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## Constitutional Culture in the Netherlands. A Sober Affair

Maurice Adams and Gerhard van der Schyff\*

*Political Power and the Governmental Process*, by Karl Loewenstein, is one of those rare pieces of twentieth century European scholarship that explicitly calls to attention the practical significance of constitutions. Writing in the 1950s, Loewenstein was interested in ‘the concordance of the reality of the power process with the norms of the constitution.’<sup>1</sup> An ideal constitution, according to him, is one where the norms of a constitution are faithfully observed: its norms govern the political process, or the power process adjusts itself to the norms. Loewenstein calls such a situation ‘normative constitutionalism’ and compares it to a tailor made suit. This he distinguishes from ‘nominal constitutionalism’ where the desired fit of the ‘suit’ has yet to be achieved, and ‘semantic constitutionalism’ where the constitution is meaningless in practice, such as under juntas.<sup>2</sup>

Loewenstein also noted the lack of attention for the dynamics that was conducive for the achievement of normative constitutionalism and was very aware of the fact that a constitution does not operate automatically once it has been adopted. ‘To be a living constitution, that is, lived up to in practice by power holders and power addressees, a constitution requires a national climate conducive to its realization.’<sup>3</sup> Such a statement provokes questions about the dynamics between constitutional law and socio-political practice, or between the formal and material validity of a constitution. Loewenstein, a Jewish émigré from Nazi Germany who became an American citizen,<sup>4</sup> was troubled by these questions, and was in his days one of the few scholars who called for more systematic attention for what we might frame as problems of ‘conflict and stability’ in the basic constitutional order.<sup>5</sup>

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<sup>1</sup> K. Loewenstein, *Political Power and the Governmental Process* (Chicago/London: The University of Chicago Press, 1957 (2nd edition 1965)), pp. 147-148.

<sup>2</sup> There are of course many other constitutional typologies possible. E.g. on the basis of author: Plato, Aristotle, Cicero, Montesquieu, Hobbes, Rousseau, Bryce, Wheare, Strong, Azkin, etc. Or by period: Antique, medieval, Modern, etc. Or by political ideology: liberal, Marxist, etc. Or by physical appearance: long or short, with or without preamble, with or without judicial constitutional review, uni- or multi-documentary, etc. On this, see M. Van Damme, *Constitutionele en politieke systemen* (Antwerpen: Kluwer, 1984). We take the typology of Loewenstein as a frame of reference, because it suits our focus on constitutional culture.

<sup>3</sup> Loewenstein, p. 148.

<sup>4</sup> Loewenstein was trained as both a lawyer and a political scientist. For an intellectual biography, see M. Lang, *Karl Loewenstein. Transatlantischer Denker der Politik* (Stuttgart: Franz Steiner Verlag, 2007).

<sup>5</sup> To be sure, today there is more attention than ever before for the types of — interdisciplinary — questions Loewenstein posed. The work of for example T. Ginsburg c.s. is relevant here. See his *The Endurance of National Constitutions* (Cambridge University Press, 2009) (together with Z. Elkins and J. Melton). But this doesn't preclude the fact that, in European academic circles at least, a specifically legal approach still seems dominant. See A.

In this chapter we want to discuss this theme in the context of Dutch constitutional culture.<sup>6</sup> What role, if any, does the Dutch Constitution play in channeling and/or constraining the political state of affairs? And is the Dutch Constitution capable of governing the dynamics of the political power process? These questions are highly relevant, since constitutions are considered to be the ultimate means of building and sustaining a just and stable politico-institutional order.

A terminological note is apt here. In this chapter we use 'Constitution' as referring to the actual Dutch document known as such. As Martin Krygier notes in his chapter to this volume, a constitution is about the way public power is constituted. It has to do with the legal architecture and frame of a polity (institutional design, foundations, and structure), as well as the character of its major institutions and their occupants, their interrelations among themselves and with the subjects of power.<sup>7</sup> *Constitutionalism* then refers to the way *the exercise* of such power is constituted, made up.<sup>8</sup> As Krygier also correctly notes, if a constitution is to contribute to *constitutionalism*, it must be implemented and be effective in the institutions and practices of the political order. That implies that the constitutional culture must be conducive to constitutionalism. The phrase 'constitutional culture' here refers to the agglomeration of beliefs and attitudes that the people, judges, lawyers and the state hold towards the Constitution and constitutional law in general.<sup>9</sup>

### Some institutional facts

The Netherlands is a small unitary country, with some 17 million inhabitants. It is highly affluent and densely populated, and also a (mainly) ceremonial

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von Bogdandy, 'Comparative constitutional law: a contested domain' in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p. 28.

<sup>6</sup> Loewenstein, as we saw, talks about a 'climate' in this context.

<sup>7</sup> For the purposes of this chapter this also encompasses the rule of law, which for us encompasses fundamental rights, judicial review, the separation of powers, as well as a variety of governance structures. Cf. M.D. McCubbins, D.B. Rodriguez and B.R. Weingast, 'The rule of law unplugged', *Emory Law Journal*, 59 (2010), 1455. We thus use a substantive conception of the rule of law. On the distinction between formal and substantive conceptions, see B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2004), pp. 91-113.

<sup>8</sup> See Chapter ... in this volume.

<sup>9</sup> See K.Y.L. Tan, *The Constitution of Singapore. A Contextual Analysis* (Oxford: Hart Publishing, 2015), p. 58. A more general definition refers to the network of understandings and practices that structure a specific constitutional culture. See R. Siegel, 'Text in context: gender and constitution from a social movement perspective', *University of Pennsylvania Law Review*, 150 (2001), 303. Cf. Nelken, who understands the term legal culture, in its most general sense, as one way of describing relatively stable patterns of legally-oriented social behaviour and attitudes. D. Nelken, 'Defining and using the concept of legal culture' in E. Örüçü and D. Nelken (eds.), *Comparative Law. A Handbook* (Oxford: Hart Publishing, 2007), p. 113.

monarchy.<sup>10</sup> The Netherlands has traditionally, and for a long time already, been a country of minorities, especially in religious and political terms. This also shows in electoral results, as no political party has ever been able to succeed in winning a parliamentary majority since the introduction of universal suffrage in 1917.<sup>11</sup>

Parliament, which consists of two Chambers, is situated in The Hague. The so-called Second Chamber or lower house is the more political of the two, and consists of 150 members, who are elected once every four years –if there are no new elections as a result of government collapse– through a system of proportional representation. The First Chamber or upper house, also informally called the Senate, consists of 75 members who are elected every 4 years by the members of the provincial councils (i.e. 12 councils with 564 members in total, accounting for 12 provinces). Its election, however, does not coincide with elections for the lower house. The position of Senator is a part-time one of – formally at least – one day a week, with no parliamentary assistance. Its members come from all sectors of society. Although having more or less the same powers of governmental oversight as the lower house, the upper house has no right of legislative initiative or even amendment, but it nevertheless has to approve legislation accepted by the lower house. It can only fully accept or reject this legislation, making for a rather intricate and complicated relation between the lower and upper houses. Constitutional convention has it that the upper house is supposed to focus on technical issues of legislative quality (*chambre de réflexion*), but once in a while it behaves more politically. Its existence and legitimacy has been a matter of debate over the years, especially when it contradicts the lower house on what are understood to be ‘political’ decisions, which are considered by some to be the prerogative of the lower house.<sup>12</sup>

Next to being a monarchy, the Netherlands is a parliamentary democracy, which means that the existence of the government is dependent upon a majority in parliament (especially the lower house).

Dutch constitutionalism could be described as being a rich tapestry of customs and documents.<sup>13</sup> Two national documents nevertheless stand out in this regard. On the one hand, there is the *Charter of the Kingdom of the Netherlands* (1954), and on the other hand, we find the *Constitution of the Kingdom of the Netherlands* (the first version dating back to 1814 but with its last major revision in 1983). Of the two, the Charter is the less known, but higher in terms of legal hierarchy nonetheless. The Charter regulates the relationship between the countries forming the Kingdom, namely the Netherlands, Aruba, Curaçao and Saint Maarten (the latter three islands

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<sup>10</sup> A useful and detailed overview about Dutch political history and its institutional shape can be found in R. Andeweg and G.A. Irwin, *Governance and Politics of the Netherlands* (Basingstoke: Palgrave Macmillan), 2014.

<sup>11</sup> *Ibid.*, pp. 22-23.

<sup>12</sup> On this M. Adams, ‘De nieuwe Belgische Senaat en het wetgevingsproces: kamer van reflectie of doublure? Enkele beschouwingen in het licht van de Nederlandse situatie’ *RegelMaat. Tijdschrift voor Wetgevingsvraagstukken*, (1996), 230.

<sup>13</sup> G. van der Schyff, *Judicial Review of Legislation. A Comparative Study of the United Kingdom, the Netherlands and South Africa* (Dordrecht: Springer, 2010), p. 23 (on which this paragraph is partly based).

being situated in the Caribbean), stating them to be equal partners. The Dutch Constitution itself however, is only applicable to the Netherlands and foresees a decentralised unitary state. When we in this chapter refer to Dutch constitutionalism or the Dutch Constitution, it is with this document in mind.

## **A sober affair**

The casual observer might be excused for thinking that the written Constitution of the Netherlands belongs to the same category as its United States or German counterparts. However, this would be to exaggerate the importance of codifying a constitutional system in a single document which is then entrenched to protect it from later legislative whim.

Instead the Constitution of the Netherlands might have more in common with its unwritten British neighbour than one might expect; it is in any case difficult to imagine the Dutch Constitution as an apex document containing the system's *Grundnorm* from which all else is to be deduced. This is because the Dutch Constitution is not intended as the beginning and end of rule of law values and constitutional culture in the Netherlands, similar to section 2 of the Constitution of South Africa that makes its superiority and all-encompassing role in that order more than clear by stating that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Instead the Dutch Constitution creates an incomplete constitutional framework to be further developed by parliamentary legislative or non-legislative means.<sup>14</sup> In this sense the Constitution allows the political process great freedom in developing and regulating constitutional law, as is the case in the United Kingdom where a sovereign parliament is not hindered by a codified constitutional document aimed to curtail a potentially rampant parliament. As a matter of fact, to say that the Constitution 'creates' a system in the Netherlands might be an overstatement in some respects, as opinion may differ on whether the legislature owes its competence to the Constitution or whether its legislative function exists independently of the two-hundred year old document. This is because it may be argued that article 81 of the Constitution establishes the legislature as comprising the government and the States General while endowing it with law-making powers; conversely though it may be argued that the Constitution simply recognises the legislature and provides for its specific procedure. Depending

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<sup>14</sup> See also the foreword to J.R. Stellinga, *De Grondwet systematisch gerangschikt* (Zwolle: Tjeenk Willink, 1950). Further on this, e.g. M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen and R.J.G.M. Widdershoven, *Beginnelsen van de democratische rechtsstaat*, 7th edn (Kluwer: Alphen aan den Rijn, 2012), p. 76 support the view that the Constitution creates a general competence to legislate, while W.J.M. Voermans, *Toedeling van bevoegdheid* (The Hague: Boom Juridische Uitgevers, 2004) notes and criticises the difference of opinion in this regard.

on one's view, the difference between the Dutch Constitution and its British neighbour might be smaller than between the Dutch Constitution and its German neighbour.

The Dutch Constitution, one can safely say, is one of sober ambition as far as its own worth is concerned. Although the document begins with a bill of rights as is commonplace among many modern constitutions and even incorporates socio-economic rights, a number of remarks may be made. The range of rights does not include those to a fair trial, the right to life is also absent unless one deploys interpretative vigour when it comes to article 114 that provides that capital punishment may not be imposed. Conspicuous by its absence is also a general right to property or ownership, instead article 14(1) allows expropriation but only upon compensation having been paid in accordance with an act of parliament.

This latter construction is also typical of the scheme that applies to the limitation of rights. While many declarations of rights focus on the extent to which a right may be limited, providing for instance that rights may only be limited in as far reason or necessity demands as in the case of the South African bill of rights or the European Convention on Human Rights, the Dutch Constitution focuses on the agent capable of limiting a given guarantee. Invariably that agent is the legislature that is allowed to limit a right in an act of parliament or by means of delegating the relevant authority.<sup>15</sup> The effect is to place the centre of decision-making outside the Constitution when it comes to limiting rights, instead of providing a shield with which to fend off interferences with the scopes of rights; the Dutch Constitution puts its faith in the wisdom of the legislature when it comes to deciding sensitive matters such as the conditions under which rights should be protected. Placing the gravity of decision-making outside the Constitution is even more in evidence when the structure of socio-economic rights is considered. For instance, article 22(1) provides that the 'authorities shall take steps to promote the health of the population'. This is not the language of enforceable subjective rights, but that of reminding the political institutions of what is expected of them in exercising their powers.

A close look at many of the rights in the Constitution also reveals that they are presented not as principles, but as rules. Rules might be clear and succinct in that they either apply or not, but principles allow more terrain to be constitutionalised.<sup>16</sup> The rule-like nature of especially the civil and political rights becomes apparent when the first two sub-provisions of article 7 are read:

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

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<sup>15</sup> See e.g. art. 8 of the Dutch Constitution: 'The right of association shall be recognised. This right may be restricted by Act of Parliament in the interest of public order.'

<sup>16</sup> The distinction is of course prominently by Dworkin. See R. Dworkin, *Taking Rights Seriously* (Cambridge (Massachusetts): Harvard University Press, 1977), pp. 22-28.

2. 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.

Article 7 guarantees not so much the principle of ‘free expression’ as it regulates various forms of communication. Even if one would want to focus on the principle underlying the provision, subsection 4 limits the scope of its application by excluding commercial advertising from constitutional protection. Casting rights as rules essentially reduces the reach of the Constitution and serves to emphasise its reluctance as a source of norms that extends to every nook and cranny of society.

The sober nature of the Constitution is not only apparent in the context of fundamental rights, but also goes to the heart of the country’s political process. The fact that the Netherlands is a parliamentary system that allows governments and their members to be relieved of their posts through parliamentary motions of no-confidence is not a direct product of the Constitution. The cardinal rule that government is subject to parliamentary confidence is an unwritten rule of constitutional law dating from the nineteenth century when parliament flexed its muscle in controlling the king’s ministers, such as by refusing to pass budgets.<sup>17</sup> All the Constitution had to state on the matter was to say that ministers and not the King would be responsible for acts of government, while remaining silent on who ministers had to be held to account.<sup>18</sup>

Far from dictating the form of government as in Germany for example, the Constitution provides very little on how governments are to be formed and the conditions under which they may exercise office. Constitutional innovation or change is rather the product of political practice, as became apparent again when the lower house of parliament decided to exclude the King from the process of forming a new government.<sup>19</sup> Previously the King appointed an *informateur* to explore the possibilities in constructing a new coalition as no single party ever attains an absolute majority. On the advice of this mediator the King would appoint a *formateur* who would choose ministers and who usually becomes the new prime minister. Yet since the general election of 2012 the lower house decides by itself who should investigate and negotiate the political landscape in forming a new cabinet. As this process is not codified in the Constitution, or in an act of parliament, it is essentially a question of pure political will as evidenced by the fact that the change was affected by simply amending the lower house’s standing orders.<sup>20</sup>

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<sup>17</sup> See further L. Dragtra, N.S. Efthymiou, A.W. Hins and R. de Lange, *Beginselen van het Nederlandse Staatsrecht* 17th edn (Kluwer: Deventer, 2012), pp. 100-106; Burkens et al., p. 249; E.M.H. Hirsch Ballin and E. van Vugt, ‘De transformatie van de bevoegdheid tot ontbinding van het parlement’ in E. Witjens, V. Van Bogaert and C. Bollen (eds.), *E Hofi Di Ley* (The Hague: Boom, 2014), pp. 113, 114-115.

<sup>18</sup> Art. 42(2) of the Constitution.

<sup>19</sup> Burkens et al., p. 243.

<sup>20</sup> Art. 139(a)-(b) of the Standing Orders of the Second Chamber of 22 June 1993. See also Parliamentary Papers II 2011-2012, 32 759, no. 6.

Furthermore, there is little appetite in the Netherlands to change the culture of timidity where the Constitution is concerned. While the Constitution has certainly been developed since its inception, for example through the addition and expansion of a catalogue of rights, it remains debatable whether the document is the font of rule of law values and constitutional culture in the country. For example calls to modernise the dated provisions of article 7 on a free press, most recently again in 2010 by the State Commission on the Constitution, have fallen on deaf ears.<sup>21</sup> Eliminating the provision's reference to specific forms of communication and focussing it on the protection of all communication and information irrespective of mode have come to nothing. By still concentrating its efforts on regulating the printed press, the digital age has hardly arrived as far as the Dutch Constitution is concerned.

More importantly than updating the Constitution in such respects, the government also let the opportunity pass to include a comprehensive value provision in the Constitution itself in lieu of a preamble, as suggested by the Commission in its report. The Commission suggested to refer to the country as a 'democratic *rechtsstaat*', to require the state to promote and protect core values such as human dignity and to base the exercise of public power on the Constitution and legislation. The then government though had little appetite to inject the Constitution with a value-laden provision that would have counter-balanced the document's preoccupation with rules and procedures. Instead a later government agreed, only after quite some political pressure, to include a watered-down value provision in the Constitution., Importantly though, the proposal still has to withstand the difficult and unpredictable process of constitutional amendment in order to be adopted.<sup>22</sup> Also, there is no word whatsoever in the Constitution about the European Union. The Dutch Constitution as such, we might conclude, is rather uninspiring.<sup>23</sup>

## Constitutional silence

The Constitution is not only a rather sober document, but its role in everyday political and constitutional life is more limited than that of some other constitutions, so much so that in some respects one might even speak of a 'constitutional silence', to quote Hirsch Ballin.<sup>24</sup> Although the Constitution is the highest national norm apart from the overarching Charter, one might be forgiven for thinking that it was just an ordinary law at times.<sup>25</sup> This conclusion can be based on the use of the Constitution during parliamentary

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<sup>21</sup> W. Thomassen, Rapport Staatscommissie Grondwet, 2010, pp. 70-71.

<sup>22</sup> See Parliamentary Papers II 2011-2012, 31 570, no. 20; Parliamentary Papers II 2013-2014, 31 570, no. 24.

<sup>23</sup> About this G. van der Tang, 'Een Grondwet voor de politieke samenleving', in *De Grondwet herzien, 25 jaar later*, pp. 91, 94.

<sup>24</sup> E.M.H. Hirsch Ballin, *De Grondwet in Politiek en Samenleving* (Boom Lemma: The Hague, 2013), p. 9.

<sup>25</sup> On the hierarchy of norms, see Burkens et al., p. 91.



debates, as well as its enforceability before, or lack thereof in the country's courts.

Turning first to parliamentary debate, Hirsch Ballin noted that members of parliament make little use of the Constitution in debating each other on current issues.<sup>26</sup> His survey of lower house debates in 2013 showed that the Constitution was only mentioned when amendments to the document were discussed, the topic of European monetary union had to be considered and the criminal liability of the government featured on the agenda.<sup>27</sup> When a member of the house asked whether the Constitution was contravened when local councils circumvented statutory provisions on charging for care, the responsible secretary of state did not respond.<sup>28</sup> And when a member of government did refer to the Constitution, such as reference to article 15 of the Constitution and article 5 of the European Convention on Human Rights by the minister responsible for justice (in a debate on expanding the grounds for detention without trial) the Chamber did not engage in debate on the provisions.<sup>29</sup> Interestingly, a member of parliament referred to the written Constitution in embellishing his argument that it was parliament's duty to hold government accountable.<sup>30</sup> This member was obviously not aware that in the Netherlands this seminal aspect of parliamentary governance is not regulated as such in the Constitution but is the product of political practice as recognised by unwritten constitution law, as discussed above. Not only does this example illustrate the sober nature of the Constitution, but it also shows the lack of knowledge about constitutional fundamentals when it comes to parliamentarians.

The sober nature of the Constitution is probably only part of the reason for its absence from political debate. For instance, Hirsch Ballin argues that the Constitution can definitely play a role in the debate on the extent to which the legislature has to respect the courts' discretion in sentencing matters. In his analysis he points to a number of provisions from the Constitution, such as articles 15 and 16 on deprivation of liberty according to law and article 113(1) that attributes the settling of criminal cases to the courts' jurisdiction.<sup>31</sup> From these provisions he deduces that the Constitution implies a separation of powers in criminal matters between the legislative and judicial branches, more in particular a certain political detachment in deciding such cases. The separation of powers, he concludes, is a device with which to protect the individual against public power, in this case the will of legislative majorities. Hirsch Ballin's analysis shows that the Constitution can indeed be used to further political debate.

## **Enforcing the Constitution through the judiciary?**

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<sup>26</sup> Hirsch Ballin, p. 9.

<sup>27</sup> See also Hirsch Ballin pp. 9-12 for the examples discussed here.

<sup>28</sup> Parliamentary Proceedings II, 13 January 2013, p. 40-5-33.

<sup>29</sup> Parliamentary Proceedings II, 12 June 2013, p. 94-13-96.

<sup>30</sup> Parliamentary Proceedings II, 17 January 2013, p. 4-13-10.

<sup>31</sup> Hirsch Ballin, p. 12.

The fact that the Constitution is not part and parcel of the politician's everyday lexicon is probably as much to be ascribed to the Constitution's lack of enforcement mechanisms, especially in the form of judicial constitutional review, as it is to a political culture that is disinterested in its provisions (or maybe the former should be seen as an expression of the latter). Indeed, not only politicians, but judges too are well-placed to apply constitutions. The expansion of judicial power since the Second World War has meant that in many if not most countries acts of parliament are generally subject to judicial review.<sup>32</sup> Constitutional law is increasingly treated less as a special branch of law that falls outside the scope of judicial enquiry and more as enforceable law. Even in a jurisdiction without a codified constitution such as the United Kingdom some members of the judiciary have warned that were parliament to violate basic constitutional fundamentals, such as abolishing the courts' control function in its entirety, the courts might use the common law to refuse such a move any legal force.<sup>33</sup> In other words, the constitutional function of the common law might be revived to counter a parliament intent on abusing its sovereign position in the legal order.<sup>34</sup>

Constitutional law in the Netherlands occupies a very different position in this regard. Whereas constitutional relationships might be somewhat fuzzy in the United Kingdom, thereby leaving the backdoor open for the common law to rescue the day in the event of a constitutional crisis of the magnitude described above, the Constitution of the Netherlands is quite clear on the role of the courts in matters of constitutional application. Uncertainty about the place of the courts in the institutional arrangement was taken away in 1848 when a bar on constitutional review was inserted. In its current guise as article 120, the provision holds that the 'constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. The effect is to enforce a strict separation of powers, although the Constitution is the highest national norm it may not be used to judicially test acts of parliament or treaties for that matter.<sup>35</sup>

The provision has stood the test of time by withstanding numerous calls and attempts to abolish it, or to reduce its reach. The Cals/Donner State Commission advised in the 1960s that the bar be lifted in respect of civil and

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<sup>32</sup> See generally C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press: New York, 1995); W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, Springer, 2005); T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); S. Gloppen, R. Gargarella, E. Sklaar (eds.), *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies* (London, Frank Cass, 2004).

<sup>33</sup> *Jackson v. Her Majesty's Attorney General* [2005] UKHL, 56, par. 102, 159.

<sup>34</sup> See G. van der Schyff, 'Exploring the parameters of lawmaking: lessons from the United Kingdom', in M. de Visser and W.J. Witteveen (eds.), *The Jurisprudence of Aharon Barak: Views from Europe* (Wolf Legal Publishers: Nijmegen), p. 125.

<sup>35</sup> See M. Adams and G. van der Schyff, 'Constitutional review by the judiciary in the Netherlands: a matter of politics, democracy or compensating strategy?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 66 (2006), 399.

political rights, but to no avail.<sup>36</sup> The bar also survived the grand constitutional revision of 1983, albeit with different wording. In the early 1990s the government of the day declared its intent to modify the ban, an intention which the Supreme Court supported when asked for its advice in the matter.<sup>37</sup> But governments come and go while the bar remains it seems. More recently the National Convention, a body appointed to consider ways to bring the political process closer to the people, recommended in its report in 2006 that the bar be lifted in respect of civil and political rights and that a constitutional court be established to carry out any review.<sup>38</sup> Again the proposals were not acted on, as happened to the advice of the State Commission in 2010 that the bar be reconsidered.<sup>39</sup>

To date the most concrete proposal for reform concerns a constitutional amendment tabled in 2002 by a then member of the opposition (the 'Halsema' proposal or bill, after the member of the parliamentary opposition). The bill advocates the lifting of the ban in the case of what it terms 'enforceable rights'.<sup>40</sup> Reference to the list of exempted rights quickly establishes that exempted rights amount to civil and political rights, while it is to remain in effect for socio-economic rights as well as all other provisions of the Constitution such as the legislative process for instance.<sup>41</sup>

Amending the Constitution is no easy affair though. A bill first has to be accepted by a simple majority in both houses of the States General, before it can be read for a second time the lower house of parliament must have been re-elected.<sup>42</sup> The idea is that the voters must have the opportunity to express themselves on any constitutional amendments before a second reading may take place. Importantly also, a bill wishing to amend the Constitution must attain a two-thirds majority in its second reading in order to successfully amend the Constitution. The effect of this drawn-out process is that the Constitution is particularly rigid, especially as general elections usually deliver a different composition of the lower house and new political objectives with that. Although even more than one general election has taken place since its first reading, the Halsema bill is only now being read for a second time, as its supporters have been wary to initiate the second reading because the political climate might not be amenable to the bill passing the tough two-thirds majority. This long duration of time points not only to the hesitance of those wanting the bill to pass, but also to the lack of appetite among politicians to allow the courts a greater say in shaping the constitutional culture through interpretation and application of enshrined

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<sup>36</sup> J.L.M.Th. Cals and A.M. Donner, *Tweede Rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet*, The Hague, 1969.

<sup>37</sup> *Nota inzake rechterlijke toetsing*, 1991. For the Court's advice, see 7 *NJCM-bulletin* 1992, p. 243.

<sup>38</sup> R.J. Hoekstra, *Hart voor de publieke zaak: aanbevelingen van de Nationale Conventie voor de 21e eeuw* (The Hague, National Convention, 2006).

<sup>39</sup> For the government's negative reaction, see *Parliamentary Papers II* 2011–2012, 31 570, no. 20.

<sup>40</sup> *Parliamentary Papers II*, 2001–2002, 28, 331, no. 2; 2002–2003, 28, 331, no. 9.

<sup>41</sup> *Parliamentary Papers II*, 2002–2003, 28, 331, nos. 9, p. 18–19.

<sup>42</sup> For the procedure, see art. 137 of the Constitution.

fundamental rights. The fact that the bill stresses that the function of constitutional review would be a supplementary one and is in no way intended to replace political initiative and legislative control over the Constitution has seemingly fallen on deaf ears.<sup>43</sup>

## Applying international law

An analysis of the protection of rule of law values and the constitutional culture in the Netherlands is not simply a straightforward choice between the legitimacy of elected representatives as opposed to unelected judges as the guardians of the Constitution. The debate takes an unexpected turn when one considers that although acts of parliament are not subject to constitutional review by the courts, they are subject to treaty review to determine whether they violate international law most commonly in the form of treaties concerned with fundamental rights such as the European Convention on Human Rights.<sup>44</sup> Treaty review is a consequence of the country's monist legal order that makes no distinction between national and international law in deciding what amounts to applicable law in the Netherlands. The scope of review becomes even broader when European Union law is added to the equation, as the monist nature of that legal order requires that domestic judges must refuse to apply any national norms that conflict with any primary or secondary norms of European law independent of what national law may rule on the issue.<sup>45</sup>

Whereas EU monism might be considered a necessary feature of belonging to the Union, the judicial application of other sources of international law is a matter of national constitutional law. In this latter regard the sober character of the Constitution comes to the fore once again. Monism as such is not a principle created by the Constitution, but is a rule of unwritten constitutional law as recognised by the courts.<sup>46</sup> Although the principle is somewhat modified by the Constitution in articles 93 and 94, its source is extraneous to the document. The function of the Constitution is to limit the applicability of international law, other than EU law of course given its autonomous operation, by requiring that courts may only apply binding international law. This requirement has been interpreted to exclude socio-economic rights from judicial application instead favouring civil and political rights and to limit the courts to applying written international law as opposed to custom.<sup>47</sup>

When comparing treaty review with the Halsema bill the similarities are not mere coincidence. The bill was purposely designed to emulate treaty review in order to lower political resistance to accepting constitutional review by upsetting the status quo as little as possible. The Halsema bill

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<sup>43</sup> Parliamentary Proceedings II, 2002-2003, 28, 331, no. 9, p. 14.

<sup>44</sup> Burkens et al., pp. 353-356, 361-367; N.S. Efthymiou and J.C. de Wit, 'The role of Dutch courts in the protection of fundamental rights', *Utrecht Law Review*, 9 (2013), 75.

<sup>45</sup> Art. 267 TFEU; CJEU *Costa v. ENEL* [1964] ECR 585 (6/64).

<sup>46</sup> HR 3 March 1919, *NJ* 1919, p. 371 (*Grenstractaat Aken*).

<sup>47</sup> Burkens et al., pp. 362-365.

therefore restricted its review to civil and political rights and intended for review to be conducted by all judges (and not just with a single or specialised apex court), as is the case with treaty review in the Netherlands. While this type of decentralised constitutional review might seem to be of little comfort to jittery politicians, a centralised and purpose-designed constitutional court was judged by some as a greater threat to the dominant position of political institutions as such a court would speak with one voice, while a multitude of judges applying the Constitution in diverse ways would not pose a unified challenge.<sup>48</sup> These design concessions failed to convince doubters of constitutional review and have clearly not had much effect to date. Similarly, the breach in the inviolability of acts of parliament occasioned by treaty review has not convinced legislators to increase the range of norms with which to review acts of parliament and again shows the reluctance to shift the gravity of political decision-making from the legislature to the judiciary more than is absolutely necessary.

Based on the reluctance to take the plunge and introduce the constitutional review of acts of parliament, however careful and measured that plunge may be, one might be tempted to argue that treaty review compensates constitutional review thereby obviating the need for the latter.<sup>49</sup> While this argument is certainly true to a certain extent as the Constitution protects rights that can also be found in various treaties, such as rights to freedom of religion and expression to name but two common examples, it fails when a right such as that to education is considered. The right to education in article 23 of the Constitution is specifically tailored to the situation in the Netherlands, as its eight subsections will attest to. The same can be said of the protection offered privacy in article 10 leading to the conclusion that the Constitution is not simply a copy of international law and vice-a-versa. Moreover, the Constitution is not limited to protecting fundamental rights, as the document also regulates the legislative process for instance. Articles 81 to 88 explain the legislative process by detailing the stages that a bill has to follow before it can be enacted as valid law. While treaty review goes some way in embellishing rule of law values in the Netherlands, the fact remains that international law can never supplant the Constitution even though the latter may be a somewhat sober document and not exactly exuberant in its ambitions.

Having said all this, developing or establishing a constitutional culture of course demands more than simply agreeing to conduct judicial review, whether it be with regard to constitutional or treaty review. For instance, while treaty review indeed is a feature with a long track record in the Netherlands, its more recent exercise has been marked by reluctance on the part of the courts. Although there have been periods of what might be termed judicial activism when legislation was actively taken to task and measured for compatibility with binding international law, such as the review of family

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<sup>48</sup> C.A.J.M. Kortmann, 'Advies van prof. mr. C.A.J.M. Kortmann', *NJCM-Bulletin*, 17 (1992), 305, 306.

<sup>49</sup> See also the inaugural lecture by R. de Lange, *Concurrerende rechtsvorming* (Ars Aequi Libri: Nijmegen, 1999).

laws in the 1980s, courts in the Netherlands are generally careful to exercise their powers of treaty review.<sup>50</sup> The case of Salah Sheekh, a failed asylum seeker from Somalia, presents a good example. The applicant complained that the possibility of his expulsion to Somalia would threaten his article 3 right in the European Convention on Human Rights not to be 'subjected to torture or to inhuman or degrading treatment or punishment'.<sup>51</sup> This he argued would be his fate as a member of the minority Reer Hamaar community because his expulsion to the relatively safety of northern Somalia where he had no family or clan members to protect him would make him vulnerable and probably result in him having to live in a camp for internally displaced persons.<sup>52</sup> In contesting the application the government contended that the applicant had failed to exhaust all available domestic remedies, as required in article 35(1) of the Convention, before he approached the European Court of Human Rights for relief.<sup>53</sup> This was the case, the government averred, because the applicant had not lodged a further appeal with the Administrative Jurisdiction Division of the Council of State, as that court was the highest appellate instance in the matter.

To the amazement of the Dutch establishment, the Strasbourg Court ruled that the requirement in article 35 had not been breached, the bench then proceeded to review the merits of the application before ruling that expulsion to Somalia would indeed violate article 3 of the Convention.<sup>54</sup> The Court found that the position of the Council of State in this matter was so predictable as to warrant the Council being bypassed altogether.<sup>55</sup> The effect was to reprimand the Council of State, if not in so many words, for a judicial line that was formalistic to the extent that the court's adjudicative function amounted to little more than a formulaic approach in deciding the merits of a case such as that of Salah Seekh's. This is all the more reiterated by the Court finding a violation of article 3, as a closer inspection of the available facts deemed the safe areas to be particularly unsafe for someone in the position of the applicant.<sup>56</sup> In other words, not only did the Strasbourg Court bypass the national court hierarchy in a somewhat spectacular fashion, but it also made it patently clear that the highest court's judgment would have been so unsympathetic to the situation as to violate a core right of the Convention.

To its credit the government of the day responded quickly by adjusting its asylum policy to meet the requirements as set out in the *Salah*

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<sup>50</sup> See also J. Uzman, T. Barkhuysen and M.L. van Emmerik, 'The Dutch Supreme Court: A reluctant positive legislator' in A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press, 2011), p. 645.

<sup>51</sup> ECtHR, *Salah Sheekh v. The Netherlands* of 11 January 2007, par. 114, 128.

<sup>52</sup> *Salah Sheekh v. The Netherlands*, par. 128.

<sup>53</sup> *Salah Sheekh v. The Netherlands*, par. 119.

<sup>54</sup> *Salah Sheekh v. The Netherlands*, par. 147; capturing the establishment's amazement at the decision F. Jansma, 'Hof Europa dwingt ander asielbeleid af', *NRC* 24 May 2007, for this newspaper article see: [http://vorige.nrc.nl/binnenland/article1800486.ece/Hof\\_Europa\\_dwingt\\_ander\\_asielbeleid\\_af](http://vorige.nrc.nl/binnenland/article1800486.ece/Hof_Europa_dwingt_ander_asielbeleid_af)

<sup>55</sup> *Salah Sheekh v. The Netherlands*, par. 123.

<sup>56</sup> *Salah Sheekh v. The Netherlands*, par. 149.

*Sheekh* case.<sup>57</sup> However, this does not address the cultural and institutional issue of constitutional checks and balances when it comes to realising constitutional and rule of law values in the Netherlands. Although the *Salah Sheekh* case might not be evident of everyday adjudication in the Netherlands, it does pose the question whether the courts are not too reticent in adjudicating sensitive matters such as asylum practice and policy. Treaty review might exist, but its exercise must not be allowed to fade into the sunset if it is to fulfil any role in helping to maintain the rule of law.

In gauging the country's rule of law culture it is therefore somewhat concerning then that a member of parliament tabled a proposal in 2012 to prohibit the courts from reviewing the compatibility of acts of parliament with binding international law.<sup>58</sup> Whereas the previously discussed Halsema bill wants to introduce constitutional review along the lines of treaty review, the Taverne bill wants to abolish treaty review along the lines of the bar on constitutional review. The bill argues that norms of international law are vague and should therefore be interpreted by the legislature because of its democratic legitimacy than appointed judges.<sup>59</sup> Were the Taverne bill to succeed in amending the Constitution, a slim prospect one imagines given the legislative hurdles it would have to pass, it would make the country's constitutional culture more dependent on external stimuli as in *Salah Sheekh* than on domestic impulses.<sup>60</sup> It is therefore encouraging that the Council of State, which gives advice on bills apart from acting as one of the country's highest courts, has severely criticised the proposal for among other reasons not showing why the courts are to be denied the power of review.<sup>61</sup> In addition the Council for the Judiciary, which advises on matters that affect the courts, warned that the bill would seriously affect the quality of the *rechtsstaat* by not recognising that the courts complement the legislature instead of vying with the legislature.<sup>62</sup> In other words, both the legislature and the courts are necessary to ensure the quality of legislation and not just one or the other.<sup>63</sup>

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<sup>57</sup> Parliamentary Papers II 2006–2007, 29 344 and 30 800 VI, no. 64.

<sup>58</sup> Parliamentary Papers II 2011–2012, 33 359 (R 1986), nos. 2, 6.

<sup>59</sup> Parliamentary Papers II 2011–2012, 33 359 (R 1986), no. 6, p. 6-7, 10.

<sup>60</sup> The fact that the member of parliament responsible for the bill, Joost Taverne, later tabled a bill relying on the current role of the judiciary, instead of its exclusion, in applying international law confirms the slim chance of the proposed amendment succeeding. According to the new bill, which is not aimed at amending the Constitution, judges can only apply international law after parliament's express instead of implied consent in approving a new treaty. The effect would be to increase parliamentary oversight instead of sidelining the constitutional function of the judiciary. See Parliamentary Papers II 2014-2015, 34 158 (R 2048), nos. 2, 5.

<sup>61</sup> Parliamentary Papers II 2011–2012, 33 359 (R 1986), no. 4.

<sup>62</sup> Par. 3.2 of the letter from the Council for the Judiciary of 17 May 2013 addressed to the chair of the lower house of parliament. For the letter, see <http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadviesing/Wetgevingsadviezen2013/2013-15-Advies-Taverne.pdf>

<sup>63</sup> It can be added that the Dutch policy response to critical recommendations of international human rights bodies is generally defensive and sometimes borders on complete denial. See J. Krommendijk. 'Dutch denial? The response to recommendations of international human rights bodies', in *The Netherlands Yearbook of International Law* (Springer: Heidelberg/New York/Dordrecht/London, 2015) (to appear) and J. Krommendijk,

## Evaluation and explanation

On the basis of the above we can typify the Dutch Constitution more as a general guide to the exercise of political power as opposed to a collection of robust guarantees in the service of rule of law values. The Netherlands is marked by a rather sober or moderate constitutional culture, and by a strong distance between constitution and politics. As this quote illustrates, 'It is virtually impossible to find any politician in The Hague [the seat of Parliament] who would want to win or lose a political debate on the ground that a certain topic would be contravening the Dutch Constitution.'<sup>64</sup> As a result, there are very few people, apart from those who belong to the inner circle of constitutional specialists, who consider themselves as the 'guardians of the constitution.' The Dutch Constitution does not function as a strong normative document<sup>65</sup>; it is rather a codification of political practice than the other way round.<sup>66</sup> All this might not necessarily be considered a problem, because since the Netherlands is generally regarded as a tolerant and democratic nation, the Dutch might as well praise themselves with such a situation. So how can this constitutional culture be explained? And what are its implications? Arend Lijphart's political theory could well offer an explanation for the specific institutional configuration of the Dutch politico-constitutional system, and also of the behaviour of the actors shaping this. Lijphart has termed his theory 'consociational democracy'.<sup>67</sup> It means 'government by elite cartel to turn a democracy with a fragmented political culture into a stable democracy'.<sup>68</sup>

A consociational democracy, as is clear from the definition just cited, is most often found in societies that are strongly divided. While it was generally assumed that political stability was beyond reach for such societies, Lijphart demonstrated that political *instability* is not a predestined terminus for

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*The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland. Paper Pushing or Policy Prompting?* (Intersentia: Antwerp, 2014).

<sup>64</sup> L.F.M. Besselink, 'Constitutionele klimatologie', *Nederlands Juristenblad* (1998), 212. On constitutional culture see also G.F.M. van der Tang, *Grondwet en grondwetsidee* (Arnhem: Gouda Quint 1998), pp. 373-375; M. Adams, 'Constitutional and socio-political dynamics in the Netherlands and Belgium', in H. Glaser (ed.), *Norms, Interests, and Values. Conflict and Consent in the Basic Constitutional Order* (Nomos Verlag: Baden Baden, 2015), pp. 89-129.

<sup>65</sup> The expression of its normativity differs essentially from that of neighbouring Belgium for instance, especially in the realm of the relations between the different constituent parts of the Belgian federation. See M. Adams, 'Disabling constitutionalism', *International Journal of Constitutional Law*, 12 (2014), 279-302.

<sup>66</sup> As the Dutch scholar J. van der Hoeven already in 1958 observed, in his seminal *De plaats van de grondwet in het constitutionele recht* (Zwolle: Tjeenk Willink, 1958).

<sup>67</sup> On this, see in particular his *The Politics of Accommodation. Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968); *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Yale University Press, 1977); and *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (New Haven: Yale University Press, 1984).

<sup>68</sup> A. Lijphart, 'Consociational Democracy', *World Politics*, 21 (1969), 216.



fragmented or even disunited societies. The potentially destabilising effects of division are on the contrary likely to prompt established political actors to search for pragmatic ways to deal with societal cleavages. Alternative methods of political accommodation, contrary to regular majoritarian politics, are thus explored, and the different segments in society actively strive for cooperation, consensus and stability: they seek to find each other and to cherish common ground as much as possible. As a result, differences between (ruling) groups are not politicised or exaggerated and a substantial number of the political leaders cooperate in governing the country, thus neutralising destabilising tendencies. This also should prevent major political groups from becoming estranged from the political system. As a result, although political decision-making in consociational democracies is strongly affected by the interplay of past and present political and other tensions, in practice, so the theory goes, it operates in a way that defuses these tensions and encourages compromise.

The hallmarks of a consociational democracy are broad government coalitions, political proportionality (in elections and representative bodies, but also in advisory bodies, the civil service, etc.), mutual rights of veto in political decision-making, and 'pillarisation'. Pillarisation is a term that describes the vertical organisation of a society along traditional ideological, religious, and/or politico-economic divides. Pillarised societies are divided in several smaller segments or pillars according to different religions or (mainly socio-economic) ideologies. All of these pillars have their own social institutions (broadcast companies, newspapers, schools and universities, sports clubs, mutual sickness funds, etc.) and resources, with each group retaining autonomy of how to use them. As the political scientist Van Schendelen observed: 'In the pillarized society the cleavages between the (...) main social grouping were such that 'the common government' could handle only a few issues and usually only in a procedural way, leaving as much substantial decision-making as possible to the pillars themselves.'<sup>69</sup>

The Netherlands played an important part in the development of Lijphart's views and theories. In the past the country was deeply ideologically divided between liberals and socialists, and between Catholics and Protestants. According to Lijphart, Dutch society from the 1960s onwards was a classic example of both a pillarised society and a consociational democracy.<sup>70</sup> It were the pillars through which societal tensions were contained as it were, and the potential problems were resolved by means decision-making amongst the elites of these pillars. And due to the complicated nature of reaching political compromises, the political elite

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<sup>69</sup> M. van Schendelen, 'The Netherlands: from low to high politicisation', in M. van Schendelen and R.J. Jackson (eds.), *The Politicisation of Business in Western Europe* (London: Croom Helm, 1987), p. 65.

<sup>70</sup> And he considered Belgium to be 'the most thorough example of a consociational democracy'. A. Lijphart, 'The Belgian example of cultural coexistence in comparative perspective' in A. Lijphart (ed.), *Conflict and Coexistence in Belgium. The Dynamics of a Culturally Divided Society* (Berkeley: Institute of International Studies, 1981), p. 1. See also A. Lijphart, *Democracy in Plural Societies. A Comparative Exploration* (New Haven: Yale University Press, 1977), pp. 223-238.

mostly took decisions behind closed-doors. Transparency was no hallmark of consociational democracy.

What is important to note here, is that although the Dutch pillars have crumbled as religious divisions have weakened and large groups of society have become emancipated, elite compromise still remains a key theme and operational device in Dutch political decision-making.<sup>71</sup> Indeed, Dutch society and its institutions often still avail themselves of channels, other than constitutional and rule of law discourse, to deal with social or political conflicts and interests, including the protection of fundamental rights. But whereas previously societal problems were solved within the so-called pillars, today pivotal organisations dealing with these problems include next to parliament, the Council of State, the Social and Economic Council, the Auditor's Office, the Scientific Council for Government Policy, the High Council of the Judiciary, Ombudspersons, and other public advisory, controlling or decision-making bodies.<sup>72</sup>

In line with Lijphart's reasoning, it could then well be argued that the renowned late 20th-century Dutch 'polder model' is an offshoot of consociational democracy. The phrase 'polder model' has uncertain origins, but is mostly used to describe the typically Dutch version of consensus politics, developed in the 1980s and 1990s in socio-economic affairs.<sup>73</sup> The term, referring to the typical Dutch 'polders',<sup>74</sup> is short hand for an institutionalised form of cooperation and consensus seeking between political actors, social partners and other societal organisations. The term was however also quickly adopted in other situations of pragmatic consensus decision-making by elites in the face of diversity and plurality. So, following the gradual dissolution of the old 'pillarised' way of organising Dutch society, the Dutch system of political decision-making found new, distinctly non-judicial and non-legal ways to avoid potential bottlenecks in political decision-making processes.

If this were a correct evaluation, it would not be unfair to state that the Dutch are constitutionally relativistic and sometimes even maybe negligent, but one might be led to believe that this is not a problem given the country's perceived democratic maturity. Blessed is the country that has such a firm democratic order, that the Constitution can be safely ignored!, one

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<sup>71</sup> R. Hague and M. Harrop, *Comparative Government and Politics*, (Basingstoke: Palgrave MacMillan, 2007), p. 115.

<sup>72</sup> The Council of State for example *advises*, next to being the highest administrative court, on the legislative quality (including the constitutionality) of pending bills.

<sup>73</sup> J.J. Woldendorp, *The Polder Model: From Disease to Miracle? Dutch Neo-Corporatism 1965 – 2000* (Amsterdam: Thela, 2005), p. 28.

<sup>74</sup> Although not typically Dutch, polders are usually associated with the country's landscape. A polder refers to a piece of land won from the water and enclosed by embankments such as dykes. The analogy is according to many used for the Dutch way of political decision-making, where since the Middle Ages, different communities living in the same polder had to cooperate with another to prevent flooding and disaster for all, even when they were at odds with each other. So the potentially destabilising effects of conflict paradoxically prompted the political actors to search for pragmatic ways to cooperate and to deal with the potentially disastrous effects of flooding.

might be tempted to remark<sup>75</sup> And in any case, under such conditions a weak constitutional culture could be considered advantageous, because it at least does not act as an obstacle for the smooth - non-legal - facilitation and absorption of economic, social and cultural developments.

The question for us of course is whether or not this last evaluation is correct, and if the relativistic Dutch constitutional culture is still fitting for contemporary society. The composition of Dutch society has in any case been changing significantly through immigration in the last few decades, especially as a result of the arrival of new ethnic and religious minorities, Muslims in particular.<sup>76</sup> This presents the country with pressing issues surrounding integration, even more so since many immigrants belong to disadvantaged groups. In any case, social divisions are deepening, but the traditional pillars are not there anymore to even out potential societal tensions. In this sense consensus government in a *depillarised* society breeds populism and anti-democratic and anti-establishment tendencies.<sup>77</sup> The pillars on which consociationalism builds are gone, but the political configuration and infrastructure is still elitist and working within the consociational tradition. Indeed, there is a lot of criticism of this situation, because it hampers institutional and constitutional reform. The elitist character of Dutch politics has indeed been under increasing attack in the last decade or so. Political competition seemed to intensify with no guaranteed voters available anymore as in the era of pillarisation. Also the rise of the populist right and left is strong and seems to be enduring, and calls for more direct democracy have been multiple.<sup>78</sup> As it develops, consociationalism can thus harden or rigidify pre-existing group differences,<sup>79</sup> with political instability as the result. In the Netherlands constitutional relativism – which as we have argued might be understood as an offshoot of elitist decision-making – nevertheless still prevails, even though it is a constitutional relativism in an unstable political culture.

## Two proposals

We have seen that the Netherlands cannot be classified as marked by a well-developed constitutional and rule of law culture. As a result the Dutch Constitution does not play a prominent role in channeling and/or constraining the political process. If we believe this to be a problematic situation, this provokes the question to what extent consensus government could or should be supplemented or replaced by a more fully developed constitutional culture, in order to enable political stability and diffuse societal tensions. Can a constitution fulfil such an enabling function? Here we will

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<sup>75</sup> W.J. Witteveen, 'Hoe instructief moet de Grondwet zijn?', *Socialisme en Democratie* (11/2008), 54.

<sup>76</sup> On this see Andeweg and Irwin, p. 49 ff.

<sup>77</sup> *Ibid.*, p. 286.

<sup>78</sup> *Ibid.*, p. 51.

<sup>79</sup> R. Pildes, 'The legal structure of democracy', in K. Whittington, R. Keleman and G. Kaldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), p. 333.

present two proposals based on the preceding analysis. The first represents a bottom-up, and the second a top-down approach. The idea also being that they facilitate each other.

To begin with the last question: according to Stephen Holmes, a constitution can indeed assume an enabling role. A constitution can help create or facilitate the very *demos* which governs itself through the constitutional regime, a situation he calls 'positive constitutionalism'.<sup>80</sup> In this sense a state can use its constitutional powers to achieve cooperation and support, and use a constitution to construct power and guide it 'towards socially desirable ends, and prevent social chaos and private oppression, immobilism, unaccountability, instability, and the ignorance and stupidity of politicians'.<sup>81</sup> As Choudhry has it: 'To some extent, the constitution can foster the development of a common political identity by creating institutional spaces for shared decision making among members of different ethnocultural groups. Concrete experiences of shared decision-making within the framework of the rule of law, and without resource to force or fraud, can serve as the germ of a nascent sense of political community.' It can 'constitute a *demos* by encoding and projecting a certain vision of political community with the view of altering the very self-understanding of citizens'.<sup>82</sup>

At the same time, in a complex democracy any important public policy is likely to create disagreement, and inevitably such disagreement will advance some interests and values while threatening others. This will of course also have an impact on the perceived legitimacy of such choices.<sup>83</sup> This is what Sunstein calls 'deliberative trouble'<sup>84</sup>, and such a situation is unavoidably part and parcel of any society which is prepared to call itself democratic. What is however important to note here, is that this political disagreement can be heightened, simply by virtue of the fact that like-minded people mostly and sometimes even exclusively talk *to one another*. As a result they are likely to end up thinking a more extreme version of what they thought before; social fragmentation will be the result, a situation which today is very much amplified by new technologies such as the internet.

This brings us to our first proposal. The Dutch 'official' relativistic constitutional culture is not surprisingly mirrored in the lack of knowledge of the Constitution among the general public.<sup>85</sup> A constitution can nevertheless

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<sup>80</sup> S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), pp. xi-xiii, 5-7, 161-164.

<sup>81</sup> *Ibid.*, p. 51.

<sup>82</sup> S. Choudhry, 'Bridging comparative politics and comparative constitutional law: constitutional design in divided societies' in S. Choudhry (ed.), *Constitutional Design for Divided Societies. Integration or Accommodation?* (Oxford University Press, 2008), p. 6.

<sup>83</sup> W.F. Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order* (Baltimore: The Johns Hopkins University Press, 2007), pp. 332-333.

<sup>84</sup> C.R. Sunstein, *Designing Democracy. What Constitutions Do* (Oxford University Press, 2001), pp. 239-243.

<sup>85</sup> See B. Oomen, 'Constitutioneel bewustzijn in Nederland: van Burgerzin, burgerschap en de onzichtbare Grondwet', *Recht der Werkelijkheid*, (30) 2009, 55. Only 15% of the respondents to a questionnaire about constitutional knowledge thought they knew the Dutch constitution reasonably well or even good. See in the context of human rights also B. Oomen, *Rights for Others. The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge: Cambridge

provide us with a common language which makes it possible to communicate and debate about the - constitutionally warranted - values that seem to be constitutive for a polity.<sup>86</sup> That could enhance or steer the process of reason-giving, ‘ensuring something like a ‘republic of reasons’’.<sup>87</sup> A necessary, albeit not sufficient, condition for a healthy constitutional culture, i.e. a culture where reason-giving is prime, is thus the development of a more engendered form of *constitutional literacy*.<sup>88</sup> Constitutional literacy reminds us of the concept of cultural literacy as it was coined by E.D. Hirsch.<sup>89</sup> Hirsch states that in order to be able to communicate in a meaningful way with each other, people have to be able to rest or rely on a minimal common body of knowledge. For this, more than just knowledge of words and facts is necessary, also a shared contextual knowledge and culture is important. ‘The complex undertakings of modern life depend on the cooperation of many people with different specialties in different places. Where communications fail, so do the undertakings. (That is the moral of the story of the Tower of Babel).’<sup>90</sup> Hirsch emphasises that too big an information dissymmetry or imbalance can result in a certain service not being present at all anymore. ‘Ultimately our aim should be to attain literacy at a very high level, to achieve not only greater economic prosperity but also greater social justice and more effective democracy.’<sup>91</sup> There is hardly any reason to believe why this would not be true of constitutionalism too, which is all the more reason to make more work of constitutional literacy.

A stable polity thus also needs institutions that can efficiently settle controversies.<sup>92</sup> Not just controversies among citizens or groups, but also among officials and private citizens. And by ‘settling’ is meant dealing with constitutional questions according to official procedures that most officials as well as most politically aware and active citizens will, most of the time, consider legitimate.<sup>93</sup> Even stronger and contrary to intuition (and also in tune with Holmes’ conception of positive constitutionalism): a constitution in its institutional dimension also helps those in power to come to grips with many of the most difficult questions a society can be faced with, including migration and diversity, identity and inclusion, security, etc. To quote Holmes again: ‘If we think of constitutional rules as scripts, rather than ropes (...) it is easier to understand why powerful actors, looking for protocols to facilitate rapid coordination, might be willing to incorporate them into their motivations as obligatory principles of conduct. They are not incapacitating

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University Press, 2013).

<sup>86</sup> We are deliberately not talking about detailed constitutional knowledge here.

<sup>87</sup> Sunstein, p. 239.

<sup>88</sup> On this M. Adams, ‘Constitutionele geletterdheid voor de democratische rechtsstaat’, *Nederlands Juristenblad* (2013), 1110.

<sup>89</sup> E.D. Hirsch, *Cultural Literacy. What Every American Needs to Know* (New York: First Vintage Books, 1988).

<sup>90</sup> *Ibid.*, p. 2.

<sup>91</sup> *Ibid.*

<sup>92</sup> Murphy, p. 333.

<sup>93</sup> This of course also provokes questions about *what* it is these institutions should interpret: the text of the Constitution, or the broad constitutional order? And also questions about *how* what is to be interpreted should be interpreted. See W.F. Murphy, p. 333.

but capacitating. They are not shackles making unwanted action impossible, but guidelines making wanted action feasible. Seen in this way, their binding power becomes more commonsensical than mysterious.<sup>94</sup> The right to free speech for example, does not only imply that individuals must be able to say whatever they would like to, but also entails the inescapable possibility to be able to talk to *someone else*. Speaking is not simply an individual matter, as it also means *speaking with* and *being spoken to*.<sup>95</sup> This implies the possibility to enable and cultivate social interaction – Robinson Crusoe needed no free speech before he met Friday! - and so provides for open public debate.

Returning to the institutional dimension of the Dutch constitutional fabric, what is clear from the analysis in this chapter is that in the Netherlands there are hardly any ‘after the fact’ constitutional warranties in the system of checks and balances. With the exception of treaty review, which is subject to the courts’ reticence as we saw, nearly all constitutional checks are situated *before* legislation is approved (and mostly in an advisory sense), leaving the constitutional system almost completely depended on political majority rule.<sup>96</sup> We submit, and this is our second proposal, that the introduction of judicial constitutional review in the Netherlands might be one way of facilitating an enabling dimension to Dutch constitutionalism. In this vein, Sunstein rightly stresses that the creative use of judicial power in terms of judicial constitutional review can be used to energise a democracy.<sup>97</sup> But under the condition that is indeed not just looked at as a system of ‘blocking’ government by having just one competence – i.e. simply and unequivocally striking down legislation -, but that it can also be used as a means to start a constitutional dialogue leaving ground for the legislature to act upon questions a constitution poses. So that it is able to find a balanced middle ground between a parliamentary type of democracy on the one hand and a constitutionally entrenched democracy on the other hand; a supplement in other words to the Dutch political system. Therefore, one road ahead might be to come up with an institutional design that also provides the opportunity to stimulate a dialogue<sup>98</sup> between the legislature and the judiciary on the content of the Constitution.<sup>99</sup> Inspiration can for example be

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<sup>94</sup> S. Holmes, ‘Constitutions and Constitutionalism’ in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p. 202. Also quoted by Krygier in this volume.

<sup>95</sup> F. De Wachter, “Mensenrechten: de moraal van de 21ste eeuw?”, in B. Raymaekers and A. Van De Putte (eds.), *Een nieuw wereldbeeld voor een nieuwe mens? Lessen voor de eenentwintigste eeuw* (Leuven: Universitaire Pers/Davidsfonds, 2005), p.44.

<sup>96</sup> See also A. Brenninkmeijer, ‘Stresstest rechtsstaat Nederland’, *Nederlands Juristenblad* (2015), 1046. Brenninkmeijer talks about ‘complete systemic failure’.

<sup>97</sup> Sunstein, p. 241.

<sup>98</sup> The dialogical metaphor was first used by P.W. Hogg and A. Bushell, ‘The Charter Dialogue Between Courts and Legislatures’, *Osgoode Hall Law Journal*, 35 (1997), 75. There exists a wealth of literature on this topic. A prominent believer in this type of dialogue is K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). Critical of the democratic potential of such an arrangement, is L.B. Tremblay, ‘The legitimacy of judicial review: the limits of dialogue between courts and legislatures’, *International Journal of Constitutional Law*, 3 (2005), 617.

<sup>99</sup> Another example might be the situation in the United Kingdom under the Human Rights Act. See e.g. J. Jowell, ‘Judicial deference: servility, civility or institutional capacity?’ *Public*

found in Canada. The Canadian Charter of Rights and Freedoms states in section 33 (also known as the 'notwithstanding clause') that 'Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in (...) this Charter'. The clause can be used to negate for a limited, but through re-adoption renewable period of time any federal or provincial judicial review by overriding the rights enunciated in the Charter. A declaration to that extent should be included in the law specifying which rights have been overridden. Such a declaration lapses after five years or a lesser time, as specified in the clause. In effect this means that parliament or the provincial legislature can restrict the applicability of certain sections of the Charter dealing with fundamental freedoms as for example expression, religion, the press, or due process and equal protection. Section 33 is, as former Canadian Supreme Court Justice Frank Iacobucci has said, 'a vivid reminder of Canada's parliamentary tradition, that sovereignty resides (...) in Parliament and the provincial legislatures and that parliamentary supremacy is not yet a matter of pure historical interest'.<sup>100</sup> Although hardly used, a main attraction of the provision is that it forces politicians to accept the responsibility that comes with the use of section 33 and give reasons for such a limitation of rights.<sup>101</sup> The provision can thus engender democratic public and parliamentary debate on the constitutional issues at stake.

All this of course raises concrete – prominently including empirical – questions of a constitution's normative and practical value. Under what conditions does a constitution make a difference in real life in a specific jurisdiction in other words? The answers to these issues are necessarily a combination of general insights about constitutional compliance and development, in combination with informed estimations about how these insights match highly contingent local conditions. As a result the answers are not clear cut, and there does not seem to exist an objective or ideal set of rules for matching a people and their situation with a set of institutions.<sup>102</sup> But whatever the case may be, there is one general insight we are willing to pose here, namely that democratic politics without constitutionalism is troublesome; in the long run no democracy can survive such a state of

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*Law* (2003), 592; R. Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1988', *Public Law* (2004), 33. And, most prominently, A. Sathanapally, *Beyond Disagreement. Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012).

<sup>100</sup> F. Iacobucci, 'Judicial review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms' in D.M. Beatty (ed.), *Human Rights and Judicial Review. A Comparative Perspective* (Dordrecht: Martinus Nijhoff, 1994), p. 106.

<sup>101</sup> Cf. A.S. Butler, 'Judicial review, human rights and democracy' in G. Huscroft and P. Rishwort (eds.), *Litigating Rights. Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002), p. 69.

<sup>102</sup> See D.S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006), p. ix. Loewenstein too discards the idea of trying to devise a "perfect theoretical constitution", instead claiming that "an ideal constitution has never existed, and will never exist." K. Loewenstein, *Political Power and the Governmental Process*.

affairs.<sup>103</sup> Societal instability indeed comes with an array of negative consequences, the possibility of violence being one of them. The inability of the Dutch Constitution to sufficiently govern the dynamics of the power process and its insufficient role in forging a polity, can therefore be understood as a warning of the demise of the state's possibilities to effectively act as the agent of its citizens' well being. In such conditions, the Constitution runs the risk of falling prey to deliberate political manipulation.

## **Rounding up**

'A constitution is what power holders and power addressees make of it in practical application', Loewenstein wrote.<sup>104</sup> That of course is a true. It is nevertheless important to be aware of the fact that constitutionalism and rule of law values, concepts which are supposed to have authority through constitutions, cannot fly on autopilot. They need maintenance and active direction, so as to create a conducive constitutional culture. Constitutions, and courts, might in this process be seen as the indispensable oxygen to keep the flame of liberty alive.<sup>105</sup> The demise of the old pillars that constituted society in the Netherlands and formed the basis of its governance and the key to its political stability, might therefore alert one to the need to develop a stronger constitutional culture and to help fill the vacuum left by the dissolution of the old power structures.

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<sup>103</sup> Cf. H. van Gunsteren, 'Het staatsrecht in de politiek', *Nederlands Juristenblad* (2010), 1111.

<sup>104</sup> Loewenstein, p. 148.

<sup>105</sup> Cf. R. Dworkin, 'What is democracy?' in G.A. Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Budapest/New York: Central European University Press, 2012), pp. 33-34.