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Nonjudicial constitutional interpretation: The Netherlands

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NON-JUDICIAL CONSTITUTIONAL INTERPRETATION: THE NETHERLANDS

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The Netherlands merits attention as one of the shrinking number of countries that continue to resist assigning principal responsibility to the courts for ensuring constitutional supremacy. Responsibility for evaluating the constitutionality of legislation is instead entrusted to both houses of parliament, ministerial bureaucracies, the Council of State, quasi-autonomous entities, and civil society as well as the courts. A case study of the Netherlands yields several important insights into the practice of constitutional interpretation.

First, judicial review of legislation is not essential to the success of liberal democracy or the protection of constitutional rights. The absence of judicial review has not led to anything resembling constitutional failure or underenforcement in the Netherlands compared to other liberal democracies.

Second, while an institution like the Council of State may not exist or operate in identical form elsewhere, one encounters functional equivalents that can provide ex ante advice on the constitutional implications of potential legislation. The reality across all constitutional democracies is that responsibility for constitutional interpretation is shared across multiple institutions, including the executive writ large and non-partisan bodies.

Third, and following from the previous point, this sharing of interpretive responsibility across multiple institutions means that some form of what we might call inter-institutional dialogue is unavoidable. To be sure, the legislature and the executive may not always play the starring role in constitutional interpretation, as they do in the Netherlands. But even in countries with strong courts that assertively perform constitutional review, they are always a part of the picture.

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I. CONSTITUTIONAL INTERPRETATION OUTSIDE THE COURTROOM

1. The changing role of constitutions: From political charters to supreme law of the land

At the turn of the twentieth century, mainstream opinion in Europe viewed constitutions as essentially political charters that set out policies and programs for the state. These documents existed for the benefit of, and operated in, the realm of politics, but were not seen as exhibiting strong effects in the legal domain. This view of constitutions as fundamentally political rather than legal led Hans Kelsen to argue against the involvement of ordinary courts in constitutional interpretation. He reasoned that the task of constitutional review—examining whether laws conform to the constitution—should be entrusted to a specialized constitutional court created exactly for this purpose that would be formally distinct from the judiciary and thus save the courts from having to deal with essentially political matters.[2]

The prevailing view in Europe today, by contrast, is that constitutions are legal rather than political in character. The American view had always been that "the Constitution is first and foremost a law, and a superior law at that."[3] In the aftermath of World War II, as nations cast about for anything that might serve as a bulwark against the horrors of fascism, this view was also embraced in Europe. To be clear, constitutions have not lost their political value or programmatic attributes. They continue to express national identity and policy goals: social and environmental ideals, for example, are often still couched in aspirational terms. But these functions are now eclipsed by the role of the constitution as the country's *Grundnorm*, or the fundamental legal norm from which all other legal norms derive their validity.

2. The ascendency of courts as constitutional guardians

[2] See Hans Kelsen, 'La guarantie juridictionnelle de la constitution (La justice constitutionnelle)' (1928) 35 Revue du droit public 197.
[3] Wojciech Sadurski, 'Constitutional Review in Europe and in the United States: Influences, Paradoxes and Convergence' (2011) 9 Sydney Law School Legal Studies Research Paper No. 11/15, quoting Laurence H. Tribe, American Constitutional Law, 2nd ed. (Foundation Press, 1988) at 27.

To think of a constitution as supreme law, however, is also to raise the question of how its supremacy over other laws will be ensured. Who should be entrusted with the awesome responsibility of interpreting and enforcing the constitution, and how should this responsibility be discharged? This question of where and how to vest ultimate guardianship of the constitution is a classic trope of constitutional scholarship.

For decades, the most popular answer has been the courts, albeit with various caveats and varying levels of misgiving and doubt. The preference for judicial enforcement began in earnest in the wake of the end of World War II and gained momentum with the fall of communist or authoritarian regimes from the 1980s onwards. A few countries such as Denmark, Sweden, and the Netherlands—the focus of this chapter—have resisted this trend.[4] There is nothing to suggest a lack of respect for the constitution in these countries, which belies the notion that judicial review is essential for a constitution to be effective. Nevertheless, the great majority of constitutional systems around the world today give judges the power to rule on the constitutionality of government action.[5] This increasing empowerment of courts has led scholars to speak of the "judicialization of politics" or a shift from democracy to "juristocracy".[6]

The ascendency of courts has not gone unchallenged. The strongest and most persistent misgiving concerns the propriety of allowing judges to set aside rules that have been adopted by popularly elected representatives. Bickel famously called this misgiving the "countermajoritarian difficulty".[7] It is a testament to the force of this democratic objection that it continues to be debated by scholars, jurists, and politicians alike.[8] For a long time, the debate assumed the need for a choice between two

[4] On the practically defunct status of judicial review in Denmark and Sweden, see Ran Hirschl, 'The Nordic Counter-Narrative: Democracy, Human Development, and Judicial Review' (2011) 9(2) International Journal of Constitutional Law 449 at 450–51; Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48(3) American Journal of Comparative Law 345.

[5] Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 Journal of Law, Economics, and Organization 587 at 587 (reporting that the proportion of constitutions that provide explicitly for judicial review has increased from 38% in 1951 to 83% in 2011). Two dominant institutional configurations exist: the decentralised (or American) model and the centralised (or European) model. Under the former, the regular courts decide constitutional questions in the context of concrete disputes; under the latter, a specialized constitutional court decides such questions, perhaps before the law has even come into effect. See David S. Law and Hsiang-Yang Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan' in this volume.

[6] See e.g. Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2007). See also: Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)', in Wojciech Sadurski, Martin Krygier and Adam Czarnota (eds.), Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses (CEU Press, 2005); Carlo Guarneri and Patrizia Pederzoli, From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press, 2002).

[7] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Yale University Press, 1962).

[8] See e.g. Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer, 2014), notably ch. 2; Matthias Jestaedt et al., Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren (Suhrkamp Verlag, 2011); David S. Law, 'A Theory of Judicial Power and Judicial Review' (2009) 97 Georgetown Law Journal

arrangements that were considered to be irreconcilable: either judges should have the final word on the constitutionality of legislation (thus ensuring the supremacy of the constitution), or the legislature is supreme, with its acts duly insulated from being questioned by other institutions (thus respecting the democratic pedigree of parliamentary enactments).

3. The turn away from judicial supremacy toward constitutional dialogue

The late twentieth century saw a new breed of institutional responses to the challenge of ensuring constitutional supremacy without sacrificing popular democracy. Canada, the United Kingdom, and New Zealand have been in the vanguard of this movement. All three operated under the traditional paradigm of parliamentary sovereignty that vests supreme authority over all matters—including the articulation and enforcement of constitutional norms—in the legislature. Consistent with global trends, sentiment turned in these countries toward the view that the protection of individual rights against potentially hostile legislative majorities needed to be strengthened, and that judges would have a part to play in making this happen. However, these countries were unwilling to abandon the extreme of legislative supremacy merely to replace it with the opposite extreme of judicial supremacy. Instead, they devised systems in which courts interpret and enforce the constitution but the legislature retains the final word on what will be law.

In Canada, parliament can pre-emptively immunise statutes from judicial scrutiny on fundamental rights grounds and override court decisions invalidating statutes deemed in breach of the 1982 Charter of Rights and Freedoms.[9] In the United Kingdom, the courts may declare that a law violates the European Convention on Human Rights, but parliament is free to ignore the decision and leave the law in place.[10] In New Zealand, the courts are obligated to interpret statues in such a way as to avoid conflict with the bill of rights, but parliament can defeat such an interpretation simply by using clear and unambiguous statutory language.[11]

The institutional arrangements in these three jurisdictions are the core examples of what Stephen Gardbaum has christened the "new Commonwealth model of constitutionalism".[12] What defines this model is the conscious pursuit of a middle ground between complete legislative supremacy of the kind that has traditionally characterized Commonwealth countries, on the one hand, and judicial supremacy of

723; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

[9] Canadian Charter of Rights and Freedoms 1982, ss. 1, 24(1) and 33. The full text of these provisions can be found in the Online Supplement [at xx].

[10] UK Human Rights Act 1998, ss. 3, 4, 10 and 19. The full text of these provisions can be found in the Online Supplement at [xx].

[11] New Zealand Bill of Rights Act 1990, ss. 4, 6-7. The full text of these provisions can be found in the Online Supplement at [xx].

[12] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 American Journal of Comparative Law 707. For a fuller account of this model, see Stephen Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice (Cambridge University Press, 2013).

the type that has become more popular globally since World War II, on the other hand.[13] In a related vein, Mark Tushnet distinguishes between "weak form" and "strong form" review. In systems subscribing to weak form review, judicial decisions on constitutional questions are treated as "expressly open to legislative revision in the short run." Conversely, in strong form regimes, courts enjoy "the final and unrevisable word on what the Constitution means, with legislatures and executive officials having no substantial role in informing the court's constitutional interpretations."[14]

In practice, the arrangements in Canada and the United Kingdom have so far resembled conventional systems of hard review in which courts have the final word: the national legislatures of both countries have proven highly unwilling to override or ignore the courts.[15] Nevertheless, the idea of resolving questions of constitutional meaning through an ongoing "dialogue" between the legislature and the courts has captured the imagination of scholars and generated a vast literature.[16] The appeal of the concept is obvious: the idea that judges are engaged in a "dialogue" with elected lawmakers enables judges both to perform judicial review and to answer the charge of counter-majoritarianism. In other words, the notion of "constitutional dialogue" promises a way of reconciling judicial review with popular democracy. Some of the relevant literature seeks to explore the merits of dialogic judicial review and to identify the conditions that must be satisfied for dialogue to reach its full potential.[17] Much has also been written on whether and under what conditions the interaction between courts and legislatures truly deserves to be called "dialogue".[18]

Taken as a whole, the debate over the idea of constitutional dialogue has offered a welcome corrective to certain longstanding tendencies and biases in constitutional scholarship. The topic has generated renewed interest in the ability and obligation of democratically elected legislatures to safeguard constitutional supremacy. More generally, it has encouraged constitutional scholars to expand their focus beyond

[13] Gardbaum, 'The New Commonwealth Model of Constitutionalism' (n 12) at 710.
[14] Mark Tushnet, 'Weak-Form Judicial Review and "Core" Civil Liberties" (2006) 41 Harvard Civil Rights-Civil Liberties Law Review 1; see also Mark Tushnet, 'The Rise of Weak-Form Judicial Review', in Tom Ginsburg and Rosalind Dixon (eds.), Comparative Constitutional Law (Edward Elgar, 2011).
[15] See David Snow, 'Notwithstanding the Override: Path Dependence, Section 33, and the Charter' (2008) 8 Innovations 1; Janet Hiebert, 'Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding', in James B. Kelly and Christopher P. Manfredi (eds.), Contested Constitutionalism (UBC Press, 2010); UK Ministry of Justice, Responding to Human Rights judgments: Report to the Joint Committee on Human Rights on the Government's response to Human Rights judgments 2014-16, Cm 9360 (2016), Annex A.
[16] For an overview of the diverse range of dialogue theories, see Christine Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 Brooklyn Law Review 1109.
[17] E.g. Scott Stephenson, From Dialogue to Disagreement in Comparative Rights Constitutionalism (Federation Press, 2016); Luc Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617; Peter W. Hogg and Allison A. Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 Osgoode Hall Law Journal 75.
[18] E.g. Kent Roach, 'Dialogic Judicial Review and Its Critics' (2004) 23 Supreme Court Law Review 49; Po Jen Yap, Constitutional Dialogue in Common Law Asia (Oxford University Press, 2015).

courts. As Tom Ginsburg and Ran Hirschl observe in their contributions to this volume, there has long been a tendency on the part of legal scholars to focus on courts and case law to the exclusion of other institutions, but this has begun to change.

4. Executive constitutional interpretation

The existing literature on non-judicial constitutional interpretation tends to focus on how legislatures and their internal organs, notably committees like the UK Joint Committee on Human Rights, discharge their responsibilities.[19] It is obvious, however, that other institutions also play a role in giving meaning to the constitution. Consider the fact that, in every country with a constitution, public officials are invariably under some kind of obligation to uphold the constitution. Logically speaking, however, they cannot uphold the constitution without possessing, then acting upon, some sense of what the constitution requires. Just because they are under an obligation to uphold the constitution does not necessarily mean that they are under an obligation to uphold the constitution *as interpreted by the judiciary*. Some would argue that public officials are entitled, if not obligated, to interpret the constitution for themselves in order to perform their duties.[20]

The executive branch is bound to play a role in constructing the meaning of the constitution. Proposals for new legislation frequently emanate from the executive, and the civil servants in charge accordingly often have an early and important opportunity to draft legislation in a manner that comports with constitutional prescriptions.[21] In many countries, a president or head of state who has concerns about the constitutionality of a bill can veto it or force the legislature to reconsider it by refusing to sign it into law. In non-parliamentary systems where the executive branch is independent from the legislative branch, the executive branch may even have the option of refusing to implement or enforce a law that it considers unconstitutional.[22]

Most countries have specialized executive bodies—often of a non-partisan nature—that advise the government on legal matters and help to ensure compliance with constitutional requirements, including during the early stages of lawmaking

[19] See e.g. Janet Hiebert and James Kelly (eds.), Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom (Cambridge University Press, 2015); David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) Public Law 323; Richard Bauman and Tsvi Kahana, The Least Examined Branch: The Role of Legislatures in the Constitutional State (Cambridge University Press, 2006), notably Parts 4 and 5.

[20] Even in the United States, where the Supreme Court repeatedly declares itself the supreme arbiter of constitutional meaning, there exists a longstanding view that other officials are entitled and indeed obligated to interpret the constitution for themselves in order to perform their duties. This view is known as departmentalism. See e.g. Richard H. Fallon, Jr., 'Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age' (2018) 96 Texas Law Review 487 at 494–97; Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 Michigan Law Review 2781 at 2782–84.

[21] See Vanessa MacDonnell, 'The Civil Servant's Role in the Implementation of Constitutional Rights' (2015) 13 International Journal of Constitutional Law 383; Mark Tushnet, 'Non-Judicial Review', in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds.), Protecting Human Rights: Instruments and Institutions (Oxford University Press, 2003).

[22] See e.g. Christopher S. Yoo, 'Presidential Signing Statements: A New Perspective' (2016) 164 University of Pennsylvania Law Review 1801 at 1808–1820.

processes. Examples include the Council of State in France, the Chancellor of Justice in Estonia, the Cabinet Legislation Bureau in Japan, the Privy Council Office in Canada, and the Office of Legal Counsel in the US Department of Justice.[23] The pre-enactment review carried out by such institutions has a long history that often predates the exercise of constitutional scrutiny powers by courts. By way of example, the French Council of State in its current guise was created in the twilight years of the eighteenth century, whereas its Constitutional Council was set up as recently as 1985.

Even in countries that practice constitutional adjudication, constitutional interpretation by these bodies can be of greater practical significance than constitutional interpretation by the courts. Japan is one example: the Cabinet Legislation Bureau, a bureaucratic entity that reviews proposed legislation, has for decades been principally responsible for interpretation of the controversial pacifist clauses of Article 9 due to the Japanese Supreme Court's virtual abdication of this role.[24] An increasing number of countries have also created independent institutions, such as ombudsmen and human rights commissions, that seek to ensure respect for constitutional rights and thus play a role in interpreting and applying constitutional norms alongside courts and legislatures.[25]

The Netherlands is an extreme example of reliance on non-judicial constitutional interpretation and thus makes for an ideal case study. Dutch courts are prohibited from striking down legislation on constitutional grounds. Instead, responsibility for avoiding and remedying constitutional violations falls upon a combination of ministerial civil servants, an independent advisory body called the *Raad van State* (Council of State), and parliament.

II. THE CONSTITUTIONAL SYSTEM OF THE NETHERLANDS

The Netherlands is a small country located in northwestern Europe, bordered by Germany and Belgium and separated from the United Kingdom by the North Sea. Its population of just over 17 million comprises a great variety of sociocultural and religious groups, due to the historical openness shown to non-nationals that often finds expression in the country's self-characterisation as having a 'multicultural society'.

The European country known as the Netherlands is technically part of the Kingdom of the Netherlands, which also includes islands in the Caribbean that are the legacy of its Dutch commercial and sea-faring prowess during the country's seventeenth-

[23] See e.g. Trevor W. Morrison, 'Stare Decisis in the Office of Legal Counsel' (2010) 110 Columbia Law Review 1448 at 1458–1470.
[24] E.g. David S. Law, 'Why Has Judicial Review Failed in Japan?' (2011) 88 Washington University Law Review at 1425 at 1454.
[25] For discussion and examples of independent institutions that play a role in upholding constitutional norms, see Mark Tushnet, 'Fifth-Branch Institutions: South Africa' in this volume.

century Golden Age. Three of these islands (Bonaire, St Eustatius and Saba) hold the status of special public bodies and are treated like other Dutch municipalities; the others (Aruba, Curaçao and St Maarten) obtained the status of autonomous countries within the Kingdom in 2010 and have their own constitutions.[26] The relationship between these islands and the country in Europe is regulated by the *Statuut voor het Koninkrijk der Nederlanden* (Charter of the Kingdom of the Netherlands), which is technically superior to the *Grondwet* (Dutch Constitution) but governs a narrow range of matters.[27] The *Grondwet* is more relevant for most purposes and is the focus of this chapter.

1. Constitutional history

The 1648 Peace of Westphalia, amongst others, heralded the end of the Dutch Revolt against the rule of the Spanish Habsburg empire, which was fought primarily on religious grounds.[28] In the Treaty of Münster, the latter formally recognised the sovereignty of the Republic of the Seven United Provinces whose territorial scope was almost the same as present-day Netherlands. During the period of the Republic, there was no sovereign head of state with absolute powers, as each of the constituent provinces claimed sovereignty within their respective territory, notwithstanding collaboration in areas such as foreign policy, warfare and finance.[29] This confederative state remained in existence until 1795, when it was succeeded by the Batavian Republic (1795-1801). The 1798 governing charter of this Republic, influenced by the ideology of the French Revolution, provided the substantive foundation for the modern constitution of the Netherlands. In the early nineteenth century, the French gradually extended their control over the Netherlands, culminating in the former exercising direct rule over the country in 1810. The Netherlands regained its independence in 1813 and William, the son of the Prince of Orange who had fled after the collapse of the Republic of the Seven United Provinces, was installed as the *Souvereine Vorst* (sovereign ruler). The following year saw the adoption of the first Dutch constitution. After a military campaign against Napoleon, a new constitution was enacted in 1815 that completed the Netherlands' transition from being a republic to officially becoming a monarchy, as it formally vested the "Crown of the Netherlands" in William and his legitimate heirs.[30] This 1815 Constitution, which was

[26] It is thus possible to look at the arrangements within the Kingdom of the Netherlands through the lens of subnational constitutionalism, a topic addressed by Cora Chan in this volume. However, the vast differences in size and socio-economic significance between these islands and the Netherlands as well as their considerable geographic separation works to deprive any such analysis of the kind of salience and controversy typically associated with subnational constitutionalism in regionalised or quasi-regionalised national settings.
[27] Statuut, Art. 5(2).
[28] The revolutionaries mainly espoused Protestantism, whereas the Philip II, the King of Spain, was Catholic.
[29] These areas were spelled out in the 1579 Unie van Utrecht (Union of Utrecht), which in due course became the legal foundation of the Republic.
[30] Grondwet 1815, Art. 12, today found in Art. 24.

for the remainder largely a recast of its predecessor text,[31] is still in force today, making the Dutch *Grondwet* one of the oldest in the world.

The *Grondwet* has been amended on twenty-three occasions, and with increasing frequency after World War II. As of this writing, no fewer than fourteen amendment proposals are pending on matters ranging from the role of the King[32] to the well-being of animals[33] to the introduction of a corrective referendum.[34] Most amendments have been relatively minor in scope and impact, but the amendments of 1848, 1917, and 1983 were of particular importance.

The 1848 amendment established the foundations of the country's contemporary governmental structure. Political ministerial accountability and the right to dissolve parliament were formally introduced, along with direct election of the Lower House; the main principles governing the provincial and municipal governments were spelled out; and several new fundamental rights were added, including freedom of association and assembly, and freedom of education. Of particular relevance to this chapter, the 1848 revision also introduced a prohibition against judicial review of parliamentary legislation.

A second important revision took place in 1917. The electoral system at all levels of government was changed from a 'first-past-the-post' system with single-member districts to a proportional representation system. The franchise was extended to all men (and was later extended to women in 1922). In return for agreeing to general male suffrage, the religious parties in parliament secured a constitutional guarantee of equal state funding for public and denominational schools. This put an end to the *schoolstrijd* (school wars) that had been a polemic issue in Dutch political debate and had help shape the initial configuration of the political landscape.

The last major reform took place in 1983. A thorough technical overhaul shortened the *Grondwet* considerably and modernised most of its terminology. The substantive changes mainly concerned the catalogue of rights: the death penalty was formally abolished, and the prohibition against discrimination, freedom of expression, and the right to privacy were added to the *Grondwet*, as were social and economic rights. In view of the scale of this revision, and the comparatively minor nature of subsequent amendments, the Dutch constitution in its current version is often referred to as the 1983 *Grondwet*.

2. Basic features of the Dutch constitution

[31] In addition, parliament went from unicameral to bicameral: at the 1815 Congress of Vienna, Belgium became part of the Netherlands and the Belgian representatives on the constitution-framing committee insisted on creating a separate nobility chamber, which was retained after Belgium's secession in 1830.
[32] Kamerstukken II 32 8672 Nr. 2 (2010-2011) and Kamerstukken II 32 866 (R 1958) Nr. 2 (2010-2011).
[33] Kamerstukken II 30 900 Nr. 2 (2006-2007).
[34] Kamerstukken II 30 174 Nr. 2 (2004-2005).

Several aspects of the *Grondwet* are notable by today's standards. First, by the standards of contemporary constitution-writing, it is relatively succinct. It contains a total of just 142 provisions in total, spread over eight chapters that deal respectively with (1) fundamental rights; (2) the executive; (3) the *Staten Generaal* (parliament); (4) the *Raad van State* (Council of State), Court of Audit, National Ombudsman, and other permanent advisory or oversight bodies; (5) legislation and administration; (6) the judiciary; (7) provinces, municipalities, *waterschappen* (water management bodies) and other specialized bodies that operate with some independence from the central government; and (8) revision of the constitution. Most provisions are written in deliberately succinct and general terms to be operationalised and fleshed out by custom or future legislation. Second, nothing in the *Grondwet* declares itself, or is considered, unamendable, which is typical of older constitutions but goes against a growing trend.[35]

Third, the *Grondwet* lacks any provisions of a primarily expressive or ideological nature. Unlike the vast majority of constitutions, it contains no preamble.[36] Many fundamental ideas – including the rule of law, the basis of sovereignty, and democracy itself – are not explicitly mentioned as such, although they do in practice undergird and animate the Dutch constitutional order.[37] This may change, however, as the government introduced a proposal in 2016 to add an unnumbered general provision stating that "The *Grondwet* guarantees democracy, the *rechtsstaat* (Rule of Law) and fundamental rights."[38]

The adoption of a constitutional amendment requires the agreement of both Houses of parliament, which must be given on two separate occasions, called *lezingen* (readings), and a general election must take place before the Lower House can consider the amendment for the second time.[39] This requirement should enhance the democratic legitimacy of any revision. The arduous procedure has not deterred governmental or private-member initiatives for constitutional change. Since 1814, the *Grondwet* has been amended on 23 occasions and 14 proposals are currently pending before the *Staten-Generaal* at various stages of the revision process, addressing issues ranging from the role of the King[40] to a duty to care for the well-being of animals[41] to the introduction of a corrective referendum.[42]

3. Parliamentarism and the role of the monarchy

[35] There is a growing global trend toward the adoption of explicitly unamendable provisions, especially in the area of fundamental rights. Yaniv Roznai, Unconstitutional Constitutional Amendments (Cambridge University Press, 2017), at 20–21.
[36] See e.g. Tom Ginsburg, Nick Foti and Daniel Rockmore, '"We The Peoples": The Global Origins of Constitutional Preambles' (2014) 46 George Washington International Law Review 305; Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 International Journal of Constitutional Law 714.
[37] In addition, the Grondwet has no identifiable core or provisions that are considered immutable.
[38] Kamerstukken II Nr. 2 34 516 (2016-2017).
[39] Grondwet, Art. 137.
[40] Kamerstukken II 32 8672 Nr. 2 (2010-2011) and Kamerstukken II 32 866 (R 1958) Nr. 2 (2010-2011).
[41] Kamerstukken II 30 900 Nr. 2 (2006-2007).
[42] Kamerstukken II 30 174 Nr. 2 (2004-2005).

The Netherlands has a parliamentary system of government, in which the executive needs the confidence of parliament to continue to hold office. The Dutch parliament, known as the *Staten Generaal* (States-General), is bicameral. The 150 members of the superior *Tweede Kamer* (Lower House) are directly elected via a system of proportional representation;[43] their 75 colleagues in the *Eerste Kamer* (Upper House) are chosen by the deputies in the *Provinciale Staten*.[44] There is no minimum number of votes that a party must win in order to obtain a parliamentary seat, which has resulted in a considerable, and growing, degree of political fragmentation – 28 parties participated in the 2017 parliamentary elections, of which 13 secured enough votes for at least one seat in the *Tweede Kamer*.[45] A corollary is that cabinets in the Netherlands are always formed by a coalition of multiple parties, whose collaboration is based on the *regeerakkoord* (literally, "agreement to govern") in which they identify, in considerable detail, the policies that will be pursued during their term in office. Cabinets serve for a maximum of four years before elections must be held,[46] but resignations for political reasons and early elections are a relatively common occurrence.[47]

The relationship between government and parliament is only partially regulated by the *Grondwet*. As in other countries, the formal or "large-C Constitution" is complemented by an informal "small-c constitution" that includes unwritten norms and conventions.[48] Article 68 of the *Grondwet* sets the stage for parliamentary oversight by imposing a duty on ministers and *staatssecretarissen* to provide parliament with the requisite intelligence and information in response to oral or written questions.[49] It also confers upon each parliamentary chamber the right of interpellation,[50] the right to pass motions[51] and the right to institute a formal inquiry to carefully and thoroughly examine how the government has handled matters with a significant social impact.[52] However, the foundational rule that the *kabinet* must either maintain the confidence of the *Tweede Kamer* or step down is not laid down in the *Grondwet* and neither does this text address motions of no-confidence—a defining feature of parliamentary systems. The corollary is that the rules and conditions for ordinary parliamentary motions are applied by default. It is a rare occurrence for either chamber of the *Staten Generaal* to explicitly withdraw confidence in a (junior) minister[53] or the *kabinet* as a

[43] Ibid., Arts. 51(2) and 53.
[44] Ibid., Arts. 51(3), 53 and 55.
[45] In addition to the traditional mainstream labour, liberal, Christian and socialist parties, recent years have seen a growth in parties representing fringe or highly specific interests such as the Partij voor de Dieren (Party for Animals), the Piratenpartij (Pirate Party, focused on privacy and copyright issues) and 50 Plus (whose manifesto is geared toward the elderly).
[46] Grondwet, Art. 52(1).
[47] Since World War II, the country has had a total of 28 cabinets, less than half of which completed their term.
[48] For discussion of the distinction between the "large-C" and "small-c" constitutions, see Albert Chen's chapter in this volume.
[49] Grondwet, Art. 68; see also Rules of Procedure of the Tweede Kamer, Arts. 134 ff.
[50] Ibid., Art. 133.
[51] Ibid., Art. 66.
[52] Grondwet, Art. 70; Rules of Procedure of the Tweede Kamer, Arts. 140 ff and Parliamentary Inquiry Act.
[53] If a minister steps down, the staatssecretaris for his or her department must also tender his or her resignation, cf. Grondwet, Art. 46.

whole. If a resignation or fall of the *kabinet* does take place, this is normally at the latter's own initiative in response to a (serious) transgression of the rule to provide timely and correct information;[54] in relation to the outcome of a parliamentary inquiry;[55] or due to disagreement within the coalition.[56]

Article 81 of the *Grondwet* declares that:

> Acts of Parliament shall be enacted jointly by the Government and the *Staten Generaal*.

The constitutional rules governing the legislative process reveal the political primacy of the *Tweede Kamer* vis-à-vis the *Eerste Kamer*: the latter lacks the right either to initiate or to amend bills.[57] Staffed mainly by part-time politicians and with a single plenary session each week, the *Eerste Kamer* sees itself as the '*chambre de réflexion*' (chamber of reflection): it focuses on the quality and constitutionality of bills rather than their political wisdom or desirability, on which it defers to the *Tweede Kamer*.

Technically speaking, the Netherlands is a constitutional monarchy, and popular support for the monarchy as an institution remains high. In reality, both the "large-C" and the "small-c" constitution envisage a peripheral position for the King within the Dutch political system. Nevertheless, the King continues to serve an important symbolic role, and depending upon his personality, he may in practice exert more influence than the formal rules envisage during the course of his regular consultations with cabinet members and parliamentarians. The erstwhile prominence of the monarch is still reflected in the *Grondwet*'s definition of the *regering* (government) as comprised of the King together with his ministers.[58] In his capacity as the nominal head of the *regering*, the monarch exercises a variety of formal powers typical of constitutional monarchies, such as the ratification of legislation and the issuance of royal decrees (although such actions require the counter-signature of the relevant minister of the *regering* to be effective).[59]

4. Decentralisation of power within a unitary state

The Netherlands is divided into 12 provinces—whose primary competences lie in the areas of culture, education, infrastructure, and the environment—and further into

[54] This for instance led to the departure of the minister and staatssecretaris for Security and Justice in March 2015 who had wrongly told the Lower House that the receipt for a multi-million pay-out to a criminal turned informant could no longer be found, thereby making it impossible to verify the exact amount paid, which later turned out to be more than double the sum initially reported.
[55] For instance, in December 2002, the minister Defence for tendered his resignation in the wake of an inquiry into fraud in the construction industry.
[56] E.g. in the case of the fall of the cabinet-Balkenende II in June 2006.
[57] In practice, the Eerste Kamer's inability to amend bills is overcome through the use of a novelle: once it becomes apparent that the Eerste Kamer has concerns about a pending bill, the Tweede Kamer will introduce a further bill, or novelle, to address the concerns of the Eerste Kamer, which will postpone or suspend its deliberations until the novelle has been adopted.
[58] Grondwet, Art. 42(1). When referring to the team of ministers and secretaries of state—i.e. minus the King—who are individually and collectively accountable to parliament, the term kabinet (cabinet) is used instead.
[59] Ibid., Arts. 43, 46, 64(1), 74(2), 77, 87, 117, 131.

nearly 400 municipalities. These subnational units enjoy considerable residual autonomy to regulate their own affairs but are subject to supervision and direction by higher levels of government.[60] This combination of local self-government and central oversight has led scholars to characterise the Netherlands as a decentralised unitary state.

The origins of this characterisation can be traced back to the historical choice not to include a statement of where sovereignty lies.

L Besselink, H Albers and W Eijsbouts, Le principe de subsidiarité – rapport néerlandais

> The paradox of being simultaneously decentralised and unitary, can be explained historically and constitutionally. The Constitution of the Kingdom of the Netherlands of 1815 … is not conceived of as an expression of a *pouvoir constituant* from which the public institutions of political society derive their life and existence. It has not established territorial corporations, but has recognised their existence. From the very beginning the Constitution wished 'to leave' to provincial and local authorities all affairs that belong to their 'internal policy and oeconomy'. This included powers of administration and the competence to make regulations concerning their own domestic affairs. Also after the 1983 revision, the Constitution still speaks of the powers of administration and regulation which are 'left' to their own institutions.[61]

The supreme organ in each province is the directly elected *Provinciale Staten* (states provincial), with executive powers wielded by the *Gedeputeerde Staten* (states deputies) and its chairman, the *Commissaris van de Koning* (King's commissioner).[62] Municipalities are headed by a directly elected *gemeenteraad* (municipal council), and most executive powers are held by the *College van Burgemeester en Wethouders* (college of the mayor and aldermen). State deputies and aldermen are appointed by the *Provinciale Staten* and the *gemeenteraad* respectively from among their membership, but it is at present the central government that chooses the King's commissioners and burgomasters.[63]

The Netherlands also practices a limited form of functional decentralisation, whereby public authority is vested in entities with responsibility for a specific task or portfolio. The most well-known are the *waterschappen* (water management bodies) and the *publiekrechtelijke bedrijfsorganisatie* (public bodies for the professions and trades).[64] The role and position of such functional entities resembles that of the territorial units: they exercise rule-making and administrative powers within their sphere of activity, may be called on to give effect to legal norms adopted by Parliament or the *Provinciale Staten*, and the central government monitors their activities, which can involve quashing decisions deemed contrary to the law or the public interest.

[60] Ibid., Arts. 124 and 132.
[61] L Besselink, H Albers and W Eijsbouts, 'Subsidiarity in Non-Federal Contexts: The Netherlands and the European Union', report prepared for the XVIe Congress of the Fédération Internationale pour le droit européeen (Rome, 1994).
[62] Grondwet, Art. 125.
[63] Ibid., Art. 131.
[64] Ibid., Arts. 133 and 134.

5. Fundamental rights

The catalogue of fundamental rights included in the first chapter of the *Grondwet* contains a total of 23 articles, which is relatively low by current standards but not unusual for a constitution drafted in the early 1800s. The first 16 articles set out classic civil and political rights and freedoms, such as the right to equality (Art. 1), the right to freedom of religion or belief (Art. 6), and the right to respect for privacy (Art. 10). Unlike for instance the South African Constitution or the Canadian Charter of Rights and Freedoms, the *Grondwet* does not have a general limitation clause: the conditions for restricting the rights guaranteed are spelled out in each of the provisions. The 1983 constitutional revision added a limited number of economic, social, and cultural rights that task the State with promoting adequate employment opportunities (Art. 19) and health (Art. 22), securing wealth distribution (Art 20), and keeping the country habitable (Art. 21). Although they are honoured in practice, several fundamental rights remain (for now) missing from the text of the *Grondwet*, including the right to a fair trial, the right to life, and the right to human dignity.[65]

The traditional brevity of the *Grondwet*'s rights chapter is partly due to its age. At the time of its drafting, the number of rights protected was comparable to that found in other constitutions with a similar provenance. The enduring constitutional stability in the Netherlands following the grand 1848 amendment has meant that there has been no strong impetus to expand and reinforce the rights charter in a manner akin to countries with a more chequered constitutional history.

Among the rights that are included in the *Grondwet*, the freedom of religion and the right to equality in particular have spurred debate in the Netherlands in recent years, much like in other countries. Among the controversies involving this right were repeated attempts to legislate a prohibition on wearing clothing that conceals the wearer's face;[66] plans to restrict the conditions under which ritual slaughter of animals is possible;[67] and a series of judgments by national courts as well as the European Court of Human Rights as to whether a political party whose internal regulations prevent the placement of female candidates on its electoral list on religious grounds is entitled to receive party financing from the State.[68]

6. Relationship with the world

The Netherlands has long exhibited a high level of openness and commitment to international law and transnational integration. It was one of the six founding members of the European Economic Community (the precursor to the European

[65] In 2016, the government introduced a proposal to constitutionalise the right to a fair trial: Kamerstukken II 34 517 Nr 2 (2016-2017). As of this writing, this bill is pending before the Tweede Kamer in its first reading.
[66] Kamerstukken II 34 349 nr. 2 (2015-2016).
[67] Kamerstukken II 31 571 nr. 2 (2008-2009).
[68] ECLI:NL:RBSGR:2005:AU2088; ECLI:NL:GHSGR:2007:BC0619; ECLI:NL:RVS:2007:BB9493; ECLI:NL:HR:2010:BK4549 and App no 58369/10, SGP v the Netherlands [2012] ECHR.

Union) and an original signatory to the European Convention on Human Rights (ECHR). History and geography go far toward explaining Dutch attitudes toward transnational law. Being a trading nation with a small domestic market, the Netherlands has traditionally viewed the rest of the world as its hinterland and treated engagement with other countries as central to its prosperity and survival.

The main constitutional rules are laid down in Articles 90 through 94 of the *Grondwet*.

ARTICLE 90

The Government shall promote the development of the international legal order.

ARTICLE 91

(1) The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the *Staten Generaal*. …
…
(3) Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the *Staten Generaal* only if at least two-thirds of the votes cast are in favor.

ARTICLE 92

Legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

ARTICLE 93

Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

ARTICLE 94

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.

These provisions were inserted in the *Grondwet* in the 1950s to prepare the country for imminent European integration. The government has repeatedly used the authorisation contained in Article 92 to join such organizations as Benelux, the European Economic Community, the EU, and the Council of Europe. Articles 93 and 94 make clear that the country practices a limited form of monism, meaning that written rules of international law automatically take precedence over conflicting national laws, provided that courts are capable of applying them without the help of implementing legislation.[69] The express commitment in Article 90 to "the international legal order" is one of the few ideological commitments to be found anywhere in the *Grondwet*. Principled on its face, the Dutch embrace of legalism and globalism over

[69] This monism was first recognized by the Dutch Supreme Court in Grenstractaat Aken, 3 March 1919, NJ at 371. For discussion of monism and dualism, see Markus Bockenförde, 'International Law and Constitution-Making: Sudan' in this volume.

the second half of the twentieth century can also be understood as a pragmatic response to the country's newfound status as a small power following decolonization.

III. Constitutional Interpretation Outside the Courtroom in the Netherlands

1. The explicit constitutional prohibition against judicial review

A distinctive feature of the Dutch constitutional order is that the *Grondwet* explicitly prohibits judicial review of either legislation or treaties. The relevant provision is Article 120:

> The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.[70]

The adoption of this provision in 1848 codified existing practice. Until that time, there had been no reported instances of judges ever having been called upon to evaluate the constitutionality of an Act of Parliament. This longstanding aversion to judicial review reflected a strongly held traditional view that legislation, as the ultimate expression of the general will of the people, should be above challenge by other state institutions and, by that logic, the *Staten Generaal* itself ought to be the supreme interpreter of the *Grondwet*.[71] The courts have interpreted Article 120 as prohibiting review of the substantive compatibility of parliamentary legislation with the *Grondwet* and of whether the proper procedural conditions governing the process for enacting statutes have been complied with.[72] They have further held that unwritten principles of constitutional law are also unavailable as yardsticks to measure statutes against.[73]

Controversial from the outset,[74] Article 120 has been the subject of several unsuccessful attempts at amendment or repeal since the 1980s.[75] Thus far, the traditional arguments against judicial scrutiny of legislation on constitutional grounds – legal certainty, the separation of powers and the courts' lack of legitimacy to query democratically enacted laws – continue to carry the day. This is in part due to the consociational nature of the Dutch political system, in which internal cleavages across social, religious, and political beliefs are managed through elite cooperation and inclusive politics, resulting in trade-offs and accommodation during lawmaking processes.[76] Such cooperative processes could be destabilised if judges were to

[70] Prior to the 1983 constitutional revision, the Grondwet declared in even stronger terms that "Laws are inviolable."
[71] Herman Theodoor Colenbrander, Ontstaan der Grondwet, deel 2 (Martinus Nijhoff, 1815) at 559, as cited in Douwe Jan Elzinga, Roel de Lange and Gerhard Hoogers, Van der Pot Handbook van het Nederlandse Staatsrecht, 16th edn., (Wolters Kluwer, 2014) at 201.
[72] Hoge Raad, Van den Bergh / Staat der Nederlanden, 27 January 1961, NJ 1963 at 248.
[73] Hoge Raad, Staat der Nederlanden / LSVB ('Harmonisatiewet'), 14 April 1989, NJ 1989 at 469.
[74] Peter van Bemmelen, Regtsgeleerde Opstellen I (1885-1889) (E.J. Brill, 1891) at 179 (quoting criticism of the provision by the chair of the 1848 constitutional advisory committee).
[75] E.g. 1983 Cals-Donner Royal Commission; Lubbers III Cabinet Memorandum judicial review 1991; 2000 Royal Commission on Fundamental Rights in the Digital Era.
[76] Hoge Raad, 28 February 1868, W 2995; Hoge Raad, 9 January 1924, NJ 1924 at 296.

invalidate the carefully wrought legislative compromises that are a typical feature of consociational systems. The *Grondwet* has moreover long been at the periphery of public discourse and thus has lacked salience as a basis for evaluating legal rules. This was deemed desirable: the *Grondwet* was conceived as the 'settlement of the past', thereby denoting harmony and stability. If it were used as a basis for review, the *Grondwet*'s ability to play that part could be undermined in the wake of possible disagreement about the meaning to be ascribed to the country's foundations.

Perhaps most importantly, there have been no events that have clearly shown the inadequacy of the current, mainly non-judicial arrangements for constitutional guardianship that could otherwise have galvanised public and political support for repealing Article 120. Indeed, a currently pending proposal does not contemplate its abolition, but rather a qualification thereof: a second paragraph would be added to empower judges to verify the compatibility of Acts of Parliament only with classic fundamental rights in concrete cases.[77] Existing political configurations mean that this proposal, like its predecessors, is unlikely to become law. To address changing perceptions about the role the *Grondwet* ought to play and with consociationalism under pressure, the more promising approach consists of examining how the non-judicial actors primarily tasked with upholding the constitution can do so better (see Section 3 below).

2. Qualifying the ban in Article 120

Article 120 does not entirely preclude judicial engagement with the *Grondwet*. First, the wording of the ban on judicial review clearly does not extend beyond treaties and Acts of Parliament, meaning that courts in the Netherlands can pronounce on the constitutionality of subsidiary legislation and other inferior rules. Secondly, although Article 120 prohibits judges from performing judicial review in the strict sense of striking down laws that violate the constitution, it leaves Dutch judges the ability to construe legislation in conformity with the constitution, which presupposes that they can interpret the applicable provisions of the *Grondwet* and determine how the law in question measures up against those provisions.[78]

On the spectrum between absolute legislative supremacy and what David Law and Hsiang-Yang Hsieh describe in their chapter as "super-hard" judicial review,[79] the Netherlands is relatively far toward the extreme of legislative supremacy—even more so than New Zealand. The courts still play some role in constitutional interpretation and enforcement due to the availability of statutory and interpretive techniques for blunting constitutionally problematic laws. In contrast to New Zealand, however, the use of such interpretive devices to minimize constitutional violations is not mandated by law.

[77] Kamerstukken II 32 334 nr. 2 (2009-2010) and most recently Kamerstukken 32 334 Nr. 11.
[78] In Harmonisatiewet (n 73 above), the Supreme Court suggested in dictum that it can indicate whether a law breaches higher norms but would not be able to offer any relief.
[79] See David S. Law and Hsiang-Yang Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan' in this volume.

As a practical matter, Article 120 is also qualified by two other articles in the *Grondwet* that subject laws to a form of judicial review. Articles 93 and 94 allow judges to disregard statutes in specific cases if they conflict with directly effective rules of international law or EU law. These provisions are of particular significance in the area of human rights because they authorize Dutch courts to review legislation for conformity with human rights treaties. Nearly all of the rights and freedoms found in the ECHR,[80] as well as much of the ICCPR and other international covenants, fall within the scope of what courts can enforce under Articles 93 and 94. So too does the Charter of Fundamental Rights of the European Union, a comprehensive and modern bill of rights that is directly applicable in the Netherlands in all areas falling within the scope of EU law.

It would be a mistake to conclude, however, that Articles 93 and 94 negate Article 120 and introduce judicial review in the Netherlands for all practical intents and purposes. These provisions authorize Dutch courts to enforce international and European rules against the legislature – but not the *Grondwet*. Judicial scrutiny of this kind does nothing to confirm or advance the normative authority of the *Grondwet* within the domestic order. More pertinently, while international human rights law and the Dutch constitutional bill of rights overlap to a considerable extent, they do not simply duplicate each other; and one will look in vain for judicially enforceable international provisions that mirror the *Grondwet*'s structural provisions. The corollary is that Article 120 ensures that responsibility for upholding the institutional arrangements set forth in the *Grondwet* must fall on some institution—or institutions—other than the courts.

3. Ex ante constitutional scrutiny during lawmaking processes

In the absence of ex post judicial oversight, pre-enactment scrutiny of new legislation takes on special significance in the Netherlands. This section examines when and how such scrutiny takes place, while simultaneously applying a dialogic framework to showcase occasions for interaction among the leading non-judicial actors.

(a) Preparation of government bills

In the Netherlands, civil servants within the relevant ministry take the lead in ensuring that the initial draft of a bill complies with the *Grondwet* and other superior legal norms, as required under the government's *Aanwijzingen voor de Regelgeving* (Directions for Rule-making). However, these Directions do not obligate the ministry to discuss whether and in what ways the proposed legislation raises constitutional concerns, much less whether such concerns have been addressed.

***Aanwijzing* (direction) 2.15**

[80] With the exception of Art. 13 (right to an effective remedy).

It will be examined, when drafting regulations, which higher rules have fettered the discretion to regulate the matter concerned.

Explanation:

Higher rules encompass international rules or binding EU legal acts, the Charter for the Kingdom of the Netherlands, constitutional provisions, legal principles and – as far as rules laid down in an order in council or ministerial regulation – rules that are laid down in an Act of Parliament. (…)

As regards Article 1 of the *Grondwet* [which guarantees equal treatment and prohibits discrimination] it is pointed out that the phrase 'or any ground whatsoever' included in that article expresses that unjustified discrimination on grounds other than those explicitly mentioned – for instance age or disability – is also prohibited.

The fact that the Explanation explicitly mentions only Article 1 of the *Grondwet* reflects the importance attached to non-discrimination vis-à-vis other fundamental rights[81] and, more generally, the egalitarian aspirations that permeate Dutch society and politics.

Once the relevant ministry has finished with the legislation, the Ministry for Security and Justice's Department for Legislation reviews it for quality and conformity to higher law before it is presented to the Council of Ministers for discussion and approval. The Directions promote dialogue within the government over the constitutionality of proposed legislation by enabling the Department to engage in "meaningful discussion about alternative possibilities" to the extent it deems necessary:

***Aanwijzing* (direction) 7.4**

1. In view of the primary responsibility of the Minister for Security and Justice for the evaluation of legislation for its rule of law and administrative quality, including a verification of the compatibility with constitutional, EU and international rules, the following documents must, before they can be submitted to the council of ministers for consideration, be placed before the Department for Legislation of the Ministry for Security and Justice for review:
    a. Legislative proposals;
    b. Proposals for orders in council;
    c. …
    d. A proposal for legislation or draft of an order in council and the supplementary report [by the government], in the event that the advisory opinion of the *Raad van State* contained significant criticism on the content or form thereof.
2. (…)
3. (…)
4. The placement, as mentioned in the first paragraph, must take place at a sufficiently early juncture so as to allow ample room for a meaningful discussion about alternative possibilities, if the Department for Legislation would deem such necessary.

(b) The Raad van State (Council of State)

[81] The Council of State has confirmed that neither the text of the Grondwet nor its drafting history would warrant giving Art. 1 priority in case of a clash with another right. See Advisory opinion of 28 December 1987, nr. W04.87.0487 (Bill-Equal Treatment Act).

The *Raad van State* (Council of State) has long been part of the constitutional order of the Netherlands. The 1814 *Grondwet* provided that the sovereign prince would act only "after having submitted the matter for consideration to the *Raad van State*."[82] To this day, the *Raad* still acts as principal advisor to the legislature, but it is now also responsible for adjudicating the bulk of administrative disputes in final instance, like its counterparts in other Continental European countries. This combination of functions is reflected in its bifurcated structure: the *Raad van State* comprises an administrative jurisdiction and an advisory division. To prevent allegations of partiality, members are prohibited from hearing cases concerning matters on which they previously prepared opinions in their advisory capacity.[83] The King officially presides over the *Raad*,[84] but in practice, the vice president of the *Raad* runs the institution and is responsible for its performance. Prospective state councillors must have experience or expertise in matters of public administration, legislation or adjudication and tend to be drawn from the civil service, the government, the judiciary, and academia.[85]

Most relevant for present purposes is the *Raad*'s engagement with the *Grondwet* when dispensing advice during lawmaking processes. Article 73(1) of the *Grondwet* sets out the situations in which the *Raad*'s input must be sought:

> The *Raad van State* or a division of the *Raad* shall be consulted on Bills and draft orders in council as well as proposals for the approval of treaties by the *Staten Generaal*. Such consultation may be dispensed with in cases to be laid down by Act of Parliament.[86]

Once the government (or an MP, in the case of a private member's bill) has submitted their proposal, one councillor is designated the *rapporteur* and assigned the task of evaluating its text and preparing a report for consideration by the full *Raad*. The *rapporteur* may in turn request the assistance of a permanent constitutional council that was established in 2008 as part of the *Raad* to encourage more systematic attention to constitutional issues and improve the quality of its reflections on such matters.[87] The *Raad*'s analysis is not limited to identifying possible infringements of the *Grondwet* or other laws. Instead, the *Raad* has the opportunity to flesh out how relevant constitutional rules should be interpreted or applied.[88]

If the *Raad van State* gives its approval or recommends only minor amendments, the bill proceeds to the next stage of the legislative process. Conversely, if the *Raad* has fundamental objections that would warrant substantial revision or even withdrawal

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[82] 1814 Grondwet, Art. 32.
[83] Cf. Grondwet, Art. 73(2) and Council of State Act, Arts. 16-27.
[84] Grondwet, Art. 74(1) and Council of State Act, Art. 1(1).
[85] Council of State Act, Art. 8(2).
[86] Grondwet, Art. 73(1); see also Council of State Act, Arts. 17(1) and 18(1). The Raad van State can also provide advice on its own initiative when it believes a certain issue warrants legislative attention and, upon request, must advise the government and parliament on matters of legislation and public administration.
[87] 2009 Annual Report Raad van State at 55.
[88] See e.g. Advisory opinion nr. W4.99.0392 of 15 December 1999; Advisory opinion nr. W07.09.0103/II ('Joint Strike Fighter').

of the bill, the government is required to consult once more with the Department of Legislation, then to debate the bill anew before it can proceed.[89] In practice, this additional dialogic exchange of views occurs only sporadically, as the *Raad* rarely finds glaring constitutional defects.

More significantly from a dialogic perspective, the government must always officially respond to the *Raad van State*'s opinion in the explanatory memorandum that accompanies a bill when it is sent to parliament.[90] The *Raad*'s views can and do inform and encourage parliamentary debate and advance the development of Dutch constitutional law. Given the resource and knowledge constraints faced by many parliamentarians, an advisory institution like the *Raad* performs important signalling and informational functions that enable meaningful debate to occur. At the same time, the extent to which the *Raad van State* can actually enrich political and constitutional debate is contingent on the quality of the constitutional analysis contained in the *Raad*'s opinions.

The *Raad* engages in a three-part analysis of proposed legislation. The first part is a substantive policy analysis that considers the suitability, feasibility, and desirability of the bill. The second part is an evaluation of the technical quality of the draft legislation. The third part is a legal analysis that includes examination of the bill's conformity with the *Grondwet*, unwritten constitutional principles, and international and European rules of a constitutional nature.

The *Raad*'s approach to interpretation of the *Grondwet* is similar in a number of respects to the approach that courts take to constitutional interpretation.[91] First, the *Raad* relies on traditional methods of legal interpretation, such as the textualist, historical, purposive, and 'living law' approaches. Second, although it is not legally bound by its past interpretations, the *Raad* aims to decide in accordance with the views articulated in earlier advisory opinions. It consciously endeavours to construct an internally consistent body of opinions—known as its '*legisprudence*' in Dutch academic and political discourse—that is akin to the type of jurisprudence developed by courts. Third, the *Raad*'s analytical framework resembles that typically used by courts in that it uses the language of balancing, especially when reviewing legislation that could impinge on fundamental rights.

An example is the *Raad*'s evaluation of a 2008 private member's bill that sought to prohibit the ritual slaughter of animals. The *Raad* had found that special forms of slaughtering according to Jewish and Muslim beliefs were protected by freedom of

[89] Aanwijzingen voor de regelgeving, Direction 276 and Direction 254(1)(d).
[90] The government is not legally obliged to heed the Raad's views, but open disagreement is uncommon. An example of an opinion that prompted disagreement is Advisory opinion nr. W12.10.0075/II ('language ability for social security entitlements').
[91] Several of these similarities were documented in a 2010 empirical study authored by two members of the Raad itself. Jurgen de Poorter and Hendrika van Roosmalen, Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State (Raad van State, 2010).

religion and that, by completely forbidding established religious practice, the proposed ban failed the proportionality test:

> The unqualified prohibition of ritual slaughter no longer makes it possible to practice this form of religious observance. The Explanatory Note posits that the harm inflicted on animal welfare before and during un-sedated ritual slaughter offers a sufficiently strong justification to remove the current exemption in the Animal Health and Safety Act and accordingly permits a limitation of the freedom of religion. The Explanatory Note incorrectly evokes the image of animals as bearers of legal rights, with a status comparable to that of human beings. The Council is of the view that this does not evince that the requisite balancing exercise has been undertaken – during which the protection of the fundamental right should be accorded particular weight. While the Council concurs with the author of the Bill as to the importance of safeguarding animal welfare, it is of the view that the justification provided [in the Explanatory Note] is not sufficient. It deems it likely that the measure creates too great a limitation of the freedom of religion, given that the practice of an established religious ritual and the consumption of meat obtained in observance thereof is made impossible.
>
> According to the Council, the Bill accordingly exceeds the limits of Article 6, first paragraph of the Constitution. Its advice is that the Bill be reconsidered.[92]

While the *Raad*'s constitutional analysis may look very court-like in a number of ways, in other respects it operates differently from most courts when performing constitutional review. First, in line with its position as the government's official advisor, the *Raad* usually limits itself to signalling that a bill raises constitutional concerns and indicating that a more careful analysis of a bill's constitutional implications is warranted, rather than declaring in definitive terms that the bill is unconstitutional. Second, whenever possible, it will shy away from performing a full-fledged proportionality check itself and instead highlight the considerations that ought to be included in an analysis of the bill's constitutionality.

The quality of the *Raad*'s constitutional scrutiny has improved in recent years and now features more prominently in parliamentary debates than was the case a decade or so ago. A remaining concern is the relative lack of clarity about the views and arguments that the *Raad* has taken into account in preparing its advice. The reports prepared by its internal constitutional council are not as a rule made public, and minority opinions, while permitted, are rare. Nor is there opportunity for academics, civil society groups, or other interested organisations to respond or comment, either in relation to specific proposals or more generally. The lack of public participation is mainly due to time constraints and confidentiality concerns but, from a dialogic perspective, amounts to a missed opportunity for a more inclusive constitutional discourse.

(c) Staten-Generaal

When the explanatory memorandum or *Raad* opinion indicates that a bill has constitutional implications, it is common for those implications to be debated in parliament. An example of such debate occurred in relation to the bill discussed above that would have completely banned the ritual slaughter of animals. As illustrated by

[92] Advisory opinion W11.08.0398/IV of 20 October 2008.

the excerpt above, the *Raad* concluded that a ban on established religious practice failed the proportionality test.[93] After vigorous debate in which regular references were made to the *Raad*'s findings, the *Tweede Kamer* concluded that the restriction of the freedom of religion was sufficiently counterbalanced by the societal interest in enhancing animal welfare.[94] The *Eerste Kamer*, however, agreed with the *Raad* that the bill was insufficiently respectful of constitutional rights and accordingly voted it down by an overwhelming margin.[95] Commentary on this episode praised the *Eerste Kamer* for faithfully discharging its role as a more legally focused and less political 'chambre de réflexion'.[96]

There are also instances where parliament is first to address the constitutional effects of a bill, typically because the bill's authors or the *Raad van State* have not realised that the *Grondwet* or other higher norms are implicated. For example, during the debate on what eventually became the Law Opening Marriage (to same-sex couples), the *Tweede Kamer* discussed how to balance the right to equal treatment for such couples with the right of civil servants to act in line with their religious beliefs.[97] This difficulty had been addressed neither in the bill's explanatory memorandum nor by the *Raad*, which had focused instead on the private international law consequences of allowing same-sex marriages and the need to preserve the option of a civil union.[98] This example illustrates that parliament does not play a merely passive or reactive role in upholding constitutional norms but instead takes responsibility proactively for doing so.

The role that the *Grondwet* and other higher rules play during parliamentary debates is still not as large as one might hope, however, in a country that tends toward legislative rather than judicial supremacy. Neither the *Eerste* nor the *Tweede Kamer* has a standing committee or other mechanism that is specifically focused on constitutional interpretation. One might say that this is quite unusual: in other countries that similarly do not envisage a strong role for the judiciary in upholding the constitution, parliament often has established dedicated committees or has functionally equivalent instruments at its disposal to increase the degree of constitutional verification that legislative proposals attract.[99] There is further a dearth of rules that could otherwise have helped draw parliamentarians' attention to such scrutiny activities. Part of the explanation for this state of affairs can be sought in the attitude towards the *Grondwet* mentioned earlier: a text that has for a long time been at the margins in public and political life, thereby signalling constitutional harmony, does not call for the establishment of elaborate scrutiny processes. In addition, resource constraints are an important culprit: legislative scrutiny for possible constitutional defects requires time and expertise, both of which tend to be in short supply. Expertise is a particular challenge in light of high turnover and lack of legal training among parliamentarians.

[93] Advisory opinion W11.08.0398/IV of 20 October 2008.
[94] Handelingen TK 2010/2011, nr. 98, item 25 and nr. 96, item 16.
[95] Handelingen EK 2011/2012, nr. 33 item 5 25-26.
[96] Disagreements between the two Houses that result in the defeat of a bill are uncommon: the Eerste Kamer rejects fewer than 2% of all bills that have been passed by the Tweede Kamer.
[97] Handelingen TK 1999/2000, nr. 97 and Handelingen TK 1999/2000, nr. 98.
[98] Advisory opinion nr. W03.98.0593/I of 23 March 1999.
[99] See e.g. the chapters on Australia and Sweden in Parliaments and Human Rights (n xx).

The 2017 general election replaced roughly one-third of the *Tweede Kamer*, and less than a quarter of all sitting MPs now hold a law degree—a lower proportion than in years past.

To address the problem of expertise, legislatures in other countries that similarly allocate primary responsibility for constitutional scrutiny to the legislature—such as the United Kingdom, Australia, Sweden, and Finland—often establish specialised constitutional affairs committees.[100] Thus far, no such committee exists in the Netherlands, but the Dutch parliament has begun to focus on the issue. In 2016, the *Tweede Kamer* convened a symposium to discuss ways of strengthening its capacity for considering constitutional issues, and a proposal to establish a special parliamentary committee remains under consideration as of this writing.[101]

(d) The Netherlands Institute for Human Rights (NIHR)

As the country's independent guardian of human dignity, the NIHR is expected to monitor and promote respect for human rights. It is the only quasi-autonomous public administrative body that is formally authorised to advise the State about general matters of policy and legislation. The Law on the NIHR explicitly authorises the government and each house of parliament to consult the NIHR regarding the human rights dimensions of existing or proposed legislation, orders in council, and regulations.[102] Such consultation has occurred, for instance, in relation to the proposed modernisation of the Criminal Procedure Code. The law also obligates the minister responsible for a particular proposal to "provide the Institute with the opportunity to discuss its studies, reports, recommendations, and opinions."[103]

The NIHR is also free to offer advice on its own initiative and does so in several ways.[104] It regularly makes submissions in response to public consultations organised by the government. In other cases, the Institute has directly written to parliament to express concerns about the human rights implications of legislation that may not yet have received the attention they deserve. This happened for example with the proposed prohibition on clothing that covers the face: in this case, the NIHR reiterated some of the objections that the *Raad van State* had already identified. Although the government and parliament are not formally obliged to engage with the NIHR's views, they tend to do so, especially if they had solicited the Institute's input on the matter in question. The NIHR's influence is bolstered by the quality of its opinions, which combine clear writing with ample references to its own previous opinions and case law. Through the quality of its opinions and its official advisory role, the NIHR has accordingly fostered a meaningful substantive dialogue about human rights in the political arena.

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[100] See e.g. chs. 6, 9 and 10 in Murray Hunt, Hayley Hooper, and Paul Yowell (eds.), Parliaments and Human Rights: Redressing the Democratic Deficit (Hart, 2015).
[101] Kamerstukken II 34 665, nrs. 1, 2 (2016-2017).
[102] NIHR Act, Art. 5(1).
[103] Ibid., Art. 8(2).
[104] Ibid., Art. 5(2).

IV. CONCLUSION

The Netherlands merits attention as one of the shrinking number of countries that continue to assign principal responsibility to the legislature for ensuring constitutional supremacy. As a case study, it demonstrates at the very least that judicial review of legislation is not essential to the success of liberal democracy or the protection of constitutional rights. The absence of judicial review has not led to anything resembling constitutional failure or underenforcement in the Netherlands compared to other liberal democracies.

Although the Netherlands is unusual in rejecting judicial review of legislation, it is not unusual in rejecting the idea that courts should have an absolute monopoly on constitutional interpretation. In this sense, the difference between the Netherlands and many other countries is simply one of degree. The reality across all constitutional democracies is that responsibility for constitutional interpretation is shared across multiple institutions. In the case of the Netherlands, for example, the constitutionality of legislation is evaluated by both houses of parliament, ministerial bureaucracies, the *Raad van State*, quasi-autonomous entities, and civil society as well as the courts. Although the courts cannot invalidate legislation, they can and do interpret legislation so as to conform with constitutional requirements.

Even in countries with judicial review, courts do not have the only word on constitutional questions. The legislature may stand on equal or even superior footing to the courts, as demonstrated by the "new Commonwealth model of constitutionalism".[105] Executive involvement is also normal. While an institution like the Council of State may not exist or operate in identical form elsewhere, one encounters functional equivalents that can provide *ex ante* advice on the constitutional implications of potential legislation. Examples include the Chancellor of Justice in Estonia, Japan's Cabinet Legislation Bureau, and the US Office of Legal Counsel in the Department of Justice. Furthermore, ombudsmen and human rights institutes that routinely interpret and apply constitutional norms in the course of their work have rapidly proliferated in recent decades and are today found in many countries around the world. In other jurisdictions, one may find institutions and offices with responsibility for constitutional interpretation that lack any direct parallel in the Dutch system: think for example of the power vested in the president to refuse to sign bills into law because of constitutional reservations, as it exists in, inter alia, Germany, Hungary or South Korea.

This sharing of interpretive responsibility across multiple institutions means that different institutions will inevitably exchange views and disagree with each other on matters of constitutional interpretation in the normal course of events. In other words, some form of what we might call inter-institutional dialogue is unavoidable. Moreover, this dialogue is not limited to courts and legislatures. Not only do the

[105] See supra n 12 and accompanying text above.

executive and non-partisan bodies participate in constitutional dialogues, but their participation may be formalized and mandatory. To be sure, the legislature and the executive may not always play the starring role in constitutional interpretation, as they do in the Netherlands. But even in countries with strong courts that assertively perform constitutional review, they are always a part of the picture. Any account of constitutional interpretation in a given jurisdiction that ignores the contribution of non-judicial actors should accordingly be treated with a healthy dose of scepticism.

V. SUGGESTIONS FOR FURTHER READING

A. On non-judicial constitutional interpretation and review

- David Feldman, 'Parliamentary scrutiny of legislation and human rights' (2002) *Public Law* 323.
- Janet Hiebert, 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints', in Murray Hunt, Hayley Hooper, and Paul Yowell (eds.), *Parliaments and Human Rights – Redressing the Democratic Deficit* (Hart, 2015).
- Sanford Levinson, 'Constitutional engagement "outside the courts" (and "inside the legislature")', in Richard Bauman and Tsvi Kahana (eds.), *The Least Examined Branch – The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006).
- Mark Tushnet, 'Non-Judicial Review', in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds.), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003).
- Maartje de Visser, *Constitutional Review in Europe – A Comparative Analysis* (Hart, 2014), Chapter 1: The Role of Non-Judicial Actors in Upholding the Constitution.

B. On the Netherlands and its constitutional system

- Leonard Besselink et al., (eds.), *Constitutional Law of the EU Member States* (Kluwer, 2014) 1203-1239.
- Karel Kraan, 'The Kingdom of the Netherlands', in Lucas Prakke and Constantijn Kortmann (eds.), *Constitutional Law of 15 EU Member States* (Kluwer Law International, 2005).
- Wim Voermans, 'Constitutional Law', in Jeroen Chorus, Ewoud Hondius, and Wim Voermans (eds.), *Introduction to Dutch Law*, 5th edn, (Wolters Kluwer, 2016) at 317.
- Carla M. Zoethout, 'On Blasphemy, an Idealistic Constitutional Provision and Militant Democracy: Constitutional Topics in the Netherlands' (2016) 22 *European Public Law* 461.