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THE RIGHTS-BASED INTERPRETATION AND THE CONSTITUTIONAL COURT OF TÜRKIYE

Zühtü Arslan

Indeed, as in every field, interpretation is of vital importance in terms of constitutional jurisdiction. What makes interpretation so important is its essential role in understanding and making sense of the world we live in and the reality surrounding us. Polysemy, inherent in the nature of language, necessitates interpretation.

In this sense, interpretation is probably the most important issue in terms of constitutional jurisdiction. In the well-known *Marbury v. Madison* decision of 1803, which is known as the date of birth of constitutional jurisdiction, it was stated that it was emphatically the province and duty of the Judicial Department *to say what the law* is and that those who apply the rule to particular cases must, of necessity, expound and interpret that rule.[1]

The significance and power of constitutional interpretation is also emphasised through the statement "*We are under a Constitution, but the Constitution is what the judges say it is*" which was uttered a century after the said decision.[2]

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As the case is in other fields, interpretation does not exist in a vacuum in the constitutional jurisdiction. There are many factors having a bearing on and determining interpretation. Constitutional judges determine the meaning of the law and the constitution, which is the most basic law, through a means established/they have established in their inner and outer worlds.

In other words, judges make sense of law as formatted interpreters in a sense. For the very reason, Heidegger says that whenever something is interpreted as something, the interpretation will

[1] *Marbury v. Madison*, 5. U.S. 137 (1803), p. 177.

[2] *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-190*8, (New York: G.P.Putnam's Sons, 1908), p. 139.

be founded essentially upon fore-having, fore-sight, and fore-conception.[3]

In this context, we can say that the constitutional interpretation takes place in three interlocking circles. In the first circle at the center is the personal feelings and thoughts of the judge as the interpreter. The judge's upbringing, ideology, set of values, preferences, love and anger may have a bearing on interpretation. Indeed, thousands of years ago, Aristotle stated that judges were often influenced by feelings of friendship, hatred or self-interest, which caused them to lack objectivity thereby overshadowing their adjudication.[4]

The second circle of interpretation is the paradigm that dominates the interpretive community. Paradigm "*stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community*".[5] In this sense, the legal paradigm has a bearing on the interpretation made by constitutional courts in their capacity as an interpretive community and may be decisive in the interpretation of constitutional rules.

The third and largest circle having a bearing on interpretation is the social and political situation we are in at the macro level. Gadamer refers to the principle of rule of law as an essential condition for legal hermeneutics. According to Gadamer, interpretation cannot come into play in authoritarian regimes since the absolute will, which does not consider itself bound by law, may also transgress the basic principles of interpretation.[6]

What is referred to by Gadamer is precisely described by Tolstoy in his novel Hadji Murad. When a Polish medical student failed his exam for the third time, he slightly injured his teacher with a paper knife. Tsar Nicholas, who hated Poles, thought he had a good op-

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[3] **Martin Heidegger,** *Being and Time*, trans. J. Macquarrie & E. Robinson, (Oxford: Basil Blackwell, 1962), p. 191.

[4] **Aristoteles,** *Retorik,* Trans. A. Çokona, VIII. Edition, (İstanbul: İş Bankası Yayınları, 2022), Book 1, Chapter 1, p. 3.

[5] **Thomas S. Kuhn,** *The Structure of Scientific Revolutions*, 3rd ed., (Chicago: University of Chicago Press, 1996). p. 175. For the definition of legal paradigm, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg, (Cambridge, MA: The MIT Press, 1996), p. 194.

[6] **Hans-Georg Gadamer,** *Truth and Method*, Second Edition, trans. J. Weindheimer & D.G. Marshall, (London: Sheed & Ward, 1989), p. 329.

portunity. He wrote, and then signed, on his margin on the report regarding the student: "*Deserves death, but, thank God, we have no capital punishment, and it is not for me to introduce it. Make him run the gauntlet of a thousand men twelve times. Nicholas*".[7]

Tolstoy says that Nicholas knew that twelve thousand strokes meant death with torture, for five thousand strokes were sufficient to kill even the strongest man. Thus, he was pleased to give such decision about the student although there was no capital punishment in his country.[8] This anecdote is a typical example of how general principles of interpretation can be transgressed by the absolute will.

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In the light of these conceptual explanations, let me briefly touch upon the legal paradigm, which involves the interpretation process, and its repercussions on the decisions and judgments issued by the Constitutional Court of Türkiye (the Court).

In my article published 20 years ago, I have put forth that the courts engaging in human rights adjudication are dominated by two inter-conflicting paradigms, namely the ideology-based paradigm and the rights-based paradigm. I have tried therein to explain that the Court has been adopting the paradigm, which does not prioritise the protection of fundamental rights and freedoms and which even allows these rights and freedoms to be overridden by the ideology when needed.[9]

At the point we have currently reached, it is well known that especially through the individual application mechanism, a paradigm shift has occurred in the field of constitutional jurisdiction, as a result of which the rights-based paradigm has been adopted. It should be noted that amendments to the texts and constitutions, which are subject to interpretation, and the establishment of new constitutional institutions forming the basis for the interpretation may be decisive for the swifts in the paradigms of interpretation.

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[7] **Leo Tolstoy,** *Hadji Murad*, trans. A. Maude, (London: Thomas Nelson & Sons, 1912), pp. 151-152.

[8] Ibid., p. 152.

[9] **Zühtü Arslan,** "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies*, 11/1, (Spring 2002): 9–25.

In this sense, the individual application mechanism adopted by the constitutional amendment of 2010 has indubitably played an effective role in the adoption of the rights-based paradigm.

The rights-based paradigm is an approach, which prioritises the protection of fundamental rights and freedoms over the other societal and political interests, which regards rights and freedoms as essential whereas their restriction as exceptional, and which in the last instance entails an interpretation in favour of rights and freedoms.

In its several judgments, the Court has indicated that the approach that should predominate over the constitutional jurisdiction is the rights-based paradigm. As stated by the Court, the constitutional provisions *"may fully and properly fulfil their functions only when they are interpreted through a rights-based approach."* Therefore, those wielding public power can and must *"interpret constitutional provisions in favour of freedoms"*.[10]

Besides, the rights-based approach also necessitates the interpretation of constitutional provisions in the light of the principle of rule of law. The Court has noted that rule of law is *"a principle that is to be taken into consideration in the interpretation and implementation of all provisions of the Constitution"*.[11] Undoubtedly, this principle is extremely important for the societal and political affairs, which are the broadest circle in which the interpretation process takes place.

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It may be said that the rights-based paradigm adopted in the constitutional jurisdiction has two prominent practical repercussions. First of all, this paradigm has led to an expansion in the realm of constitutional rights and freedoms both in the individual application and constitutionality review processes.

For instance, the Court has construed Article 36 of the Constitution enshrining the right to legal remedies in a way that would also cover the right to appellate review of a decision.[12] In the same vein,

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[10] *Ömer Faruk Gergerlioğlu* [Plenary], no. 2019/10634, 1 July 2021, § 50; and *Ali Kuş* [Plenary], no. 2017/27822, 10 February 2022, § 50.

[11] *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 50.

[12] Constitutional Court's decisions, E. 2018/71 K. 2018/118, 27 December 2018, § 8; E. 2022/89 K. 2022/129, 26 October 2022, § 23.

the Court has concluded, by adopting historical, systematic and teleological methods of interpretation, that Article 70 of the Constitution where the right to initially acquire a public office is laid down also covers the *right to continued exercise of public office*.[13]

The second practical repercussion of the rights-based paradigm comes into play in its contribution to the process known as *"constitutionalisation of law"*. In its recent judgments, the Court has found a violation of the prohibition of discrimination in so far as it relates to property in the case where the additional indicator rate applied in respect of the professors transferred from the military higher education institutions was lower than that of the other professors.[14] In this judgment, the Court has stressed on one hand that in interpreting and determining the scope of the laws, the inferior courts must take into consideration the Constitution, and on the other hand that the Constitution is a living instrument. As noted by the Court, *"Constitution is not merely a text formulated as a document, but rather a legal living instrument, which steers the legal system and is to be taken into consideration in case of all public acts and actions performed."*[15]

It is undoubtedly the Constitutional Court that attributes the ultimate meaning to the Constitution as *"a living instrument"*, interprets the provisions included therein and applies them to the given cases, and, so to speak, puts flesh on the bones of these provisions. Therefore, it is a requisite of the rights-based paradigm that the interpretation and application adopted in the constitutional jurisdiction be taken into account by the other courts.

As is known, the principle of *res interpretata* requires that the judicial interpretation of basic principles and rules in case of a dispute be taken into consideration by the other courts in similar cases. Despite not clearly citing this principle as a concept in its judgments, the Court refers to the requirements of this principle within the scope of *"objective function"*.

In the sense of individual application mechanism, *"Objective function undertaken by the Court is to interpret the constitutional provisions related to fundamental rights and freedoms and to ensure*

[13] Constitutional Court's decision, E. 2021/104 K. 2021/87, 11 November 2021, § 48.

[14] *Mehmet Fatih Bulucu* [Plenary], no. 2019/26274, 27 October 2022.

[15] *Mehmet Fatih Bulucu* [Plenary], § 76.

their implementation".[16] What is expected from the courts and all institutions wielding public power following the interpretation by the Court of the basic constitutional principles and procedures on a matter is to *"act, in case of any similar matter, within the framework of the Court's interpretation"*.[17]

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Consequently, the Court's insistence on the legal and constitutional interpretation within the scope of the rights-based paradigm is of vital importance for the protection of the individuals' fundamental rights and freedoms.

As a matter of fact, probably the most formidable challenge in the field of constitutional jurisdiction will be the protection and maintenance of the rights-based paradigm *vis-à-vis* the global adverse waves in support of authoritarianism.

I sincerely believe that the Turkish Constitutional Court will continue to be the bulwark of fundamental rights and freedoms thanks to the experience it has gained in the human rights jurisdiction, the system it has established and the paradigm it has adopted notably during the last 10 years.

[16] *K.V.* [Plenary], no. 2014/2293, 1 December 2016, § 52.
[17] *K.V.* [Plenary], § 53.

INTERPRÉTATION DE LA CONSTITUTION SUISSE ET PROTECTION DU CLIMAT

François Chaix

Introduction

La présente contribution fait suite à la conférence organisée par le Tribunal constitutionnel de la République fédérale d'Allemagne (*Bundesverfassungsgericht*) qui a eu lieu à Berlin les 4 et 5 mai 2023. Cette réunion des Présidentes et Présidents de Cours constitutionnelles des pays membres du Conseil de l'Europe s'est intéressée aux défis que lance le changement climatique à la justice constitutionnelle. Au cours des discussions, s'est posée la question de savoir jusqu'à quel point la protection de l'environnement, les enjeux climatiques ou le principe du développement durable sont intégrés dans les chartes fondamentales des pays présents. Cette première interrogation a conduit à une seconde: comment interpréter la constitution lorsqu'elle contient de telles dispositions? Cela pose aussi la question du rôle du juge – et des limites de son pouvoir – dans l'interprétation de la constitution.

Pour traiter ce sujet au niveau suisse, il convient d'abord de s'intéresser aux particularités de la Constitution fédérale de la Confédération suisse (ci-après I.). Les différentes méthodes d'interprétation de la Constitution nous occuperont ensuite (ci-après II.). Enfin, à l'occasion d'un arrêt récent du Tribunal fédéral suisse, nous appliquerons ces méthodes d'interprétation au principe du développement durable, principe expressément prévu dans la Constitution suisse (ci-après III.). Pour faciliter la lecture de cette contribution pour les lecteurs non accoutumés à la doctrine suisse, celle-ci est intentionnellement limitée au strict minimum[1]. S'agissant de la jurisprudence, le même effort de concision est visé, tout en rendant attentif le lecteur au fait que les décisions citées

[1] Voir la bibliographie ci-dessous.

sont accessibles en langue originale sur le site officiel du Tribunal fédéral suisse[2].

I. Particularités de la Constitution suisse

Adoptée par le peuple et les cantons le 18 avril 1999, la Constitution fédérale de la Confédération suisse (ci-après Cst.)[3] est entrée en vigueur le **1er janvier 2000**. Avant ce texte, la Suisse avait connu trois textes fondamentaux. Le premier de ceux-ci, le « Pacte fédéral « (1814) rétablissait en grande partie l'Ancien Régime sous la forme d'une simple alliance entre États (Confédération). La naissance d'un véritable État fédéral remonte à la première Constitution de la Suisse, en 1848[4], mais la Suisse moderne est issue de la Constitution de 1874. Cette dernière renforce l'idée que le peuple puisse surveiller les autorités fédérales par le biais de l'initiative constitutionnelle ou du referendum législatif facultatif[5]. C'est aussi la Constitution de 1874 qui, la première, institue une juridiction suprême fédérale: celle-ci est permanente avec un siège fixe (à Lausanne) et dotée de juges professionnels dont la tâche principale est d'assurer l'application uniforme des lois fédérales dans les différents cantons[6]. Il s'agit du Tribunal fédéral suisse qui continue aujourd'hui, entre autres attributions, d'exercer les mêmes fonctions (art. 189 al. 1 let. a Cst.).

La principale particularité de la Constitution actuelle, qu'elle partage avec celle de 1874, est d'instituer une **participation du peuple** et des cantons pour provoquer sa révision, totale ou partielle. Par exemple, moyennant la récolte de 100'000 signatures de citoyens et citoyennes ayant le droit de vote dans un délai de 18 mois à compter de sa publication, le texte de l'initiative qui demande une révision partielle de la Constitution est soumis au vote du peuple et des cantons (art. 139 al. 1 et 5 Cst.). Une telle révision peut aussi être initiée par l'Assemblée fédérale (art. 194 al. 1 Cst.). Dans les deux cas, la modification est acceptée lorsque la majorité des votants et la majorité des cantons l'approuvent (art. 142 al. 2 Cst.). Cette procédure de révision relativement légère conduit

[2] https://www.bger.ch.
[3] RS, 101.
[4] CR Cst.-Meuwly, Intro. historique N 38 ss.
[5] CR Cst.-Meuwly, Intro. historique N 56 s.; CR Cst.-Dubey, art. 138 N 5.
[6] CR Cst.-Chaix, art. 188 N 2.

nécessairement à des modifications régulières du texte constitutionnel : depuis 1999, 13 révisions partielles sont le résultat d'initiatives populaires[7], tandis que 28 proviennent de projets rédigés par l'Assemblée fédérale[8]. La Constitution fédérale de la Confédération suisse n'est donc pas un instrument figé et arrêté une fois pour toutes; il s'agit au contraire d'un texte qui évolue au gré des besoins et des craintes de la société. L'art. 192 al. 1 Cst. précise à ce propos que la Constitution peut être révisée « *en tout temps, totalement ou partiellement* «, à l'instar de ce que prévoyaient déjà les Constitutions de 1848 et de 1874[9]. Cette « volatilité « de la Constitution s'inscrit ainsi dans une longue tradition. Pour le sujet qui nous occupe, cette flexibilité conduit à une première conséquence : la Constitution suisse – contrairement à des textes fondamentaux d'autres Etats – **n'offre pas de stabilité** dans le temps à son texte, mais elle évolue au gré des circonstances.

Du fait des révisions régulières de la Constitution, lesquelles amènent à introduire de nouvelles dispositions sur des sujets les plus divers, la Constitution suisse **manque d'homogénéité** tant dans son objet que dans son style de rédaction: si le texte d'origine, entré en vigueur le 1er janvier 2000, a été rédigé d'une traite, à un moment donné et après un travail scientifique visant à la cohérence de l'ensemble, un tel résultat n'est certainement plus garanti aujourd'hui en raison des nombreuses révisions partielles déjà intervenues. En plus du risque de perte de cohérence du texte dans son entier, on remarque de grandes différences par rapport à l'importance des sujets traités et par rapport à la densité normative des dispositions concernées. S'agissant de leur importance, il suffit de comparer l'art. 7 Cst. relatif à la « Dignité humaine » avec l'art. 88 Cst. traitant des « Chemins et sentiers pédestres et voies cyclables ». Quant à la densité normative, tandis que certaines dispositions sont caractérisées par la volonté de concision et d'abstraction en énonçant des principes et en conférant un mandat législatif, d'autres sont de simples règles de droit de niveau en réalité législatif ou réglementaire : c'est ce que certains auteurs

[7] https://www.bk.admin.ch/ch/f/pore/vi/vis_2_2_5_8.html (consulté le 30 août 2023).

[8] https://www.fedlex.admin.ch/eli/cc/1999/404/fr/history (consulté le 30 août 2023).

[9] CR Cst.-Lammers, art. 192 N 2.

dénoncent comme étant un « processus d'ordinarisation de la Constitution suisse »[10]. A titre d'exemples de telles dispositions de rang « légal », on peut citer les art. 75b (interdiction des résidences secondaires dans les communes où elles constituent 20% du parc des logements et de la surface brute au sol habitable), 121 al. 3-6 (expulsion, à des conditions précises, des criminels étrangers), 123b (internement des criminels dangereux) et 123c Cst. (imprescriptibilité de certains crimes d'ordre sexuel).

Autre particularité propre à influencer le travail d'interprétation du juge constitutionnel, la Suisse comporte **trois langues officielles** : l'allemand, le français et l'italien (art. 70 al. 1 1ère phr. Cst.), langues qui sont utilisées pour toutes les normes de niveau fédéral. Le romanche, quatrième langue nationale (art. 4 Cst.) n'a pas le même statut, mais est utilisé pour les rapports que la Confédération entretient avec les personnes de langue romanche (art. 70 al. 1 2ème phr. Cst.). Pour le sujet qui nous intéresse, il faut retenir que la Constitution suisse est rédigée dans ces trois langues et qu'aucune des versions linguistiques du texte n'a *a priori* plus de poids que les autres[11]. Pour le juge qui procède à une interprétation littérale de la Constitution, c'est évidemment une richesse : lorsque les trois versions conduisent au même résultat, c'est rassurant ; en revanche, lorsque ces textes ont des sens contradictoires, c'est une source supplémentaire d'incertitude.

Le rôle du **droit international** a aussi son importance en matière d'interprétation de la Constitution. La Suisse est en effet un pays de tradition moniste, de sorte que le droit international a une validité immédiate sur le plan interne[12]. La Constitution précise, à son art. 5 al. 4, que la Confédération et les cantons respectent le droit international et, à son art. 190, que le Tribunal fédéral et les autres autorités sont tenus de l'appliquer. La jurisprudence retient qu'un traité international a le même rang qu'une loi fédérale[13]. Pour l'interprétation de la Constitution, une affirmation aussi entière n'a pas lieu d'être et il convient surtout de déterminer le type

[10] CR Cst.-Dubey/Martenet, Intro. générale N 91.
[11] CR Cst.-Dubey/Martenet, Intro. générale N 40.
[12] CR Cst.-Besson, art. 5 N 173 ss.
[13] CR Cst.-Besson, art. 5 N 183.

de norme constitutionnelle concernée et de prendre en compte l'importance normative de la règle de droit international[14].

Enfin, dernière particularité notable par rapport à d'autres États, la Suisse est caractérisée par l'**absence d'un Tribunal constitutionnel**, dans le sens tout au moins de l'absence d'une autorité judiciaire spécifique chargée d'assurer la bonne compréhension et la correcte application de la Constitution[15]. Le système adopté est celui du contrôle diffus de constitutionnalité : chaque autorité d'application du droit – et pas uniquement la dernière instance ou une instance particulière – est compétente pour vérifier la constitutionnalité des normes qu'elle doit appliquer[16]. Il en découle un risque d'interprétations divergentes, voire contradictoires, entre organismes étatiques. En tant qu'autorité judiciaire suprême de la Confédération (art. 188 al. 1 Cst.), le Tribunal fédéral est certes institué pour assurer une application uniforme du droit constitutionnel (art. 189 al. 1 let. a Cst.): sa saisine n'a cependant pas lieu d'office, mais uniquement sur recours d'une partie.

II. Principes d'interprétation

La constitution suisse ne contient pas elle-même de règles prévoyant la ou les méthodes propres à son interprétation[17]. Quant à la doctrine, elle se prononce peu sur la question[18]. Or, réglementer dans la Constitution la manière de l'interpréter aurait été envisageable, comme le prévoit, par exemple, le droit des traités internationaux. Dans ce domaine, l'art. 31 de la Convention de Vienne du 23 mai 1969 sur le droit des traités[19] propose un tel programme: interprétation de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but; prise en compte des traités ultérieurs et d'autres engagements entre États; référence aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu[20].

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[14] CR Cst.-Dubey/Martenet, Intro. générale N 63.
[15] CR Cst.-Dubey/Martenet, Intro. générale N 95.
[16] CR Cst.-Dubey/Martenet, Intro. générale N 82.
[17] Giovanni Biaggini, Verfassungsauslegung, N 3.
[18] Giovanni Biaggini, Verfassungsauslegung, N 10.
[19] RS 0.111.
[20] Pour un exemple récent: ATF 149 III 131 consid. 6.4.2.

En l'absence de telles règles, la jurisprudence et la doctrine suisses partent du principe que l'interprétation d'une norme constitutionnelle suit en règle générale les principes en matière d'interprétation de la loi[21]. Pour rappel, ceux-ci consistent à interpréter d'abord une disposition selon sa lettre (**interprétation littérale**). Si le texte n'est pas absolument clair, si plusieurs interprétations sont possibles, il convient de dépasser la seule lettre pour s'intéresser à son processus d'adoption, en examinant notamment les travaux parlementaires qui ont conduit à son adoption (**interprétation historique**). La relation de la norme en question avec d'autres dispositions légales, sa place dans la loi constituent l'**interprétation systématique**. Enfin, l'**interprétation téléologique** s'attache à rechercher le but de la règle, son esprit ainsi que les valeurs sur lesquelles elle repose. En raison des particularités propres à la Constitution suisse, ces principes ne sont pas entièrement transposables à celle-ci : c'est le premier objet de ce chapitre (ci-après A.). En outre, du fait de sa nature et du rang qu'elle occupe dans l'ordre juridique, la Constitution est soumise à des principes d'interprétation propres[22] : c'est le second objet de ce chapitre (ci-après B.).

A. Adéquation partielle des principes traditionnels d'interprétation de la loi

Toute interprétation d'un texte part de sa lettre. L'**interprétation littérale** joue donc toujours un rôle prépondérant. Pour la Constitution suisse, il faut cependant garder à l'esprit que son texte n'est pas le résultat de l'œuvre d'un rédacteur unique ou d'une équipe de rédacteurs réunis à un moment donné pour effectuer ce travail. Il s'agit plutôt d'un texte composite, voire hétéroclite. Certaines dispositions reprennent celles contenues dans les précédentes Constitutions de 1848 et de 1874, procédant dans le meilleur des cas à une certaine mise à jour du vocabulaire. D'autres dispositions, pourtant entièrement rédigées à l'occasion de la révision de 1999, n'atteignent pas toujours les attentes en matière

[21] Arrêt 1C_393/2022 consid. 3.1 destiné à publication. CR Cst.-Dubey/Marr tenet, Intro. générale N 41.

[22] Pour approfondir: Giovanni Biaggini, Verfassungsauslegung, N 19 ss.

terminologique et syntaxique[23]. Comme on l'a vu, la Constitution suisse contient en outre des dispositions à la densité normative très variable, allant du principe général et abstrait à la règle de droit directement applicable. Enfin, l'introduction de nouvelles dispositions issues d'initiatives populaires, dont le texte est rédigé par les initiants eux-mêmes, relativise encore plus la portée de l'interprétation littérale de la Constitution suisse[24]. Si l'interprétation littérale est la porte d'entrée de toute interprétation, elle n'est de loin pas suffisante pour la Constitution suisse.

En raison du caractère composite de la Constitution suisse qui vient d'être relevé, son **interprétation historique** doit aussi être relativisée. Avant d'entreprendre une telle interprétation, il convient d'abord de déterminer dans quelle catégorie de norme constitutionnelle entre la disposition en question : reprise d'une disposition antérieure ; « mise à jour » d'une disposition antérieure ; rédaction entièrement nouvelle de 1999 ; résultat d'une initiative populaire ou d'un objet parlementaire. Pour chacune de ces catégories, le recours au travaux préparatoires sera différent. En cas de reprise et de mise à jour de dispositions antérieures, l'inteprétation dégagée par la jurisprudence et la doctrine relative à la Constitution de 1874 peut en principe servir de guide. La seule histoire d'une règle n'est cependant pas décisive si la règle est très ancienne[25]. Pour les dispositions nouvelles introduites dans la Constitution de 1999, l'étude des travaux parlementaires de cette époque peut être utile. Il en va de même pour les révisions de la Constitution issues d'initiatives parlementaires. Enfin, s'agissant des initiatives populaires, le recours à la motivation des initiants et aux débats lors de la campagne de votation constituent des appuis historiques pour interpréter le texte en question. Parfois même, les initiants et les opposants sont associés au stade de la mise en œuvre d'une initiative pour en dégager le sens[26].

L'**interprétation systématique** tire argument de la place qu'occupe la disposition dans un ensemble de normes et postule que cet

[23] CR Cst.-Dubey/Martenet, Intro. générale N 46.

[24] CR Cst.-Dubey/Martenet, Intro. générale N 47.

[25] CR Cst.-Dubey/Martenet, Intro. générale N 49.

[26] CR Cst.-Dubey/Martenet, Intro. générale N 47 concernant les initiatives déjà signalées sur les résidences secondaires (art. 75b Cst.) et l'imprecriptibilité de certaines infractions d'ordre sexuel (art. 123b Cst.).

ensemble est cohérent. Pour les raisons déjà évoquées, le texte de la Constitution suisse a des origines différentes : reprise et mise à jour de notions anciennes, introduction de textes rédigés de toute pièce par les citoyens et citoyennes dont l'initiative a été adoptée, révisions régulières proposées par le Parlement. Il en résulte que la Constitution suisse ne constitue pas un ensemble cohérent et unitaire[27]. L'interprétation systématique jouera dès lors un rôle limité, en se référant par exemple à l'intitulé de ses titres et chapitres ou en faisant ressortir le rôle d'un alinéa par rapport à d'autres dans une disposition constitutionnelle précise[28].

L'**interprétation téléologique** d'une norme constitutionnelle amène à rechercher les buts généraux de la Constitution et, de cette manière, à déterminer les principes structurels de celle-ci[29]. Ce travail est déjà en soi délicat à réaliser. De plus, là encore, la portée de ces principes peut entrer en conflit avec des dispositions plus récentes et plus précises introduites à la suite de l'acceptation d'une intitative populaire rédigée de toutes pièces. Dans ce contexte, il est arrivé au Tribunal fédéral de refuser d'appliquer directement des dispositions constitutionnelles au motif qu'elles pourraient conduire à des atteintes considérables et irréversibles à certains droits fondamentaux, tels que la protection de la vie privée et familiale (art. 13 al. 1 Cst.)[30]. Il s'en est suivi un travail législatif pour préciser, voire limiter, la portée de l'initiative constitutionnelle.

Pour les motifs qui viennent d'être énoncés, les méthodes traditionnelles d'interprétation des lois paraissent en partie inadaptées aux normes constitutionnelles en général et à la Constitution suisse en particulier. Il convient dès lors de s'intéresser à d'autres principes susceptibles d'aider à la bonne compréhension et à la correcte application de la Constitution.

B. Principes particuliers d'interprétation de la Constitution

Malgré les caractères composite et évolutif qui l'entachent, la Constitution suisse constitue le texte fondamental et suprême de

[27] CR Cst.-Dubey/Martenet, Intro. générale N 50.

[28] CR Cst.-Dubey/Martenet, Intro. générale N 52.

[29] CR Cst.-Dubey/Martenet, Intro. générale N 53.

[30] ATF 139 II 243 consid. 10.5 (art. 121 al. 3 à 6 Cst : renvoi des criminels étrangers).

la Confédération. A ce titre, la plupart de ses normes ont un **degré d'abstraction** qui leur confère une portée large et elles ne comportent qu'une faible densité normative. Il en va en particulier des principes directeurs qui structurent son contenu: le principe de l'État de droit, le principe du fédéralisme, le principe de la démocratie et le principe de l'État social sont communément admis[31]. D'autres principes ou aspirations sont énoncés par la doctrine, sans toujours recueillir l'unanimité : l'État libéral, la dignité humaine, l'ouverture au monde, la coopération internationale et la durabilité[32].

Ces éléments militent pour une **coordination** entre, d'une part, ces principes et, d'autre part, des normes au contenu normatif plus précis : on ne peut faire abstraction de la garantie de la propriété (art. 26 Cst.) lorsque la Constitution interdit la construction de résidences secondaires (art. 75b Cst.) ; de même, comme on l'a vu, la protection de la vie privée et familiale doit être prise en compte pour déterminer la portée de l'art. 121 Cst. relatif à l'expulsion des criminels étrangers (art. 121 Cst.). On retient dès lors comme règle spécifique d'interprétation de la Constitution que les normes constitutionnelles sont **toutes de rang égal** entre elles[33]. Il n'y a donc pas d'échelle de valeur entre normes selon que celles-ci auraient un contenu important ou un contenu secondaire. Par ailleurs, l'ordre chronologique d'adoption des normes constitutionnelles est indifférent. En d'autres termes, contrairement à ce qu'on retient pour l'interprétation des actes législatifs, le caractère postérieur d'une norme constitutionnelle n'implique pas nécessairement que celle-ci prévale sur la norme plus ancienne. De même, et pour le même motif, le principe selon lequel la loi spéciale déroge à la loi générale (*lex specialis*) ne s'applique pas systématiquement en matière constitutionnelle[34].

Même si la Constitution suisse est le fruit d'une perpétuelle évolution, sans véritables limites ni quant à l'objet des dispositions à introduire ni quant à leur formulation, le Tribunal fédéral s'efforce néanmoins de recourir à une **interprétation harmonisante**.[35] Cela signifie qu'il faut éviter d'interpréter une disposition constitu-

[31] CR Cst.-Dubey/Martenet, Intro. générale N 35.
[32] CR Cst.-Dubey/Martenet, Intro. générale N 36.
[33] Arrêt 1C_393/2022 du 31 mars 2023 consid. 3.1, destiné à publication.
[34] CR Cst.-Dubey/Martenet, Intro. générale N 60.
[35] ATF 145 IV 364 consid. 3.3.

tionnelle de manière isolée et pour elle-même uniquement[36], mais chercher à l'insérer dans une lecture de la Constitution « comme un tout »[37]. On peut citer comme exemple la décision du Tribunal fédéral de déduire de l'égalité entre les sexes le droit de vote aux femmes du canton d'Appenzell Rhodes intérieures alors que la Constitution de 1874 (art. 74) réservait aux cantons la compétence de légiférer dans ce domaine[38].

Pour les normes au contenu typiquement constitutionnel, soit celles énonçant des principes, des règles très générales ou valant norme-programme, se pose aussi la question de l'**interprétation contemporaine**[39]. Le but de celle-ci est d'appliquer un concept constitutionnel à une problématique nouvelle, que le constituant ignorait ou dont il ne pouvait pas entrevoir la portée potentielle future. On tient alors compte, selon la jurisprudence, « du changement des conditions historiques et des conceptions sociales »[40]. Il s'agit en quelque sorte d'atténuer une interprétation purement historique de la Constitution, laquelle conduirait à figer le texte dans une seule acceptation, reçue à un moment donné.

Il nous reste encore à mentionner l'**interprétation conforme au droit international**. On a en effet vu que la Suisse cultive la tradition moniste pour la réception du droit international. Cette caractéristique de l'État a aussi ses conséquences pour interpréter sa Constitution. La Constitution ne prévoit pas de prépondérance du droit international (cf. art. 190 Cst.). Dans sa jurisprudence sur le sujet, le Tribunal fédéral veille cependant à la conformité au droit international de la disposition constitutionnelle en jeu[41]. Il s'agit toutefois là d'un élément parmi d'autres qui permettent en fin de compte de dégager une solution qui aligne autant que possible « principes structurels, droit international et reste du droit constitutionnel »[42].

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[36] ATF 139 I 16 consid. 4.2.1 et 4.2.2.

[37] Arrêt 1C_393/2022 du 31 mars 2023 consid. 3.3.1, destiné à publication. CR Cst.-Dubey/Martenet, Intro. générale N 58 et 61.

[38] ATF 116 Ia 359. Giovanni Biaggini, Verfassungsaulegung, N 14.

[39] Arrêt 1C_393/2022 du 31 mars 2023 consid. 3.3.2, destiné à publication.

[40] ATF 112 Ia 208 consid. 2a.

[41] ATF 139 I 16 consid. 4.2.2.

[42] CR Cst.-Dubey/Martenet, Intro. générale N 58 et 61.

III. En matière de protection du climat

L'arrêt rendu par le Tribunal fédéral suisse le 31 mars 2023[43] donne un exemple intéressant de la manière dont il a fallu, dans le domaine spécifique de la protection contre le changement climatique, interpréter deux dispositions de la Constitution, de nature, de portée et d'origine bien différentes. Le litige devant le Tribunal fédéral suisse portait en substance sur la question de savoir si un canton pouvait, par le biais d'une initiative populaire, introduire sur son territoire cantonal la gratuité complète de ses transports publics. Le Parlement cantonal considérait qu'une telle gratuité était contraire à la Constitution fédérale et qu'une votation populaire sur le sujet ne pouvait pas avoir lieu: il soutenait que l'art. 81a al. 1 Cst. imposait aux usagers des transports publics de payer une part de ces coûts; de leur côté, les initiants se réclamaient, d'une part, du principe du développement durable (art. 73 Cst.)[44] et, d'autre part, des engagements pris par la Suisse dans le cadre de l'Accord de Paris (accord sur le climat)[45] adopté en décembre 2015 par la communauté internationale; à les suivre, la gratuité des transports publics contribuait à la réduction des émissions de CO_2 en encourageant le public à utiliser les transports collectifs et à renoncer aux transports individuels. Il convenait dès lors de déterminer si ces dispositions de la constitution et du droit international étaient compatibles entre elles ou si certaines l'emportaient sur les autres.

Tout opposait les deux dispositions de la Constitution entrant en compétition. A teneur de l'art. 81a al. 1 Cst., la Confédération et les cantons veillent à ce qu'une offre suffisante de transports publics par rail, route, voie navigable et installations à câbles soit proposée dans toutes les régions du pays; l'alinéa 2 prévoit que les prix payés par les usagers des transports publics couvrent une part appropriée des coûts. Il s'agit ainsi d'une disposition au contenu précis

[43] Arrêt 1C_393/2022 du 31 mars 2023 destiné à publication.

[44] La Constitution suisse fait aussi référence à cette problématique dans son préambule („ *conscients [...] de leur devoir d'assumer leurs responsabilités envers les générations futures* „) et à son art. 2 al. 2 et 4 („ [La Confédération] *favorise [...] le développement durable [...]. Elle s'engage en faveur de la conservation durable des ressources naturelles [...]* „). Ces références n'ont cependant pas été avancées par les recourants à l'appui de leur argumentation, ni mentionnées dans l'arrêt.

[45] RS 0.814.012.

utilisant des termes au sens univoques, à l'instar de ceux contenus dans une disposition de niveau légal. Pour sa part, l'art. 73 Cst. charge la Confédération et les cantons d'oeuvrer à l'établissement d'un équilibre durable entre la nature, en particulier sa capacité de renouvellement, et son utilisation par l'être humain: la disposition revêt un caractère essentiellement programmatique; son indétermination et sa complexité nécessitent une concrétisation dans la législation (consid. 3.3.2). La filiation des deux dispositions était aussi différente: l'art. 73 Cst. faisait partie du texte d'origine de la Constitution de 1999, ce qui expliquait son texte général et abstrait; l'art. 81a Cst., en revanche, avait fait l'objet d'une votation populaire en 2014, ce qui pouvait aussi expliquer que sa formulation était plus précise pour permettre aux votants de mieux se déterminer sur son objet; la rédaction de cette dernière disposition n'était pas non plus l'oeuvre des juristes chargés d'établir la Constitution comme un tout, mais résultait d'un débat politique à un moment donné.

L'interprétation littérale de l'art. 81a Cst. conduisait à exclure la gratuité des transports publics: la disposition – qui s'applique à tous types de moyens de transports publics (consid. 3.2.3) – exige des usagers de participer aux coûts de ces transports (consid. 3.2.1). L'interprétation historique et téléologique ne conduisait pas à un autre résultat: à teneur des travaux parlementaires, la disposition vise, d'une part, à ne pas offrir des transports trop bon marché (pour éviter une demande trop importante qui pourrait « étouffer « le système) et, d'autre part, à empêcher que ceux-ci soient trop chers (pour continuer à favoriser le transfert des voyageurs de la route vers le rail) (consid. 3.2.2).

Face à une disposition au texte précis et au but déclaré, adoptée en votation populaire postérieurement à l'art. 73 Cst., la portée du principe du développement durable était restreinte sur la question de la gratuité des transports publics. Ce principe avait certes déjà été intégré dans la jurisprudence, par exemple dans le domaine de l'implantation des installations de production d'énergie renouvelable ou en lien avec les mesures à prendre pour lutter contre le bruit d'un aéroport (consid. 3.3.1 et les références). Dans de tels domaines, les dispositions constitutionnelles et légales convergeaient cependant toutes vers un même but, de sorte que le principe de durabilité – aux contours encore flous – s'insérait dans

l'appareil législatif. En revanche, lorsqu'une autre disposition constitutionnelle donne une réponse précise à une question, possiblement contraire au principe du développement durable, l'art. 73 Cst. n'est pas d'une aide suffisante. Le recours à l'Accord de Paris, même dans un pays de tradition moniste tel que la Suisse, n'avait pas plus d'effet: à l'instar de l'art. 73 Cst., ce traité a une nature essentiellement programmatique et nécessite une concrétisation légale (consid. 3.3.3). Le Tribunal fédéral suisse a certes rappelé que chaque norme constitutionnelle ne doit pas être interprétée de manière isolée, pour elle-même uniquement (consid. 3.3.1); il a aussi évoqué la possibilité d'opérer par une interprétation contemporaine de l'art. 73 Cst. (consid. 3.3.2).

En définitive, le Tribunal fédéral suisse est arrivé à la conclusion, sans l'exclure absolument à l'avenir, que l'heure pour une interprétation harmonisante ou contemporaine de l'art. 73 Cst. – conférant à cette disposition une portée directe et précise – n'avait pas encore sonné (consid. 3.3.2). En outre, les initiants n'avaient pas rendu vraisemblable qu'une participation des usagers à une part des coûts de transports publics entrait nécessairement en conflit avec l'art. 73 Cst. (consid. 3.3.2). Par conséquent, l'introduction de la gratuité des transports publics sur un territoire cantonal contrevient à la Constitution fédérale et une votation sur le sujet ne peut pas être organisée. Le Parlement cantonal avait à juste titre interdit l'organisation de la votation et le recours des initiants devait être rejeté (consid. 3.5).

Conclusion

Quels enseignements peut-on tirer – au-delà des frontières suisses – des lignes qui précèdent?

De manière générale, l'interprétation d'une norme constitutionnelle dépend beaucoup de sa densité normative plus ou moins élevée, de la précision ou de l'abstraction de sa rédaction, du contexte dans lequel elle a été adoptée – à l'occasion d'une révision complète ou partielle de la Constitution – et du caractère plus ou moins récent de son adoption. Dans le domaine particulier de la protection contre le changement climatique, même lorsqu'une constitution nationale contient une disposition traitant du développement durable, la question de sa portée pratique reste con-

troversée. Lui attribuer un caractère essentiellement programmatique la cantonne dans un rôle déclaratoire, sans réels effets sur des situations concrètes. Au contraire, une interprétation « contemporaine « (en phase avec les enjeux actuels de la société) est de nature à conférer à de telles dispositions une portée concrète. Cela peut aussi appeler à revoir l'interprétation d'autres dispositions, de manière à assurer une harmonie, une cohérence de l'ensemble constitutionnel d'un pays.

La présente contribution n'entend pas prendre position sur les potentiels d'interprétation de dispositions constitutionnelles telles que l'art. 73 de la Constitution fédérale de la Confédération suisse. Sans trop d'hésitation, on peut cependant affirmer ceci: lorsqu'il a adopté de telles dispositions (pour la Suisse en 1999), le constituant n'avait certainement pas conscience de l'intensité des enjeux auxquels sont aujourd'hui confrontées les sociétés contemporaines. Un tel constat devrait amener à se poser la question de la pertinence, pour de telles dispositions constitutionnelles, d'une interprétation contemporaine conduisant en fin de compte à une « actualisation « de la Constitution[46].

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[46] Giovanni Biaggini, Aufgaben und Grenzen, 553 ss; CR Cst.-Dubey/Martenet, Intro. générale N 30 et 43; CR Cst.-Mahaim, art. 73 N 25.

CONSTITUTIONAL REVIEW IN THE NETHERLANDS

Ben P. Vermeulen & Tom J. van Ernst[1]

Introduction

The Netherlands is one of the few states in Europe that has no (judicial) constitutional review. When observed from an outsider's perspective, the Netherlands probably still looks like a well-ordered rule of law: a stable democracy based on a high-trust society. It is trust in the legal system, in particular in the wisdom of the legislature, that has been the source of Article 120 of the Dutch Constitution, which forbids judicial review of the constitutionality of Acts of Parliament.[2]

The assumption that the Netherlands can do without constitutional review has become problematic. In the past years, in particular, due to the so-called 'Childcare Allowance Case' (*kinderopvangtoeslagaffaire*), in which fundamental rights had been infringed and basic interests were violated – especially the rights and interests of less fortunate parents and their children – it became clear that not only the legislature and the executive services, but also the courts had failed. This failure was the result of a disastrous coincidence of (1) a complex legal system introducing a provisional and conditional advance payment of costs of childcare, (2) provisions that could be interpreted as requiring full repayment of the allowances in case of inability to account for all the costs that were claimed (the 'all or nothing' approach), (3) introduction of an ICT system carrying out grand scale checks aimed at detecting fraud, (4) courts that felt unable – partly due to the aforementioned Article 120 of the Constitution – to put aside the hard legislation and (5) a political climate favoring a harsh implementation of this legislation, inspired by heavy cuts in social security and wide-spread

[1] This article is written in a personal capacity.

[2] Article 120 of the Dutch Constitution reads: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

publicity of international fraud schemes.[3] A parliamentary committee that subsequently investigated this affair concluded that all state powers had fallen short in their duty to protect *bona fide* citizens.[4] After the report of that committee, published in December 2020, the government drew the ultimate political consequence and resigned in January 2021.

In an October 2021 opinion, requested by the Second Chamber of the Dutch Parliament on the 'Childcare Allowance Case', the Venice Commission[5] recommended, *inter alia*, to consider the introduction of judicial constitutional review of Acts of Parliament, and thus gave new inspiration to the longtime legal-political debate in the Netherlands on this matter.[6] As stated in the beginning, the Netherlands is one of the few liberal-democratic states where such review is prohibited. This does not imply, however, that there is no *de facto* constitutional review. This article attempts to give some insight into the status of the Dutch Constitution, the position of Article 120 of the Constitution, and the role of *de facto* constitutional review, as well as to sketch possible future developments.

This article starts with a short description of the historical background (§ 1). Subsequently the *ex ante* constitutional review (§ 2) and *ex post* constitutional review, including recent proposals and developments in this field (§ 3), are discussed. We will conclude with some final observations (§ 4).

1. Constitutional review in the Netherlands: historical background

The Dutch Constitution (*Grondwet*) dates from the Constitution of 1815 and is one of the oldest written constitutions still in force, second only to the constitutions of the United States of America (1789) and Norway (1814). The basic content and structure of the

[3] For a good, compact sketch of the legal framework and its implementation see the Venice Commission *Opinion on the legal protection of citizens in the Netherlands*, CDL-AD(2021)031, paragraphs 7–27.

[4] Parlementaire ondervragingscommissie Kinderopvangtoeslag, *Ongekend onrecht*, Bijlage bij *Kamerstukken II* 2020/21, 35510, nr. 2.

[5] The Venice Commission, officially the 'European Commission for Democracy through Law', is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law.

[6] *Opinion on the legal protection of citizens in the Netherlands*, CDL-AD(2021)031.

current Dutch constitution is the product of an evolutionary process, based on historical developments since 1815. Remarkably, having been a republic for a long time, the Dutch 1815 Constitution introduced a monarchy. The Constitution was fundamentally reformed in 1848, introducing ministerial responsibility and giving the Second Chamber (the House of Representatives) important rights such as the right of amendment and interpellation. The powers of the monarch were gradually reduced, the autonomous rule-making power of the government basically was abolished by the Meerenberg-judgment (1879) and parliament was gradually democratized. The reform of 1917, the so-called *Pacification* (pacification, peace-making) introduced universal suffrage and equal subsidies for neutral public schools and denominational private schools, thereby settling the two main constitutional issues that originated in the 19th century. The Pacification strengthened a process towards 'pillarization', a society built from subsystems (socialist, liberal, catholic, protestant pillars) that linked political power, social organization, and individual behavior, and were aimed to peacefully promote – in competition and cooperation with other social and political groups and organizations – goals inspired by an ideology shared by its members for whom the pillar and its ideology was the main source of social identification.[7]

The austere nature of the Constitution allows for ample room for societal, political, and legal development, without the need for amending its text. This characteristic is connected with the Dutch tradition of pragmatic pluralism, focused on reaching consensus through negotiations, a trait dominant during the era of pillarization until the 19-seventies and to a certain extent still cherished. Underlying values, principles, and ideologies were not made explicit, in order not to hinder the process of working towards compromises. Thus social, political, and legal changes usually took place and are taking place without amending the Constitution. Despite a reformulation and modernization of the Constitution in 1983, there have not been substantive changes since 1917.[8] In fact,

[7] Bovend'Eert Paul & Kortmann Constantijn. 'The Netherlands' In: International Encyclopaedia of Laws: Constitutional Law, edited by André Alen & David Haljan. Alphen aan den Rijn: Kluwer Law International, 2023, p. 15–19, 73.

[8] We will nuance this statement later on. In fact, the revisions of the Constitution in 1953/1956 were – *in the long run* – fundamental. They codified a monist

there is a remarkable stability, probably also inspired by the rigid procedure for revising the Constitution. Changing it requires two readings. In the first reading, the normal procedure has to be followed: introduction of a government bill, adoption by the Second Chamber (with right of amendment), and the First Chamber with an absolute majority (more than 50% of the votes in both Chambers). Then, after elections for a new Second Chamber, both Chambers have to vote for the bill adopted in the first reading, but now with a two-thirds majority (without the right of amendment of the Second Chamber).

As a result, the Constitution has offered limited guidance and has not had much substantive influence on legal and political practice.[9] This is not only due to the general character of the Constitution as an austere document open to accommodate social and political change, but also because of the predominance of the legislature. The legislature (government plus parliament) is the primary and final interpreter of the Constitution, and is the predominant, essential institution to implement the tasks and duties that the Constitution prescribes.

This primacy of the legislature is reflected in numerous constitutional provisions. Essential in this regard is Article 120 of the Constitution, prohibiting constitutional review of Acts of Parliament, thus forbidding the judiciary to test laws against the Constitution.[10] This prohibition of constitutional judicial review of laws is interpreted broadly. (1) Article 120 not only prohibits testing the constitutionality of substantive norms but also of procedural norms. (2) The prohibition not only refers to testing against the

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system in which international law as such forms part of the Dutch legal system, and introduced the explicit power and duty of the courts not to apply national law (including Acts of Parliament) when that would amount to a violation of self-executing international or European Union law. This power/duty did not seem to change much, until – from the eighties onwards – it fundamentally transformed the 'constitutional landscape': see subparagraph 3.1.

[9] L.F.M. Verhey, L.C. Groen & T.J. van Ernst, 'De Grondwet revisited: geleidelijke aanpassing en verdiepende interpretatie', in: J.H. Gerards, J. Goossens & E.Y. van Vugt, *Constitutionele verandering in Nederland?*, Den Haag: Boom Juridisch 2023, p. 53–93.

[10] It must be noted that Article 120 of the Constitution only applies to Acts of Parliament. Lower legislation – royal decrees, ministerial ordinances, provincial and municipal regulations can be tested against the Constitution.

Dutch Constitution but also to the Kingdom Charter (*Statuut*), the constitution of the Kingdom encompassing the overseas territories. (3) And it not only forbids testing of laws against written constitutional law but also against unwritten fundamental legal principles such as principles of proportionality or legal security.

Furthermore, many constitutional provisions give the legislature wide competencies to regulate in many areas, without fundamental rights, principles of decentralisation or popular sovereignty, et cetera standing in its way. For instance, most fundamental rights in the Constitution are accompanied by a restriction clause, that allows for restricting such rights by Act of Parliament, often without containing any substantive guarantees: it is sufficient if the restriction is laid down in such a law, irrespective of the content and severity of the restriction.

Judicial constitutional review *ex-post* – regarding *adopted* Acts of Parliament – is thus out of the question, due to the primacy of the legislature and the immunity of laws as enshrined in Article 120 of the Constitution, as well as due to the open restriction clauses. Of course, in such a system there also cannot be *ex ante* judicial constitutional review, nor can there be a constitutional court. In sum: the immunity of laws (Acts of Parliament) implies that there is no constitutional review and consequently no constitutional court.

It must be stressed emphatically, however, that this absence of judicial constitutional review does not imply that the Constitution has the same rank as an Act of Parliament. Acts of Parliament must be in accordance with the Constitution, as well as with constitutional law in the wider sense (the Kingdom Charter and fundamental legal principles). Thus, the Constitution is of a superior order, but it is exclusively up to the institutions involved in lawmaking – the legislator himself and preparatory mechanisms – to ensure *ex ante* that their products (laws) are in conformity with constitutional law.

The view that the legislature is the prime protector of the Constitution is based on principles of representative democracy and separation of powers. *The* democratically legitimized legislator is regarded as the adequate institution authorized and suited to assess *ex ante* the overall compatibility of his own products – laws – with higher law (such as the Constitution, among others). After all, courts do not have independent democratic legitimacy. And because of their concentration on concrete cases and their limited ex-

pertise in issues and problems that transcend the legal field, they are less qualified for conducting a broad constitutional review that must also include policy aspects, empirical issues, and feasibility motives – that's how this argumentation goes.

To give a full picture – which alas makes it more complicated – we further underline that although there is strictly speaking no judicial constitutional review of laws, de facto there is such a review. According to Dutch constitutional law – currently laid down in Articles 93 and 94 of the Constitution – the legal order is remarkedly open to international law. In 1953/1956 the Constitution was amended, a monist view of the relationship between international and national law. International law as such – without transformation – works into the Dutch legal order (Article 93). And statutory regulations (including Acts of Parliament) shall not be applied if such application conflicts with a self-executing[11] treaty or decision of an international organization (Article 94).[12]

From the eighties onwards Dutch courts have applied treaties, in particular those containing human rights, thereby declaring Acts of Parliament that stood in the way inapplicable to the case at hand. Although in the formal sense, this only leads to the non-application of national laws in the concrete case, such judgments often have a general effect, in fact declaring the law as such invalid for similar cases. Furthermore, Dutch courts are very receptive to European Union law, accepting that that law, because of its supranational character, applies *as such* within the Dutch legal order, without even having recourse to Articles 93 and 94 of the Constitution.

So it may be said that in fact, the Dutch legal order *has* a system of constitutional judicial review, that however does not apply to the national Constitution but an international/ supranational 'constitution', basically consisting of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. This international/supranational 'constitution' is ap-

[11] In the – confusing – terminology of Articles 93 and 94 of the Constitution: 'provisions which may be binding on all persons'.

[12] Article 93 of the Constitution: '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 or of resolutions by international institutions that are binding on all persons.'

plied not by a specific constitutional court, but by *all* Dutch courts (and of course in the final instance the European Court of Human Rights and the Court of Justice of the EU, respectively).

2. Ex-ante non-judicial constitutional review

In the Netherlands constitutional system, the lack of judicial constitutional review of *enacted laws* is to a considerable degree compensated by modalities of non-judicial constitutional review, taking place during the legislative process (*ex-ante*), in which there are various mechanisms also evaluating whether draft legislation is in accordance with the constitution in the broad sense. This legislative process consists of several steps and involves various entities, constitutional practices, and conventions. We will discuss this *ex ante* review in some detail.[13]

2.1. The preparatory legislative process

The legislative process in general[14] starts with an extensive preparatory departmental or interdepartmental process, which on average can take some two years. Legislation is generally drafted in a process of close cooperation between the policy department and the legislative department of the relevant ministry/ministries. Legislation of course has to be effective, to implement certain policy goals, and to achieve desired results. In particular, when the stakes are high and the field to be covered is complex, the draft therefore should be based on and justified by thorough research. During the drafting process advice is obtained by the ministry from experts and specialized advisory bodies – such as the Education Council, the Electoral Council and the Personal Data Authority – and from other relevant institutions such as implementing and supervisory bodies and sometimes relevant interest groups. When draft legislation is ready, it must be submitted to a special division of the Ministry of Justice and Security for a generic legislative review and, if necessary, also to a special division of the Ministry of

[13] Also see: P. B.C.D.F. van Sasse van IJsselt, 'Constitutional Advice and Signals in the Netherlands: Actors and Impact', in: J. de Poorter e.d., *European Yearbook of Constitutional Law 2021*, The Hague: Asser Press 2022, p. 53–82.

[14] We will not discuss private members' bills.

the Interior and Kingdom Relations for a constitutional review.[15] The latter division comments on draft legislation as to its compatibility with constitutional law in a broad sense: the Dutch Constitution, the Kingdom Charter, fundamental legal principles, as well as international and supranational 'constitutional' law, human rights provisions in particular. Often these comments are implemented into the text of the draft and/or incorporated into the explanatory memorandum. This commentary is not made public.

NB: To achieve legislative quality and uniformity, legislative departments and policy departments use the Instructions for drafting legislation (Aanwijzingen voor de regelgeving). These instructions include, inter alia, general legislative principles, rules of procedure and technical rules, but also various elements connected with principles of constitutional law. These instructions are a cornerstone of Dutch legislative quality policy and are binding for ministers and departmental officials.[16]

As a next step in the preparatory legislative process in general a public internet consultation is held. The draft law is published, with accompanying documents, on a government website, with the invitation to anyone to comment, ask questions, criticize, et cetera.[17] This instrument provides the general public – *inter alia* individuals, NGO's, interest groups, and companies – with a voice. At the start, the opportunity to voice one's concerns was used infrequently, but over time the number of consultations has increased and the involvement of citizens, businesses, civil society, and institutions in the process of legislation has grown. The input and information, thus gathered, may find its way into the draft law and will at least be discussed in the explanatory memorandum.[18]

The following step in the preparatory legislative process is the deliberation within the Council of Ministers on the draft law. When

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[15] 'Handreiking constitutionele toetsing', https://open.overheid.nl/repository/ronl-b6627c0d34e2e0c351ac24c3903a085182a01725/1/pdf/handreiking-constitutionele-toetsing.pdf; P.B.C.D.F. van Sasse van Ysselt, 'Constitutionele toetsing van wetgeving ex ante', *NJB* 2016, p. 1480-1485; aanwijzing 7.4 Aanwijzingen voor de regelgeving.

[16] P. Eijlander & W.J.M. Voermans, 'Nieuwe aanwijzingen voor de regelgeving', *NJB* 1993, p. 169–174.

[17] See www.internetconsultatie.nl.

[18] A.M. Bokhorst, 'Breder en realistischer doelbereik van internetconsultatie van wetsvoorstellen', *RegelMaat* 2023, p. 7–25.

the Council of Ministers agrees to it, the draft then is submitted and presented to the Advisory Division of the Council of State, for an advisory opinion.

2.2. The opinion of the Advisory Division of the Council of State

At the end of the preparatory phase of the legislative process, the Advisory Division of the Council of State (Afdeling advisering van de Raad van State) comes into play and has to give an advisory opinion on the draft law. This opinion is required with regard to every bill and every royal (= government) decree (Article 73 of the Constitution). Thus, the Advisory Division is the final independent advisor to the government before a bill is submitted to Parliament. The Advisory Division publishes some 400 advisory opinions a year.[19] An advisory opinion on average takes some 42 days, but in case of emergency it may be given in a few days. Large, complicated drafts on the other hand will take several months, in exceptional cases half a year or more.[20]

The Advisory Division reviews the draft legislation using an Assessment framework (Beoordelingskader, October 2022), which the Division recently renewed (see *appendix*). The new Assessment framework takes into account various recent societal and political developments in the Netherlands, for instance the, growing realization – particularly inspired by the Child Allowance Case – that many persons have difficulties with bureaucratic complexities and are unable to fulfill their administrative obligations.

The Assessment framework is made up of four elements: policy analysis; constitutional and legal analysis; feasibility analysis for individuals, enterprises and implementation; and analysis of the effects for legal practice (judiciary, prosecution, legal profession). These analyses are not strictly separated, but very much intertwined. The quality and effectiveness of legislation is determined not only by the 'internal' quality of the laws and regulations themselves but also to a considerable degree by the quality of the policy decisions upon which they are based, as well as on the qual-

[19] This number includes the advisory opinions on government decrees.

[20] For instance in the case of advising on new Code of Criminal Procedure, which took a year.

ity of their implementation, supervision, enforcement, and sanctioning. In applying the assessment framework all four analyses are applied separately but also in their mutual relationship. The structure of the framework is not a straightjacket, nor is it a 'checklist': the framework does not imply prioritization or sequencing. It gives guidance to make sure that all the relevant questions are being asked. The various aspects addressed in the Assessment framework must be regarded conjointly at all stages of drafting legislation. However, given the scope of this article, only the constitutional and legal analysis will be discussed in more detail.

In the *ex ante* constitutional review of the Advisory Division, a broad concept of constitutional law is used. Of course the Division 'tests' draft laws in the light of the Constitution, the Kingdom Charter and fundamental legal principles – which cannot be done by courts, due to the prohibition of constitutional review in Article 120 of the Constitution. Unlike the courts, the Advisory Division is not bound by that prohibition. Furthermore, the Advisory Division also looks at the (in)compatibility of laws with provisions of EU law and treaties, thereby going further than the courts are allowed to do. The courts can only declare provisions in Acts of Parliament inapplicable when their application *in concreto* is incompatible with self-executing treaty provisions or EU-law with direct effect – a limitation which in essence flows from the separation of powers.[21] But the Advisory Division, which is part of the legislative process, is not limited to these restrictions that bind the courts: the principles of the *trias politica* do not apply to it. For instance, the Advisory Division may argue that a particular law is unacceptable because it infringes a social right, whilst such a right, in general, is regarded by courts as an instruction norm that has no direct effect/is not self-executing.

The constitutional and legal analysis of the Advisory Division of the Council of State carries weight, especially as the courts are not allowed to assess the constitutionality of laws and are to a certain

[21] The limitation to self-executing treaty provisions and EU-law with direct effect is motivated by the notion that these provisions are sufficiently concrete and precise and can as such, without implementing legislation and policies, be applied by the courts, whereas other provisions – for instance social rights or policy goals – require additional action from legislature and administration, and without such additional action cannot be applied by courts.

extent limited in assessing the compatibility of laws with international and supranational law. So it is a vital part of its task that at least the Advisory Division indeed does that: fully reviewing bills in the light of the Constitution and other higher laws. In applying its constitutional and legal analyses, it is of course important to note that the Advisory Division is not the primary and final interpreter of the Constitution. Once again, that is the legislature: government, Second Chamber (House of Representatives), and First Chamber (Senate) together. In its interpretations, therefore, the Advisory Division is reluctant to make apodictic judgments. A relevant factor here is that the open character of the Constitution, containing various vague norms and abstract notions with political connotations, frequently allows for different legitimate interpretations. Though the Advisory Division is not bound by the limits of judicial review, it is aware of the political and policy aspects of constitutional issues, and to a certain extent applies self-restraint.

The analysis of the Advisory Division therefore often primarily results in questioning, without giving final answers. It checks whether in the explanatory memorandum, the applicable constitutional provisions and other norms and principles of constitutional law have been mapped out sufficiently, and what their relevance is for the draft law. The memorandum must show the extent to which the draft complies with the constitutional framework, and the considerations made in this regard must be clearly and adequately substantiated.

It is important to stress again, that the Advisory Division assesses draft laws in the light of the entire 'constitution'. Specific constitutional provisions are interpreted in their connection with the constitutional system as a whole: the conglomerate of norms of the Constitution (and the Kingdom Charter) with their underlying principles, conventions, and normative practices – for example, the general principles of democracy and the rule of law – as well as international and EU constitutional law. The general principles also include principles of adequate legislation, such as legality, equality before the law, legal certainty, proper legal protection, and proportionality.[22] Furthermore, the Advisory Division, when interpreting the wide limitation clauses accompanying constitutional rights,

[22] T.J. van Ernst & R.J.M. van den Tweel, 'Geschikt, evenredig en uitvoerbaar', *RegelMaat* 2023-1, p. 58–71.

that according to their text only requires that the limitations are laid down in an Act of Parliament, reads in that clause substantive requirements, like precision, proportionality, subsidiarity and protection of the core of the rights, drawing inspiration from equivalent rights and clauses in international treaties and EU law.

When constitutional or international human rights are being restricted by a law, that law must serve a legitimate goal and must be proportional. Does the explanatory memorandum provide for a justification and is this convincing? For this analysis, the Advisory Division also uses the findings from the policy analysis and the analysis of the capacity to implement or obey restrictions (feasibility). These analyses can give a clearer view of the proportionality and effectiveness, and thereby of the rationality of the draft legislation.

At the end of each advisory opinion, the Advisory Division gives a *dictum*. There are four dicta, of which the last two are negative:

- A: The Advisory Division has no comments on the proposal and recommends submitting the proposal to the House of Representatives;
- B: The Advisory Division has several comments on the proposal and recommends that these be taken into account before the proposal is submitted to the House of Representatives;
- C: The Advisory Division has several objections to the proposal and advises against submitting the proposal to the House of Representatives unless it has been amended;
- D: The Advisory Division has serious objections to the proposal and advises against submitting it to the House of Representatives.

If negative, the opinion will recommend substantial amendments to the text and/or the explanatory memorandum to be made as a *sine qua non* (C), or it may unconditionally recommend against submitting the bill to Parliament (D). In such cases, the draft law will have to be reconsidered by the Cabinet, that in response to the advisory opinion can amend or complement the draft law and/or the explanatory memorandum; it can withdraw the draft; or it can audaciously continue and submit the draft to Parliament without fundamental changes. After all, an advisory opinion is not binding.

2.3. The parliamentary process

In the Dutch political system, representation of the people consists of a bicameral system, in which Parliament consists of the House of Representatives[23] (Tweede Kamer, Second Chamber) and the Senate (*Eerste Kamer*, First Chamber).[24] Political primacy lies with the House of Representatives. On average the parliamentary legislative process takes one and a half years.

When a draft law is submitted and presented to parliament, it is accompanied by (inter alia) the explanatory memorandum as well as the advice of the Advisory Division and the response of the Cabinet. The House of Representatives will first consider and deliberate on the draft legislation. Based on the explanatory memorandum and advisory opinion, the members of the House of Representatives can, in dialogue and debate with each other and the minister concerned, consider whether the draft legislation is in accordance with the Constitution and other higher laws. To this end, the House of Representatives can submit motions or amendments and, if necessary, as a last resort, reject the draft law. If the House of Representatives agrees to a proposal, it will be submitted and presented to the Senate. The Senate will also consider and deliberate on the proposed legislation, but does not have the power to amend the draft legislation; it can only accept or reject it. When the Senate agrees to the draft, it can be ratified by the government and enter into force.

Political primacy lies with the House of Representatives, for various reasons. First, its members are directly elected while the members of the Senate are indirectly elected, by the members of the provincial states. Second, the cabinet of ministers is formed in relation to the House of Representatives: the cabinet must be able to count on the support or at least acceptance of a majority in that House. Furthermore, the Senate has fewer competencies in the legislative process, and for instance, lacks the power to amend. Finally, the Senate consists of part-time politicians.

In the light of the primacy of the House of Representatives, the Senate in general has taken a modest position, and was primarily concerned with issues of constitutionality, enforceability, and legislative-technical quality of draft laws. Given this practice, the Senate

[23] The House of Representatives consists of 150 representatives.

[24] The Senate consists of 75 senators.

has often been qualified as a *chambre de réflexion*. However, due to the fragmentation and politicization of the Senate, it recently tended to widen its scope, thereby neglecting the issues that it traditionally prioritized and making itself vulnerable to the criticism that it is becoming a poor imitation of the House of Representatives.

As outlined above, the legislative process on average takes about three-and-a-half years and consists of various steps in which due consideration is given to a constitutional review of draft legislation. During the legislative process, the various actors are in a dialogue with each other that allows for adequate consideration of whether a law is consistent with constitutional norms and principles. In this regard, the advisory opinion of the Advisory Division of the Council of State carries weight.

3. Ex-post judicial constitutional review?

3.1. No judicial constitutional review; paradoxes[25]

As explained in paragraph 1, in the Netherlands there is no ex-post judicial review with regard to the constitutionality of Acts of Parliament.[26] The legislature is the primary interpreter of the Constitution and the sole protector of the constitutionality of its laws. This primacy is reflected in numerous constitutional provisions. Essential in this regard is Article 120 of the Constitution, prohibiting constitutional judicial review of Acts of Parliament, thus forbidding the judiciary to test laws against the Constitution. This prohibition of constitutional judicial review of laws is given a wide meaning and also applies to the Kingdom Charter (*Statuut*) and unwritten fundamental legal principles.

The immunity of laws from being tested by judicial constitutional review has been criticized since its codification as an immunity

[25] See for this issue amongst many other writings J. Gerards, 'The irrelevance of the Netherlands Constitution, and the impossibility of changing it', *Revue interdisciplinaire d'études juridiques*, 2016/2, vol. 77, p. 207–233; and W. Voermans, 'Conspicuous absentees in the Dutch legal order: constitutional review & a constitutional court', in G.F. Ferrari (ed.), *Judicial Cosmopolitanism*, Leiden: Brill Nijhoff 2020, p. 337–347.

[26] However, lower legislation (royal decrees, ministerial regulations, ordinances of local governments can be tested against the Constitution.

clause in the 1848 Constitution.[27] The great statesman-legislator Thorbecke, one of the fathers of that Constitution, but opponent of the immunity clause, held that this clause implied that the Constitution ceased to be a constitution, while laws – deriving their validity from that same Constitution! – would stand above the Constitution. Indeed it is not so evident that although the Constitution is the supreme Dutch law, judges cannot decide that (the application of) an Act of Parliament, which holds a lower legal status, is contrary to the Constitution and therefore invalid or not applicable. The consequence is that the Act is presumed to be constitutional, although that presumption might be incorrect (but the judge may not make any statement about that). That is the first paradox.

As already mentioned, the prohibition of judicial constitutional review is interpreted widely. It not only includes the Constitution but also the Kingdom Charter (even though that has a higher status than the Constitution and itself does not contain a similar prohibition) and unwritten legal principles.[28] The *Hoge Raad*[29] and other courts have accepted that legal principles nevertheless, by way of exception, should be applied, even though that would result in not applying a provision of an Act of Parliament, when the application of that provision would have such hard consequences – violating principles like legal certainty or proportionality – that these consequences must be presumed not to have been taken into account by the legislator. In essence, this means that (only) when such exceptional consequences have not been foreseen by the legislator, it must be assumed that the written provision must give way for an *unwritten* principle.[30] This exception, limited though it is, is a second paradox. Moreover, it must be remarked that the courts have until now not accepted such a way out because of the harshness of unforeseen consequences of the strict application of a law when a – *written* – constitutional freedom is at stake.

The most fundamental paradox is that due to the constitutional openness to international law Dutch judges are allowed and even

[27] At that time summed up in the succinct phrase in Article 115 of the 1848 Constitution: "The laws [Acts of Parliament] are inviolable".

[28] Hoge Raad 14 april 1989, ECLI:NL:HR:1989:AD5725 (*Harmonisatiewet*).

[29] Idem.

[30] Afdeling bestuursrechtspraak van de Raad van State (Administrative Juriss diction Division of the Council of State) 1 maart 2023, ECLI:NL:RVS:2023:772.

obliged not to apply national law – including Acts of Parliament and even the Dutch Constitution – when there is a conflict with a self-executing treaty provision or a directly effective provision of EU-law. This paradox is enhanced by the fact that such international/supranational norms often correspond with more or less similar provisions in the Dutch Constitution, in particular equality/non-discrimination standards and fundamental freedoms. Indeed, it seems to be not logical that equality norms and fundamental freedom rights in the Constitution cannot be applied when an Act of Parliament stands in their way, whereas that Act is not to be applied when it is contrary to more or less similar norms and freedoms in international treaties and EU-law. The consequence has been, that Dutch courts apply the European Convention and the EU Charter as the main 'constitutional' framework, instead of the Dutch Constitution.

3.2. Amending Article 120 of the Constitution?

Given the paradoxes identified in subparagraph 3.1 it is self-evident that many scholars have pleaded for at least partly abolishing the prohibition on judicial constitutional review (Article 120), in order to allow judicial testing of Acts of Parliament against self-executing provisions of the Constitution. In order to get rid of this paradox a private member's bill (the so-called Halsema-bill[31]) was presented in 2002, introducing constitutional judicial review by all courts of Acts of Parliament with regard to their (in)compatibility with specific fundamental rights provisions in the Constitution. This bill was adopted in the first reading but did not get a second reading and was declared to be expired in 2018. However, the 'State Committee on the Parliamentary System' (Commissie-Remkes) in 2018 recommended the introduction of judicial constitutional review by a Constitutional Court, which was the beginning of a new political debate about the necessity of judicial constitutional review.[32] As pointed out in the Introduction, the Child Allowance Case has further stimulated the debate on constitutional review. The presumption is, that the option of constitutional review in that

[31] *Kamerstukken II* 2001/02, 28331, nr. 2.

[32] Commissie-Remkes, *Lage drempels, hoge dijken. Eindrapport van de staatscommissie parlementair stelsel*, Amsterdam: Boom 2018, p. 195–216.

case would have prevented or at least stopped the harsh and unjust treatment of parents and their children.

Indeed, the introduction of judicial constitutional review is not a strange idea. It must be stressed that the case law indicates that Dutch courts are quite capable of playing the role of constitutional courts, delivering judgments that have a great impact – on law, politics, and society. For instance, an important breakthrough was achieved in the legalization of euthanasia, where the courts formulated criteria that later on were codified. Applying the European Convention on Human Rights and EU directives has put serious limits on asylum and family reunification policies. An exceptional judgment was given in the Urgenda-case (2019), in which the Court of Cassation ordered the state to reduce in 2020 the carbon dioxide (CO2) emissions by 25% in comparison to the level of emission in 1990.[33]

The recommendation of the State Committee on the Parliamentary System made it into the (cabinet) Rutte-IV coalition agreement, expressing the intention to introduce constitutional review.[34] Introduction of judicial review requires answering various questions, such as which court(s) should be allowed to test Acts of Parliament against the Constitution; what parts of constitutional law would be involved – whether the Kingdom Charter and unwritten legal principles would also be included; and what would be the outcome of testing laws against the Constitution. In 2022 the government published a paper in which she expressed her intention to introduce a modest form of constitutional review.[35] Only the self-executing classic rights and freedoms in the Constitution – equality norms and fundamental freedoms – would be involved, implying that social rights and institutional provisions, the Kingdom Charter, and legal principles will not be qualified as standards. As to which court(s) could function as constitutional judges the government rejected the option of a specialized Constitutional court as suggested by the State Committee. She favored the current system, in which all courts, testing national law including Acts of

[33] Hoge Raad 20 december 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

[34] Bijlage bij *Kamerstukken II* 2021/22, 35788, nr. 77, p. 2.

[35] *Kamerstukken II* 2021/22, 35925-VII, nr. 169; H.G. Hoogers, 'Kroniek van een aangekondigde revolutie: de hoofdlijnenbrief inzake constitutionele toetsing', *Tijdschrift voor Constitutioneel Recht* 2022-4, p. 274–294.

Parliament against treaties and EU law, in fact already are functioning as constitutional courts. The courts would only be competent to apply the constitutional standards *in concreto*, which in case of conflict with a provision in an Act of Parliament would lead to not applying that provision in the *specific case*.

The government proposal would probably not lead to fundamental changes in the case law. The classic constitutional rights correspond to provisions in treaties like the European Convention on Human Rights and the EU Charter of Fundamental Rights. Furthermore, many constitutional provisions give the legislature wide competencies to regulate. Most fundamental rights in the Constitution are accompanied by a clause that allows for restricting the specific right by Act of Parliament, often without containing any substantive guarantees. It is sufficient if the restriction is laid down in such a law, irrespective of the content and severity of the restriction.

Nevertheless, a relevant difference between international and EU rights and Dutch constitutional rights is, that the legality principle in the Dutch context is much stricter: restrictions on constitutional rights must be precise and explicit and must be clearly demarcated. We deem it probable that if constitutional review were introduced, the courts would take the constitutional rights and the international rights together, and apply a holistic interpretation, reading international standards in the constitutional provisions. Such 'reading together' of constitutional and international standards is not uncommon, and is the standard approach of the Belgian Constitutional Court.

3.3. What about the proportionality principle?

In the meantime, there is yet another initiative that intends to introduce a form of *de facto* constitutional review. The major issue arising from the Childcare Allowance Case was the disproportionality of the reactions of the administration with regard to often minor administrative mistakes and incorrections, and the ineffectiveness of the protection provided by the administrative courts. In order to prevent that in the future, the Minister of the Interior has produced a draft proposal for a fundamental change of the General administrative law (Algemene wet bestuursrecht, Awb). According to this proposal Article 3:4 section 2 of the Awb will read: 'The ad-

verse consequences of a decision for one or more interested parties may not be disproportionate in relation to the objectives to be served by the decision, *even though section 1 limits the weighing of interests*'.[36] The ratio of this proposed new version of Article 3:4 section 2 of the Awb is to oblige the administration and the courts to unconditionally give primacy to the proportionality principle, even if that would imply the non-application of a power that is bound by strict conditions in a specific Act of Parliament. The result will be, that in every case where the administration or the court finds that a (provision of a) specific Act of Parliament works out disproportionately, that law should not be applied, in favor of the proportionality principle. That would be incompatible with Article 120 of the Constitution, which does not allow for the non-application of a strict legal provision because of a possible conflict with the unwritten proportionality principle.[37] It seems that the proposal in fact elevates the proportionality principle to a higher written norm, that surpasses and sets aside all other legal norms, including provisions in Acts of Parliament.

It is not evident that this proposal will be laid down in a draft, let aside will be accepted by the legislature. It seems that it intends to create an overarching norm, superior to other norms in Acts of Parliament. If adopted, it is unclear whether the legislature still would be competent to deviate from this norm by way of a *lex posterior* or a *lex specialis*. The explanatory memorandum does not clarify that. If indeed other provisions could not overrule this norm but always would have to give way for this norm, it would have the character of a superior rule, which would in fact be a constitutional super-norm higher than 'ordinary' Acts of Parliament and higher than the Constitution itself.

[36] Article 3:4 section 1 of the Algemene wet bestuursrecht reads: 'The administrative body weighs the interests directly involved in the decision, insofar as a restriction does not arise from a legal provision or from the nature of the power to be exercised.'

[37] Unless the exceptional adverse consequences of the application of that provision in the case at hand were unforeseen by the legislature (see paragraph 3.1.).

4. Final remarks

The Netherlands is one of few liberal democratic states that has no judicial constitutional review of Acts of Parliament: the legislature is the final interpreter and guarantor of the Constitution. The possible 'gap' that this constellation creates is in part compensated by an elaborate *ex ante* constitutional review during the legislative process. Furthermore, there is in fact a kind of constitutional review in that (all) courts are competent to test Acts of Parliament against self-executing international treaties and EU law with direct effect. Thus in a material sense, there is a modus of judicial constitutional review, in particular giving protection to fundamental rights. In short: the effective Dutch constitution is the European Convention on Human Rights and the Charter of Fundamental Rights of the EU; and the Dutch courts, together with the European Court of Human Rights and the Court of Justice, are its 'constitutional courts'.

There are nevertheless plans to introduce judicial constitutional review, with judges competent to test Acts of Parliament against the Dutch Constitution. It might be that that will be accompanied by the creation of a Constitutional Court. However, that Court would not fit in nicely in the current system of legal protection, in which all Dutch courts are *de facto* constitutional courts. We assume that, if ever judicial review is introduced, the current system will be maintained. Furthermore, a draft proposal has been made public that seems to attribute a superior status to the proportionality principle. This plan is yet unripe and leaves various questions unanswered.

The calls for constitutional review and a stronger position of the principle of proportionality and other legal principles stem from dissatisfaction in society and politics with the functioning of the various actors of the state, in particular the administrative bodies but also the administrative courts and the legislature. The waves of criticism since 2020 have been triggered by the Childcare Allowance Case, but also by other cases of dysfunctioning of vital public institutions. That criticism has led to internal reflections, resulting in good intentions and promising projects to improve the functioning of administrative bodies and courts.[38] As far as we can see, this

[38] Raad van State (Council of State), *Lessen uit de kinderopvangtoeslagzaken*, Den Haag, November 2021.

at least has led the courts to be more critical towards governments and administrative bodies, culminating in a stricter review.

The administration however is overburdened, and often seems unable to adequately deliver essential goods, services, and decisions: its effectivity and efficiency are at stake. It is doubtful whether more judicialization and constitutionalization, further limiting its margin of discretion and appreciation, will solve the lack of energy and capacity of the administration. The structural lack of resources, together with problems of political and social fragmentation and massive challenges (climate change, refugee crises), will not be solved by good laws and good courts.

But of course, good laws and good courts will at least help. We hope and believe that the Council of State, both its Advisory Division and its Administrative Jurisdiction Division, in their capacity as a legislative advisor and administrative court respectively, will make a meaningful contribution.

Appendix

Assessment Framework of the Advisory Division of the Dutch Council of State[39]

Constitutional and legal analysis

A. Relation to higher-ranking law

Constitution

– Could the proposed legislation put limits on the exercise of fundamental rights (classic rights), and if so, is there a justification for this? (see further below)

– How should the proposed legislation be assessed in light of fundamental social rights?

– How should the proposed legislation be assessed in light of institutional principles, such as the primacy of the legislator, ministerial responsibility and the relationship between different levels of government?

– How should the proposed legislation be assessed in light of the principles, conventions and rules that are the basis of or arise from the Constitution?

Charter of the Kingdom of the Netherlands

– How should the proposed legislation be assessed in light of the Charter of the Kingdom of the Netherlands, also in relation to the Constitution (particularly when it comes to the relationship between the countries and the Kingdom)?

Law of the European Union

– Is there (specific) EU legislation in this policy area applicable? If so, how should the proposed legislation be assessed in light of this legislation?

– Does EU law leave room for national legislation? If so, is this legislation compatible with the Treaty on the EU and the Treaty on the Functioning of the EU. And, in that connection, is there any justification for limiting rights arising from EU law, partly with a view to the proportionality of the proposal?

– Does the Charter of Fundamental Rights of the EU apply to the proposed legislation? If so, could the proposed legislation limit the exercise of rights contained therein, and is there any justification for this?

[39] Given the topic of this article, only the legal and constitutional analysis is included in this appendix.

Treaties

– Is there (specific) treaty law in this policy area? If so, what is the relation of the proposed legislation to it?

– Could the proposed legislation limit the exercise of classic human rights based upon treaty law, and is there any justification for this?

– How should the proposed legislation be assessed in light of social human rights?

Restrictions on constitutional and human rights

– Is there a restriction of the exercise of fundamental rights or human rights based on the Constitution, the Charter of Fundamental Rights of the EU or treaty law?

– If there is a restriction of constitutional fundamental rights, is this restriction based on an act adopted by government and parliament, as required by the Constitution, that explicitly intends to provide for such a restriction (specificity)?

– Is the restriction sufficiently accessible and foreseeable?

– Does the restriction serve a legitimate purpose, and does this purpose meet the applicable criteria?

– Is the restriction necessary in a democratic society? Does the restriction meet an urgent social need, as well as the requirements of proportionality and subsidiarity?

– To what extent do the Constitution, the Charter of Fundamental Rights of the EU and/or treaty law offer similar protection?

General principles of law

– How should the proposed legislation be assessed in light of general principles of law, such as the principles of legal certainty, equality before the law and proportionality?

B. Legal systemic aspects

General

– Does the proposed legislation fit within legislation concerning the organisation of relevant institutions, general legislation, framework legislation and sectoral legislation?

– Has the need for digital translation into algorithms been taken into account?

– Is the draft legislation plain and clear, partly in view of pre-existing legislation in the specific policy area?

– Is constancy of legislation being pursued?

Competence

– Which body has been assigned responsibility (actor/party to which the standard applies)? National-provincial/region-municipality-water authorities-Caribbean Netherlands? Private or public/semi-public entities? Is this the correct body?

– At what level will the proposed legislation be effected (law, governmental decree, ministerial decree)? Is that the correct level?

– Are the foundations for delegation, mandate and power-sharing adequate?

Discretionary powers

– What competence, discretionary powers or powers to set standards does the body responsible require? Is any authority to deviate desirable/necessary due to possible undesired effects? Are hardship clauses necessary?

Supervision, enforcement and legal protection

– Have provisions been made for legal protection? Is legal protection ensured in the digital translation of the law, such as in algorithms?

– What sanctioning system will be used to enforce the proposed legislation (disciplinary law, administrative law, criminal law, private law or dual), and what are the reasons for this choice? Is this the most appropriate sanctioning system in this case?

– In which authority will the supervision and/or enforcement be placed? Is this the correct authority?

– What supervision and/or enforcement instruments are required? Has this been included in the proposal?

Transitional law and evaluation

– Have (specific) transitional provisions been included?

– Is there evidence of experimental provisions, and if so, how were these drafted?

– Does the proposed legislation contain a provision for monitoring?

– Is an evaluation clause necessary? If so, what evaluation criteria should be applied, and is it explained why these criteria would result in a useful evaluation?

Explanatory notes to the assessment framework

Relation to higher-ranking law: Constitution, Charter of the Kingdom, EU law, treaty law and general legal principles

In forming its opinion, the Advisory Division examines whether the relevant provisions and principles of the constitutional framework have

been sufficiently incorporated, and their implications thought through, when the legislation was drafted. A proposal must sufficiently explain how a proposal fits within this framework, while the points considered must be plainly and adequately substantiated. In addition, it must be emphasised that this is a comprehensive assessment: fundamental rights and constitutional standards and principles must not be seen in isolation, but always as forming an interdependent whole. Therefore, there must be consistent regard for the relationship between the Constitution, the Charter of the Kingdom of the Netherlands1 and treaty law.

Laws and regulations must be compatible with various written and unwritten constitutional standards. Concomitantly, this holds not only for fundamental rights, but also for institutional standards. To this end, both written and unwritten legal principles are relevant, such as the principle of legal certainty, the principle of proportionality, equality before the law, the principle of legality, the primacy of the legislator and subsidiarity. Classic and social fundamental rights are enshrined in the Constitution, as well as in EU law and treaty law. The latter refers to, among others, the International Covenant on Civil and Political Rights (ICCPR); the European Convention on Human Rights and Fundamental Freedoms (ECHR); and the Charter of Fundamental Rights of the European Union. The standards set by these treaties are further explained in national, international and European case law. Both the Constitution and various treaties have provisions for their own detailed system of justifying restrictions on fundamental rights and human rights, some of which are developed in case law.

Institutional standards are grounded in the Constitution and statutory law. The relevant provisions concern the organisation and powers of the primary offices of the State. Fundamental laws, principles and conventions arise from these provisions, which are intrinsically bound up with ministerial responsibility and the autonomy of local governments. These standards pertain to democratic checks on public governance, the organisation of governance and the interrelationship between the different levels of government. Hence, these standards have implications for the legislative system, including the relationship to legislation regarding the organisation of one or more institutions, designation of the responsible bodies and the allocation of powers. There may also be implications arising from EU law and international law on these points.

Relation to higher-ranking law: EU law and (specific) treaties

In many policy areas, there are existing treaties with specific standards that are relevant to national laws and regulations, such as in the areas of environmental law, asylum law, international private law and fiscal law. Treaties to which the Netherlands is a party take priority over na-

tional law and are binding on the legislator, regardless of whether any one in particular contains binding clauses. Therefore, provisions included in treaty law represent standards that determine actions, which means that laws and regulations must be compatible with the provisions included in these treaties. For proper compliance and understanding of treaty law, the Vienna Convention on the Law of Treaties is also relevant.

When drawing up laws and regulations, EU law demands separate consideration. EU law constitutes its own legal order, based on the principles of direct effect and primacy, which are interwoven into the national legal order. National laws and regulations must be compatible with the EU treaties, and the legislative acts of the EU based upon them, such as the General Data Protection Regulation and the Services Directive. Certain EU legislation must, in order to be given full effect, be transposed into the national law of the Member States (i.e. 'implementation'). In some areas, EU law sets limits restricting the powers of the national legislator. This may apply to the content of substantive norms as well as to the institutional design, such as the organisation of oversight and enforcement.

From that perspective, it is relevant to know to what extent the EU has legislative authority in a particular policy area, and whether the EU legislator has enacted or announced legislation in that area. Where that is not the case, the proposed legislation will have to be in conformity with the EU treaties, including the rules concerning citizenship of the EU, free movement and competition law (among others those concerning state aid). If the subject has already been covered by EU legislation (i.e. it has been 'harmonised'), EU law determines the discretionary powers for drawing up national legislation. Where there is full harmonisation, such discretion does not (generally speaking) exist. If there is only partial or minimum harmonisation, that discretion is present, but national legislation must be in line with the limits imposed on that discretion by the concerned EU legislation, and more far-reaching or deviating national regulations must in any event accord with the EU treaties.

Legal systemic aspects

Draft legislation must be further examined in light of the Dutch legal system in its entirety, and in particular to legislation concerning the organisation of relevant institutions, such as municipal and provincial by-laws, as well as to general law, such as the General Administrative Law Act and the Dutch Civil Code, framework laws, such as the Environmental Management Act or the Non-departmental Public Bodies Framework Act, and sectoral law. It goes without saying that the existing legal system is not static, and a reason may arise requiring examination of whether existing legislation must be revised when preparing draft legislation. The goal

is to prevent accumulation of laws and regulations that cover the same issues without any further consideration.

In addition, this section of the assessment framework contains questions relating to the organising function of laws and regulations. Has the intended solution been adequately translated in the proposal? The wording and content of the proposed legislation must make clear what is expected of the parties involved, and what they can depend on.

If digital technologies are going to be used in the implementation, one needs to know at an early stage whether provisions of the law have to be translated into algorithms, and if so, which algorithms will be used. In case of machine learning (artificial intelligence or AI), one needs to put higher standards on the logical and systematic structure of a piece of legislation, and on the consistent use of terminology. This means, among other things, checking that the definitions used by the legislator are consistent, and an examination of whether existing legal terminology has to be defined differently, so that, what the legislator intends, actually appears in the digital implementation. In the interest of clear communication, it is also important to record the method of conversion in a specification file.

Questions pertaining to the legal system cannot be answered without an adequate policy analysis. Is the party who emerges in the problem analysis as the responsible party the same as the one indicated in the proposal? And has this party actually been given the means to take on the responsibility? Has the correct legal basis been used? And does this party have the discretionary power to, where necessary, apply tailor-made solutions? Have sufficient powers been allocated to this end? Has a provision like a hardship clause been added (where necessary) in order to prevent those involved from undergoing any undesired effects? Has adequate legal protection been incorporated? If automated or partially automated decision-making has been included, competent bodies must be given enough capacity to weigh up all the facts and circumstances by means of human interventions, and to repair errors.

The section in the assessment framework on the legal system therefore deals with whether the proposal presents an adequate (legal) translation of the way the problem is being approached. The relevant questions pertain to the text itself, as well as to the form and content of the draft law or regulation. As far as the wording and structure are concerned, the Advisory Division only highlights major technical shortcomings in law.