netherlands parliamentary system,

4. For a general overview of Dutch law, including constitutional law, see J.M.J. Chorus et al., Introduction to Dutch law for foreign lawyers, Deventer 1993.

5. Article 94 of the Constitution states: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

6. C.A.J.M. Kortmann, Constitutioneel Recht, Deventer 1994, p.79 ff.

7. Gordon Smith, Politics in Western Europe, Aldershot 1989, p.125 ff, p.128.

8. Chapter 1: Fundamental rights (Arts. 1-23); Chapter 2: Government (Arts. 24-49), #1 The King (Arts. 24-40), #2 The King and the Ministers (Arts. 41-49); Chapter 3: The States General (Arts. 50-72), #1 Organization and Composition
(Arts. 50-64), #2 Procedure (Arts. 65-72); Chapter 4: Council of State, General Chamber of Audit and permanent advisory bodies (Arts. 73-80); Chapter 5: Legislation and administration (Arts. 81-111), #1 Acts of Parliament and other regulations (Arts. 81-89), #2 Miscellaneous Provisions (Arts. 90-111); Chapter 6: The administration of justice (Arts. 112-122); Chapter 7: Provinces, municipalities, water control boards and other public

the rule of confidence, developed as an unwritten convention in the second half of the 19th century, and to date it has remained uncodified. This choice was deliberately reaffirmed during the 1983 revision process.

The content of constitutional provisions is often open and flexible. Thus, the dynamics of the relationships between the various state organs, such as the relationship between the two chambers of Parliament, between Parliament and the government, between the Legislature and the courts, and between the central government and the provincial and municipal tiers of government[9] develop within the open and flexible standards of the Constitution. The actual situation and the direction of the changes provides a different flavour to the reality of constitutional law at any given moment.

In another respect, too, the Constitution leaves room for interpretation. It determines, for example, the legal form of the dissolution of the chambers of Parliament and prescribes dissolution on particular occasions, but it does not determine in general under which circumstances such a dissolution may or must take place. Furthermore, the Constitution often delegates the determination of substantial standards to the Legislature. Many areas of constitutional importance, such as the formation of a government, take place outside the scope of any specific constitutional provision. The legal form of appointment of government ministers is fixed by the Constitution as is the principle of ministerial responsibility, but, as we have seen, the crucial rule of confidence is unwritten. It is against the setting of these written and unwritten rules that the formation of a government takes place.

Not surprisingly, codification in the Constitution is usually a step in the process of constitutionalisation. Developments in law and doctrine often take place prior to constitutional amendment. Such "bottom-up" developments have occurred recently, for example, in the field of equality legislation, and the establishment of a National Ombudsman.

Although many important areas of legal development are linked in some way or another to the Constitution, other important areas have escaped the constitutional rules. Indeed, many of the significant policy changes with a constitutional impact, such as wide-ranging deregulation operations and market-oriented policies, are outside of the scope of the Constitution as such.

More subtle changes in the general constitutional scene make it harder to grasp the impact and significance of the Constitution in the legal order. These

bodies (Arts. 123-136); Chapter 8: Revision of the Constitution (Arts. 137-142). In addition there are various additional Articles with a transitory character.

9. As the Kingdom of the Netherlands is a (decentralised) unitary state, the relationships between the central government and the constituent parts is not determined by the Constitution as is the case in federal states such as the Federal Republic of Germany.

changes do not refer so much to the dynamics of relationships between the main state actors themselves, but more to the impact in recent decades of international legal developments, notably European integration, and the influence of human rights treaties, in particular the ECHR on the national legal order.

In summary, the Constitution is only one of the sources of constitutional law. Other sources include the Statute of the Kingdom, unwritten law and custom[10] (including case-law), organic legislation, and international and supranational law. The mix of those sources determines to a greater extent the position of the Constitution in the national legal order.

It is impossible to capture in full the functioning of the phenomenon of the Netherlands Constitution in one single article. In this article, several aspects of the Constitution will be highlighted in a more or less impressionistic fashion.

2 The role of the constitution in the academic profession

Before going into the modes and limits of the constitutionalisation of the legal order, it is useful to shed some light on the academic perception of the Constitution through the years. In the academic profession, the Constitution has been given a profound importance from the beginning, albeit with varying intensity and in various ways. Thus, it has permeated legal practice as well, if only through the creation of a legal attitude in which the Constitution matters.

Academic reflection on constitutional law in the Netherlands was traditionally closely linked to the Constitution itself. The first major and comprehensive study on constitutional law, published in 1839, was a commentary on the Constitution.[11] This two-volume commentary was written by the authoritative liberal statesman and scholar, J.R. Thorbecke. The commentary referred to the 1815 Constitution; the second edition took

10. For unwritten constitutional law, see A.H.M. Dölle, Over ongeschreven staatsrecht, Groningen 1988.

11. For an overview of this issue, see C.W. van der Pot, A.M. Donner, L. Prakke, Handboek van het Nederlands staatsrecht, Zwolle 1989, p. 199 ff. On the history of the academic approaches to constitutional law, also see Twee eeuwen grondwetgeving in Nederland: 1796-1996, preadviezen staatsrechtconferentie 1996, Deventer 1997, and D.J. Elzinga, Oculi Justitiae. Pleidooien voor een contextuele rechtsbenadering, Deventer 1997, in particular chapters 3-5.

into account the 1840 amendments, the contents of which were profoundly influenced by the author himself.[12]

In the second half of the 19th century various other introductions and handbooks on constitutional law were published. Although these works, which also noticeably bore the marks of the political and philosophical persuasions of their authors, had a more systematic approach to the subject-matter of constitutional law, the Constitution and its interpretation held a prominent position.[13] In this period, two commentaries on the Constitution, in its 1848 form, were published as well.[14] The most influential of these commentaries was the three-volume study by J.T. Buys.[15] Buys, a liberal by political persuasion, introduced a new approach to constitutional law. He was influenced by the logic-dogmatic approach and the "*Begriffsjurisprudenz*" then fashionable in Germany.[16] Instead of entering the debate on the "will of the constitutional Legislature" he introduced a more system-oriented approach by constructing a system from existing rules, which could then be used as a guideline for solving other constitutional problems. The result was an analysis that was less political and less involved with legal positivism than had previously been the case.[17]

During first half of the 20th century, the study of constitutional law and the state changed in character. It became more open to the dynamic character of constitutional law and its historic contextuality.

Although both more and less wide-ranging amendments have been made to the Constitution, the framework remained the same. After World War II, a process of rethinking the Constitution was set in motion and various state committees were established to advise on constitutional revision. In 1975-

12. J.R. Thorbecke, Aanteekening op de grondwet 2nd ed., (2 vols.), Amsterdam 1941-1943.
13. Systematic approaches by J. de Bosch Kemper, Handleiding tot de kennis van het Nederlandsche staatsregt en staatsbestuur, Amsterdam 1852. A monarchal perspective is given in, A.F. de Savornin Lohman, Onze Constitutie, Utrecht 1901. Later significant systematic handbooks include those by R. Kranenburg (2 volumes, first edition 1924-1925), C.W. van der Pot (first edition 1940, latest revised edition 1995), P.J. Oud (2 volumes, first edition 1947-1948), and J.R. Stellinga (first edition 1953). More recently, a variety of (text)books, both of an introductory and more profound character have been published.
14. A more conservative commentary by (the politically active) J. Heemskerk, De practijk onzer grondwet, 2e druk (2 vol.) Utrecht 1881.
15. J.T. Buys, De grondwet, toelichting en kritiek, (3 vol.) Arnhem 1883-1888. Along the same lines, F.J.A. Huart, Grondwetsherziening 1917 en 1922, Arnhem 1925.
16. As practised by Paul Laband, Das Staatsrecht des Deutschen Reiches, (4 vol.) 1876-1882 (new edition, Aalen 1964).
17. C.W. van der Pot, A.M. Donner, L. Prakke, Handboek van het Nederlands staatsrecht, Zwolle 1989, p. 200.

1976, proposals were introduced for a general revision of the Constitution, which ultimately led to the general revision of 1983. It was only after this revision that new commentaries on the revised Constitution and the revisional process appeared.[18]

In addition, treatises on the Constitution or parts thereof have been published, as well as treatises on subjects which take the Constitution as the main reference point.[19] This year, 1998, marks the 150th anniversary of the 1848 Constitution, an occasion which is to be commemorated by activities celebrating the Constitution, as well as publications on the Constitution and its future in the context of European integration through the EU and the Council of Europe.[20]

The only substantive over all study on the role and the position of the Constitution in the constitutional system is the 1956 thesis by Van der Hoeven,[21] which was updated in 1988.

The process of constitutionalisation is an ongoing process, a process which started in the early 19th century. All in all, it can be justly said that the place of the Constitution in the general profession of constitutional law is important, but no longer holds the dominant position it had in the very early days of the constitutional legal profession. It is remarkable, nevertheless, that during the 1983 revision no substantial reflection took place on the position of the Constitution in the legal order as such. In the end, the 1983 revision was more a "face-lift for an old lady" than a substantial

18. The documents of the revision process are contained in Naar een nieuwe grondwet, 's-Gravenhage (32 volumes). Commentaries on the Constitution, C.A.J.M. Kortmann, De grondwetsherzieningen 1983 en 1987, 1987 (on the revision). For a general overview, A.W. Heringa, T. Zwart, Grondwet 1983, Zwolle 1987. For a more elaborate discussion, P.W.C. Akkermans, A.K. Koekkoek (eds.), De Grondwet. Een artikelsgewijs commentaar, Zwolle 1992. On selected issues, Gegeven de Grondwet, CZW-bundel, Deventer 1988; J.B.J.M. ten Berge et al. (eds.), De Grondwet als voorwerp van aanhoudende zorg (Burkens-bundel), Zwolle 1995. On the implementation of the new constitutional standards on fundamental rights, Tj. Gerbranda, M. Kroes, Grondrechten evaluatie-onderzoek. Documentatierapport dl.1-6, Leiden 1991.

19. Such as a study on the (former) chapter in the Constitution on religion, Arn. Borret s.j. Het zesde hoofdstuk onzer Grondwet, Leiden 1917. Following the 1983 revision of the Constitution various studies were published on particular fundamental rights as newly guaranteed in the Constitution.

20. See also NJB-special, 150 jaar Grondwet, NJB 1998, pp. 202-237, with various contributions on the usefulness (or uselessness) of the Constitution and suggestions for (de)constitutionalisation.

21. J. van der Hoeven, De plaats van de grondwet in het constitutionele recht. (Aangevulde heruitgave van het academische proefschrift.), Zwolle 1988. On constitutionality (from a comparative perspective) C.M. Zoethout, Constitutionalisme. Een vergelijkend onderzoek naar het beperken van overheidsmacht door het recht, Arnhem 1995.

redrafting of the content of the Constitution.[22] Also, the "deconstitutionalisation" that was a feature of the revision pertained to provisions which were anyway either too detailed or obsolete, and thus did not entail truly substantial decisions. Old constitutional traditions, particularly in the system of government, proved to be more tenacious than some would have thought or liked.

III The mechanism of constitutionalisation. How does constitutionalisation operate?

The fundamental conditions

The Legislature and indeed all public authorities must adhere ti the Constitution. Courts apply the Constitution in all fields of law where relevant in a particular case. There is one fundamental exception to this rule. Article 120 of the Constitution states:

> "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

This means that constitutional review of parliamentary legislation by the courts is not allowed. According to the Supreme Court, this veto of review also covers the procedure of legislation itself; in rendering a verdict on whether an official document is indeed a valid piece of parliamentary legislation, the court would have to interpret the constitutional provisions governing the process of enacting legislation.[23]

In a striking decision, the Supreme Court reaffirmed the meaning of Article 120 of the Constitution.[24] The legal conflict, in fact, concerned the Statute of the Kingdom and not the Constitution, but the ruling of the Supreme Court is relevant to constitutional review as well,[25] as the Court considered the position of the review in today's constitutional order. Contrary

22. Apart from the chapter on fundamental rights.
23. HR 27 januari 1961, NJ 1961, 248 (Van den Bergh-arrest).
24. HR 14 april 1989, NJ 1989, 469 (Harmonisatiewet-arrest). The court does leave room for the non-applicability of an Act of Parliament in a concrete case in which fundamental principles of law are concerned ("*contra legem*" review).
25. The Statute of the Kingdom is less clear on the issue of constitutional review. For details, see M. Scheltema, Constitutional Developments in the Netherlands: Towards a Weaker Parliament and Stronger Courts?, in J.J. Hesse, N. Johnson (eds.), Constitutional Policy and Change in Europe, Oxford 1995, pp. 200-213.

to the court of first instance, it also rejected review of parliamentary legislation where the Statute was concerned, and it rejected any review of parliamentary legislation with respect to unwritten fundamental principles of law. The court did, in fact, itself review legislation by explaining that the legislation challenged, which (retroactively) changed the duration of student enrolment at institutions of higher education, was indeed contrary to the principle of legal security incorporated in the Statute. The Court cautiously went on to say that its finding that of the Act of Parliament was contrary to the principle of legal security was not legally binding. This expression of judicial opinion, nevertheless, had the same impact as constitutional review would have had in this case.

The fact that according to Article 94 of the Constitution the courts (all courts) are allowed and even obliged to review legislation on compatibility with provisions of treaties binding on all persons, of course diminishes the significance of Article 120 of the Constitution, most notably where fundamental rights are concerned. Initially, the courts, not used to reviewing parliamentary legislation, were very reluctant and hesitant to make any active use of this power. Lately, the courts have adopted a much more active policy. In the field of family law, for example, the Supreme Court has agreed to grant both parents full parental rights in cases of divorce or children born out of wedlock, if certain circumstances are met, a ruling which is contrary to the literal provisions of the Civil Code.[26] The Supreme Court of Social Security Appeals [Centrale Raad van Beroep] considered the traditional restriction by the Legislature of pensions to orphans and widows, thus excluding widowers, to be contrary to the principle of equal treatment as guaranteed in Article 26 ICCPR.[27]

The Court sometimes refrains from such far-reaching judgments and refers the issue to the Legislature as a policy issue. An example of this is the ruling of the Supreme Court in which it refused to grant parents the right to choose the surname of either of the parents for their children. This choice has now been made possible by Act of Parliament.[28] The court [a Court of Appeal in this case] also refused to order the Legislature to enact certain of

26. HR 21 maart 1986, NJ 1986, 585-588. The Supreme Court regarded such interpretation against the background of Article 8 in conjunction with Article 14 ECHR not incompatible with the system of the Civil Code.

27. See CRvB 7 december 1988, AB 1989, 10 (AWW); CRvB 30 januari1991, RSV 1991, 182 (AWW).

28. HR 23 september 1988, NJ 1989, 740 (Naamrecht). The Court did, however, recognize that the issue fell within the scope of Article 26 ICCPR.

legislation within a certain period. This was justified by the (unwritten) principle of the separation of powers.[29]

With respect to all other legislation or acts of government other than parliamentary legislation, the courts do have the power of constitutional review and indeed make use of it. In the *Meerenberg* ruling of 1879, the Supreme Court regarded a Royal Decree to be contrary to the Constitution. In this ruling, which was a significant step in the establishment of the rule of law, the Court provided a systematic interpretation of the Constitution and thus substantially reduced the autonomous rule-making power of the (constitutional) King. The court held that Royal Decrees must always have a basis in an Act of Parliament or be directly based on the executive power of the King as specifically defined in the Constitution.[30] The limitation of the King's rule-making power was subsequently incorporated in the Constitution in 1887, albeit in a slightly different fashion.[31]

With regard to acts other than parliamentary legislation, constitutionally gauranteed fundamental rights are prominent grounds for review. In the field of fundamental rights in relations between citizens, the so-called "*Dritt-wirkung*" of fundamental rights, the courts play a role as well (see below).

In other instances, the court has substantially contributed to the development of the law. This has been the case in such sensitive areas as euthanasia, where the Legislature has not proved itself able to take the lead.

It has been suggested that if constitutional review would be introduced in its fullest sense now, the actual substance and content of the Constitution would make it difficult for this review to actually operate, as in many instances the Constitution leaves the determination of substantial rules to the Legislature. On the other hand, upholding the prohibition in view of the monist system of reception of international law seems somewhat odd to say the least. Also, it is considered that the premises on which review is left to the Legislature, as an adequate guardian of the Constitution, are no longer valid. It was a matter of debate during the revision of 1983, and has since been pursued. Not

29. Hof 's-Gravenhage 13 maart 1985, NJ 1985, 263; Hof 's-Gravenhage 10 september 1990, AB 1991, 85.

30. HR 13 januari 1979, W.4330 (Meerenbergarrest).

31. Article 89, section 2, of the Constitution states: "Regulations to which penalties are attached shall be embodied in such orders only in acccordance with an Act of Parliament. The penalties to be imposed shall be determined by Act of Parliament."

much has happened, in fact, despite pleas for review in doctrinal writing.[32] At the political level, the discussion on the introduction of judicial review has reached a deadlock.

On the basis of what was previously discussed, it does not follow that constitutional issues do not play a role. In parliamentary debates, and more specifically in the legislative process, the argument of constitutionality does indeed play a role. Firstly, the Department of Constitutional and Legislative Affairs (CZW), at the Ministry of Justice, has a role in the preliminary stages of drafting Bills. The Council of State, which advises on draft legislation, also concentrates on constitutionality issues. Both Chambers of Parliament, likewise, can and do raise issues of constitutionality. In the not too distant past, debates have taken place on the constitutionality of, among other things, basing American cruise missiles on Dutch soil, the necessity of simultaneous dissolution of both Chambers of Parliament in order to amend the Constitution, the necessity of constitutional amendment in order to abolish active drafting for military service (while simultaneously upholding the principle of conscription), and the creation of city-provinces for urban conglomerates. Government advisory boards, most notably the Education Council [*Onderwijsraad*], may pay attention to the constitutionality of proposed measures or legislation. In some instances, specialist legal advice may be sought on constitutional issues. In addition, the legal profession has an active role to play. Its impact, however, cannot be sharply defined.

These other mechanisms of "constitutional review" do not always function properly. "Accidents" occur, such as in the above mentioned case of the *Harmonisatiewet*.

III Areas or scope of constitutionalisation

A Constitutionalisation and the judicialisation of political life

The absence of a Constitutional Court and of a constitutional review of parliamentary legislation in general certainly contributes to the fact that the Constitution as such plays no overwhelming role in the relationship between the government and Parliament. Another important reason for this fact is the lack of a detailed codification of the rules governing the relationship between

32. M.L.P. van Houten, Meer zicht op wetgeving. Rechterlijke toetsing van wetgeving aan de Grondwet en fundamentele rechtsbeginselen, Deventer 1997, which also provides insights into the debate thus far.

the government and Parliament. Reading the Constitution on this issue gives an imperfect idea of the functioning of the political bodies.[33]

As we have already noted, the most important rule, the rule of confidence, has never been codified since it emerged as an unwritten rule in the second part of the last century. The principle of ministerial responsibility is codified, but its functioning depends on political realities.[34] The dissolution of Parliament is prescribed in certain circumstances, but the enumeration is not limited. The rights to question and interpellation have a basis in the Constitution, but their functioning is determined by political realities, as is the constitutional right of parliamentary inquiry. The procedure of drafting legislation, which ultimately needs the signature of the monarch and the counter-signature of the minister in question is fairly extensively dealt with, though not exhaustively. There is no formal mechanism for solving inter organ conflicts.

As we have seen, the procedure for the formation of a new government is not codified in the Constitution. The practice of detailed agreements between parliamentary fractions enabling the formation of coalition governments falls outside explicit regulation of the Constitution and in an indirect way, influences the relationship between the two Chambers of Parliament and the relationship of each with the government. The basic principles with respect to the electoral system of proportional representation are laid down in the Constitution (direct election for the Second Chamber of Parliament; indirect election for the First Chamber); political parties, a reality of the first order, however, are not mentioned in the Constitution.

Most rules in the Constitution which are pertinent to the government and Parliament are of a formal, institutional nature. They establish the composition of the various organs, their organisation, and their competences to a certain degree. “Daily life” is thus largely a political playing field, governed by unwritten rules and customs and actual power balances. Within the formal framework, there is a great deal of room for manoeuvre.

An example of how the political rules may work is the initial refusal by the Prime Minister of a request by the leader of an opposition party to disclose documents which played a role in the cabinet formation process. A

33. See P.P.T. Bovend’Eert, H.R.B.M. Kummeling, Het Nederlandse Parlement, Deventer 1995; D.J. Elzinga, F. de Vries, H.G. Warmelink, Developing trends of parliamentarism in the Netherlands, in J.H.M. van Erp, E.H. Hondiues (eds.), Netherlands Reports to the Fourteenth International Congress of Comparative Law (Athens 1994), The Hague 1995, pp. 251-271.

34. Currently, notably ministerial responsibility with respect to independent public bodies and the public prosecutor are the subject of public attention.

newspaper succeeded in having the refusal annulled on the basis of public information laws.[35]

The limitations placed on the Legislature and the government are mostly those based on fundamental rights and the rule of law. This is the most clear and also, from a legal point of view, the easiest to enforce where international treaties are concerned.

B Constitutionalisation and the system of the state

As we have seen, the Constitution is one of the sources of constitutional law. The Constitution does not cover all areas of law, nor has it been set up in order to do so. In this, it stands in contrast to its predecessors in the revolutionary era following the Batavian revolution in 1795. Although some may dispute this, it may be said that the Constitution is still is a prominent, and perhaps even the most prominent, source of constitutional law.

With respect to the system of the state, the Constitution provides various organisational principles. It provides the basic framework for the organisation of provinces and municipalities. In even less detail, it also provides a framework for water control boards, public bodies for the professions and trades and "other public bodies." The rest is left for further determination by the Legislature.

The Kingdom of the Netherlands is a *decentralised* unitary state. Unlike a federation, the demarcation of powers between the national level and its territorial components is not fixed by the Constitution. Article 124 of the Constitution simply states:

> "1. The powers of provinces and municipalities to regulate and administer their own internal affairs shall be delegated to their administrative organs.
> 2. Provincial and municipal administrative organs may be required by or pursuant to Act of Parliament to provide regulation and administration."

Over the course of time centralising tendencies have developed in prominence despite decentralisation efforts and programmes. It is from this point of view that efforts have been made by legal scholars to discover some normative principle of decentralisation in Article 124 of the Constitution.[36] This plea has not found much resonance. Due to financial centralisation, the room for manoevering for provincial and municipal tiers of government has

35. ARRvS 5 december 1986, AB 1987, 525 (Openbaarheid kabinetsformatie).

36. Willem Konijnenbelt, De grondwet als rechtsnorm voor porvinciale en gemeentelijke autonomie, afscheidsrede KHT, [s.l.] 1986.

decreased over time. Nevertheless, coinciding with the general trend towards deregulation, decentralisation is also taking place to a certain extent.

The present efforts by the central government to introduce the so-called city-province structure for urban conglomerates falls outside the scope of the Constitution. The constitutionality of such a new phenomenon is the subject of discussion.

Another issue of provincial and municipal law concerns the position of the provincial King's commissioner and the municipal mayor. At present, these are appointed by Royal Decree. Pleas for a more democratic appointment procedure for these functionaries have up untill now, not been successful. Attempts to implement these changes in the run-up to the general revision of 1983 failed. At present, an amendment to deconstitutionalise the issue of the designation of these functionaries, and thus to enable election, is pending.

C Constitutionalisation of fundamental rights

In no other area of constitutional law has constitutionalisation taken a more noticeable position than in the area of fundamental rights and liberties. This is due in particular to the revision of the Constitution in 1983. Of all areas of constitutional law, it is this area that has seen the most modernisation and change. The relevant Articles were extended and modernised, new fundamental rights included, social rights for the first time (systematically) introduced and all fundamental rights summarized in one chapter, the first. During the general revision, the theory and principles of the protection of the protection of fundamental rights were duly elaborated. These principles and theories were not actually laid down explicitly in the Constitution, but were agreed upon in the process of amendment between Parliament and the government and could implicitly be read into the wording of the fundamental rights Articles.

The Constitution introduced a strict system for restricting fundamental rights, by specifying the competent body for restriction of fundamental rights, by defining purposes to be met by the restriction and/or the introduction of specific procedures to be followed.[37] The concept of "restricting" a right is far-reaching. Not only are deliberate restrictions to fundamental rights regarded as such, but this is also true for undeliberate restrictions, i.e., those which cause a restriction to a fundamental right as a side-effect.

37. Generally speaking, the Legislature is the competent body to make restrictions to fundamental rights. "Law" refers to an Act of Parliament; the phrase "by or pursuant to law", the verb "regulate"; the noun "rules" refers to the compentence of the Legislature to delegate its power to make restrictions to fundamental rights.

"*Drittwirkung*", the horizontal effect of fundamental rights, has been accepted. In the absence of specific legislation, courts can and do give effect to fundamental rights in relations between individuals. The extent to which this is done is to a large extent a matter of judicial discretion.

The ban on judicial review of parliamentary legislation exercises its influence in the field of human rights as well. The Legislature is the first and foremost authority both as regards restricting and concretising fundamental rights. This is a matter of interpretation and takes place first and foremost in the parliamentary process. Indeed, the new system with its stress on the Legislature as the competent authority in this field has led to a flow of new and revised legislation.

Legislative change in the field of fundamental rights does not always actually result from the Constitution. Mass media legislation has undergone profound change due to EC law and further changes to the system of the mass media are expected to take place which will not entail any alteration to the Constitution.[38] Various attempts have been made to alter the provision on education. In the meantime, rigorous changes in educational law have taken place and are taking place under the umbrella of the (substantially) unaltered Article 23 of the Constitution; although some of these changes, though fundamental, do not raise issues of constitutionality, others do.[39]

The direct effect of the constitutional standards on fundamental rights can be easily recognized where legislation other than parliamentary legislation is concerned. There the courts come in. In a series of rulings, the strict dogmatics of the constitutional system have been modified to a certain extent, producing acceptable results both from the point of view of fundamental rights protection and the requirements of everyday practice.

Especially because of the constitutional ban on review, international fundamental rights, notably the European Convention on Fundamental Rights, take an important place and some results have been produced in this area. Techniques of review at the European level thus find their way into Dutch rulings and probably also influence the way in which the courts rule on

38. Article 7, section 2, of the Constitution simply states: "Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast."; section 3: "No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. ..."

39. These changes are the result of policy goals such as deregulation and budget cuts. For a recent analysis, see B.P. Vermeulen, "Deregulering" en "zelfregulering" in het onderwijs. Over bezuinigingen en aantasting van het onderwijsgrondrecht, in H.R.B.M. Kummeling, S.C. van Bijsterveld (eds.), Grondrechten en zelfregulering, Deventer 1997, pp. 155-182.

fundamental rights in general.[40] Over the course of time, as we have already mentioned, national courts have, generally speaking, adopted a frank attitude towards review and have overcome their initial reluctance.[41]

To complete the picture, the influence of the rulings of the European Commission and the European Court on Human Rights must be mentioned.[42] Notably, the right to family life (Article 11 ECHR (in conjunction with Article 14)) and the right to a fair trial (Article 6) have instigated major changes in Dutch law. The ruling of the European Court on Human Rights regarding Article 6 ECHR in the *Benthem* case, to chose one spectacular example, directly led to the abolition of the "Crown appeal" as a form of administrative appeal of last resort without further access to an independent court and both triggered and accelerated the realization of a long-discussed reorganisation of the court system.

IV Results and effects of constitutionalisation

Direct effects: constitutionalisation of the various branches of the law

The link between the Constitution and the various branches of the law is rooted in charging the Legislature with codifying these branches of the law. Thus, the Constitution assigns the Legislature to adopt codes in the fields of civil (procedural) law, criminal (procedural) law, and administrative law; to regulate the legal rights and responsibilities of civil servants, and to adopt a code on the position of the National Ombudsman. In some instances, the codes already existed or were in the process of (informal) preparation at the moment of the adoption of the corresponding Article in the Constitution. Thus, there is an interaction between the development of the law and the Constitution in the stricter sense of the word. Other provisions in the Constitution, for example with regard to the King or the remuneration of (former) Members of Parliament, the court system, and the organisation of

40. See also S.C. van Bijsterveld, Church and State in the Netherlands 1996, in European Journal for Church and State Research 1997, pp. 112-113 (pp. 111-119).

41. See P. van Dijk, De houding van de Hoge Raad jegens de verdragen inzake de rechten van de mens, in De Hoge Raad der NEderlande. De plaats van de Hoge Raad in het huidige staatsestel, Zwolle 1988. See also M.L.P. van Houten, Meer zicht op wetgeving. Rechterlijke toetsing van wetgeving aan de Grondwet en fundamentele rechtsbeginselen, Deventer 1997, notably p. 210 ff., p. 261 ff.

42. For an analysis, see Y. Klerk, E.J. Janse de Jonge, The Netherlands, in C.A. Gearty (ed.), European Civil Liberties and the European Convention on Human Rights, The Hague, 1997, pp. 105-141.

provincial, municipal, and other public bodies contain assignments for the Legislature as well.

In the field of fundamental rights, the Constitution either presupposes legislation or actually assigns the Legislature to adopt codes in such fields as public demonstrations and data protection. In the field of social rights, the Legislature is also assigned specific tasks with respect to such areas as social security benefits. In addition to codification assignments, constitutionalisation of the various branches of the law is notably manifest in the influence of fundamental rights.[43]

Yet, many significant legal developments fall outside the scope of the Constitution or within the general framework of the Constitution. The current reorganisation of the court system which is aimed at integrating the specialist administrative courts into the general (civil and criminal) court system, is taking place within the general framework of the Constitution, but without concrete guidance by the Constitution itself.

The development of the applicability of private (tort) law to public authorities, the use of private law by public authorities instead of public law, the applicability of criminal law to public authorities and civil servants acting in their professional capacity, the development of general principles of natural justice and recently the development towards accepting decisions by public authorities on the awarding of damages as a basis for initiating administrative legal proceedings (rather than civil proceedings) are various examples of legal developments with consitutional significance which fall outside the scope of the wording of the Constitution. The same can be said of the expansive interpretation the Supreme Court has given to its own competence to review lower court rulings on their compatibility with the "law". It has interpreted the concept of "law" to include administrative guidelines, thus extending its own competence.[44]

V Limits and obstacles of constitutionalisation

In the previous sections, various character traits of the Constitution were mentioned which prevented its having a substantial impact in various fields of law. The absence of constitutional jurisdiction is one of these elements.

43. See E.A. Alkema, H.A. Groen, P.J. Wattel, J. Naeyé, De reikwijdte van fundamentele rechten, preadviezen NJV 1995, Zwolle 1995, in which special attention is also given to civil law, tax law, and criminal law.

44. HR 11 oktober 1985, AB 1986, 84 (Avanti); HR 28 maart 1990, AB 1990, 306 (Leidraad administratieve boeten) et al. The Court did require certain criteria to be met.

Secondly, the Constitution does leave the Legislature with wide discretion in fulfilling its assigned tasks of codifying specific areas of the law. Thirdly, as we have seen, various specific legal developments with a constitutional significance fall outside of the scope of the written Constitution. Finally, even where functions, competences and relations are defined, the relevant provisions leave room for a certain dynamism between the organs.

One specific Article of the Constitution deserves to be mentioned in this context. Article 140 of the Constitution states with respect to transitory law:

> "Existing Acts of Parliament and other regulations and decrees which are in conflict with an amendment to the Constitution shall remain in force until provisions are made in accordance with the Constitution."

In its literal interpretation, the provision is clear. It has, however, triggered a heated debate on whether the conservatory effect referred to applies to all Articles of the Constitution or not. In the latter case, "self-executing" provisions of the Constitution, i.e., provisions which do not need further legislation in order to be applied, would be directly applicable and take precedence over already existing legislation which is in conflict with the amendment to the Constitution.[45] In practice, the interpretation of Article 140 of the Constitution would have particular consequences in the field of fundamental rights, as they are usually formulated as "self-executing" rights. In a court ruling concerning the application of the Opium Act which was contrary to the amended right of the inviolability of the home (Article 12 Constitution), the Supreme Court relied on Article 140 to give the Opium Act effect (instead of referring to the ban on judicial review of Article 120).[46] The Supreme Court for Social Security Cases struck down a Royal Decree which it regarded as contrary to the new Article 1 of the Constitution guaranteeing equal treatment and non-discrimination, instead of relying on the conservatory effect claimed by Article 140 Constitution.[47] It has been argued that the latter approach is unconstitutional.

45. Of course, the ban on judicial review contained in Article 120 Constitution would prevent parliamentary legislation from being nullified by a court.

46. HR 4 maart 1986, NJ 1986, 612 (Opiumwet-arrest).

47. CRvB 21 december 1990, AB 1991, 225 (Gelijke behandeling). This approach has been pursued with respect to legislation other than parliamentary legislation, also by the Supreme Administrative Court, a division of the Council of State. For an overview of the discussion, see M.T. Oosterhagen, Artikel 140, in P.W.C. Akkermans, A.K. Koekkoek, De Grondwet. Een artikelsgewijs commentaar, Zwolle 1992, pp. 1210-1219.

VI Final remarks

Fundamental changes in the relationship between the state and society are not easily captured by studying the wording of the Constitution. Trends in deregulation and privatisation, self-regulation, flexibilisation, and more stress upon market forces fall outside the direct concern of the Constitution.[48] The same is true of developments of internationalisation, even globalisation and the impact of the EU.

Formally speaking, not much has changed since the initial creation of the EEC and the rulings of the Court of Justice on the priority of E(E)C law over national law. Nevertheless, the substantial impact of EC law is undoubtedly more urgently felt in many of the Member States. These changes in a way affect the position of the Constitution too. Discussions on an alleged "evaporation" of the national-state emerging in the context of international and supranational developments have their counterparts in the discussion on the "evaporation" of the Constitution. The impact of European Convention case-law and the use of the European Convention in national court proceedings must be mentioned as well in this respect.

It is illustrative that, at the same time, the procedure for the revision of the Constitution which had not been changed for many years, has recently been simplified.[49] It is also remarkable that some of the most fundamentally and heatedly debated changes such as the introduction of a referendum and those making it possible to have an elected mayor, did not lead to any concrete results in the 1983 general revision process, but that might now change considering that the changes have not led to much opposition and debate.

Despite the fact that the Constitution is only one of the sources of constitutional law, it does play a real role in political and legal processes. It is the responsibility of public institutions as well as the legal profession to interpret the Constitution and to retain its position at the centre of the constitutional debate.

48. The 1983 Constitution accentuates the role of the Legislature, also in the field of protection and restriction of fundamental rights. The current trends of deregulation and self-regulation thus raise questions in this field, see H.R.B.M. Kummeling, S.C. van Bijsterveld (eds.), Grondrechten en zelfregulering, Deventer 1997.

49. Sc. in 1983 and 1995.