CONSTITUTIONAL IDOLATRY OR IRRELEVANCE IN TIMES OF CRISIS? THE CASE OF THE NETHERLANDS

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ABSTRACT

Constitutional idolatry is a foreign concept to the Netherlands. Although the country is a mature democracy with one of the oldest constitutions in the world, the Constitution does not live in the hearts and minds of the people. Scholars, moreover, downplay its importance for the domestic legal order. The sudden public infatuation with the Constitution during the COVID-19 crisis was thus quite a shock to the system. This article explains why the Constitution normally plays a modest role in society and explores whether the COVID-19 crisis and childcare benefit scandal have changed anything in this respect. It is argued that the Constitution of the Netherlands is not adopted by and for the people but is written for the state and its institutions instead. Consequently, the Constitution does not appeal to the people. The abolition of the prohibition of constitutional review, which is seriously considered after the childcare benefit scandal, would resolve this problem only in part.

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I. INTRODUCTION

In his book *Constitutional Idolatry and Democracy*, Brian Christopher Jones defines constitutional idolatry as 'drastically or persistently over-selling the importance and effects of written constitutions' (Jones 2020, 2). Julicher aptly described this concept as "rather foreign" to the Netherlands (Julicher 2021a). Instead of venerating the Dutch constitution, legal scholars rather downplay the importance of this—more than two centuries old—document. The Constitution is said to be "invisible,"[2] "incomprehensible" (de Meij 1998, 210–12), "of increasingly little practical and symbolic value" (Gerards 2016, 207), "unknown" (Oomen & Lelieveldt 2008, 577–78), not reflective of constitutional reality (Kummeling and Zwart 2001, 35–36), and "relatively unimportant in the legal order" (Oomen 2016, 245). Others deploy more loaded terms: they characterize the Constitution as "uninspiring" (Adams and van der Schyff 2017, 366), a wall flower (Couwenberg 2003, 127), a "pathetic little tree" (Peters 2003), "unloved" (Voermans 2014), and in dire need of "a kiss of life" (Haan et al. 2014).

The aim of this contribution is twofold. First, it examines why constitutional idolatry is such a foreign concept to Dutch constitutional culture. What explains the relativistic and sometimes even condescending attitude of legal scholars towards the Constitution, and why does this document play such a minor role in political debates and in society? To answer this question, this article considers not only the basic features and peculiar elements of the constitutional document itself, but also its historical development. (§ 2)

The second part of this contribution explores whether, and if so, to what extent, recent crises in the Netherlands have led to renewed attention for the Constitution (§ 3). Did the COVID-19 crisis and the childcare benefit scandal expose either the importance or the inability of the Constitution to steer important public debates and decisions? And to what extent did these crises change something about the legal and public perception of the Constitution, or something in the Constitution itself?

2. As was the title of a symposium organized by the Ministry of Interior Affairs on February 27, 2008. See "*De onzichtbare Grondwet: woord- en beeld verslag van het Symposium op 27 februari 2008*." *The Hague*, 2008.

II. THE INSIGNIFICANCE OF THE CONSTITUTION FOR THE PEOPLE OF THE NETHERLANDS

In the "age of constitutionalism" (Loughlin 2022, 16ff., 109ff.), the Constitution of the Netherlands is an anomaly. Unlike many other constitutions around the world, the Dutch Constitution is not "drafted in the name of the people," it is not "designed to establish a comprehensive scheme of Government," nor does it qualify as a foundational law that entrusts the judiciary with "the responsibility of acting as its guardian" (Loughlin 2022, 3–7). Instead, it is a sober document with a modest ambition and a long history, characterized by a high level of pragmatism.

A. The Founding Fathers' Aversion to Ideology and Popular Sovereignty

The Constitution of the Netherlands dates from 1814, and its contemporary character is still largely influenced by how its founding fathers approached and viewed this document. They did not want an ideologically inspired Constitution like its predecessor, the *Bataafsche Staatsregeling* (1798). The *Bataafsche Staatsregeling* was the first written constitution of the Netherlands and resulted from the Batavian Revolution (1794–1799). The Batavian Revolution put an end to the confederate structure of the Republic of the Seven United Netherlands (1588–1795). In the Republic of the Seven United Netherlands, each of the seven provinces was sovereign over its own territory. The administrative assemblies of the provinces (the so-called *Staten*) sent representatives to a general assembly (the *Staten-Generaal*) to discuss matters that concerned the Republic as a whole. Since the members of the *Staten-Generaal* were bound by strict instructions from the Staten of the provinces they represented (Van Vugt 2021, 35), power "rested firmly in the hands of the individual provinces" (Andeweg and Irwin 2009, 15). At the head of the provinces stood a stadtholder endowed with the supreme command over army and fleet. The stadtholderate was declared heritable in 1747, meaning that only descendants of William of Orange (1533–1584)[3] could obtain the position of stadtholder.

The *Bataafsche Staatsregeling* of 1798 was clearly inspired by the Enlightenment. It came into being after the French supported a coup d'état by a group of radical unitarists (Andeweg and Irving 2009, 16). Since the Netherlands were no longer a confederation of provinces but a unitary state, sovereignty within the Netherlands

3. William of Orange was stadtholder and leader of the revolt against the Spanish king that ultimately led to the independence of the provinces in 1588.

no longer resided with the *Staten* of the provinces. Instead, Article 9 of the *Staatsregeling* allocated the "supreme power," which was absolute and indivisible and the source of all public power, in "The Batavian People" (Velde 2019, 164). The Batavian Republic was, however, short lived. In 1806 Napoleon replaced it with the Kingdom of Holland, which was incorporated in the French Empire in 1810. As a result of the defeat Napoleon suffered in 1813, he withdrew his troops and the Netherlands became independent again.

After regaining national independence, the drafters of the Constitution of 1814 abstained from articulating the essential values and principles upon which government was founded. The negative connotations with the ideological nature of the *Bataafsche Staatsregeling* caused the chair of the 1814 Constitutional Committee to say that the ideological theories had only made them miserable (Colenbrander 1908, 81). Since the experiments with democracy and popular sovereignty had resulted in ineffective decision-making, a coup d'état, and foreign occupation, "the idea of popular sovereignty was to be completely set aside" (Van Hogendorp 1866, 85). The drafters adopted a more neutral stance instead: the Constitution had to provide the basic instructions for the organization of the state and function as a statute for governmental powers (Van der Tang 2003, 237). The angle was pragmatic: the idea was to improve the weak parts of the old constitution of the Republic of the Seven Netherlands "without unnecessary changes, while keeping the old customs, rights, institutions and even names to which the nation [was] so emotionally attached" (Colenbrander 1908, 56–57).

Although the 1814 Constitution maintained the unitary state, it recycled some elements from the time of the Republic of the Seven Netherlands. For example, while the Constitution established a constitutional monarchy, it vested the "[s]overeignty over the United Netherlands" in the son of the last stadtholder: Prince Willem Frederik van Oranje-Nassau and his descendants.[4] This concept of sovereignty was not understood as a source from which all public power emanates. On the contrary, it was the Constitution itself from which this sovereign derived his power.[5] His power was not absolute either. The Constitution attributed full executive power to the Prince of Oranje-Nassau, but the legislative and budgetary powers had to be exercised in partnership with the *Staten-Generaal*.

4. Article 1 of the Constitution of the Kingdom of the Netherlands of 1814. Hereafter cited as DC (1814).

5. This was reflected *inter alia* in the obligation for the Prince of Oranje-Nassau to take an oath to sustain and enforce the Constitution upon inauguration, as stipulated in Article 28, DC (1814).

Indeed, the 1814 Constitution restored the *Staten-Generaal*, but did so only in name: Article 52 did not identify this institution as the general assembly of the representatives of the various provinces but stated that "the *Staten-Generaal* represent the *entire* people of the Netherlands" (Van Vugt 2021, 331). The people of the Netherlands were not seen as a sovereign entity,[6] nor did the Constitution provide them with a right to elect their representatives. The members of the *Staten-Generaal* were instead appointed by the *Staten* of the provinces,[7] but the Constitution stipulated they were not bound to instructions of these councils.[8] After all, the members of the *Staten-Generaal* were now expected to promote the general interest of the Netherlands as a whole and not the respective interests of the various provinces (Van Vugt 2021, 331).

B. A Statute for the State and Its Institutions

1. Article ZERO: Not a Preamble but a Proclamation on the Function of the Constitution

The 1814 Constitution was never replaced by a new document: it is like an old house that was never demolished, had some of its rooms renovated and its front cleaned, but was mostly subjected to maintenance. Until today, the Netherlands is a constitutional monarchy, albeit further developed and democratized both through constitutional amendments and through changes that happened outside of the Constitution (Aerts 2016, 56). As a result, the contemporary Constitution still embodies the nineteenth-century spirit of a legal document that primarily organizes the position of and relationships between the state institutions. Against this background, it is not difficult to understand why the Constitution plays such a minor role in Dutch society. After all, the Dutch Constitution is not a document of the people (Jones 2020, 10; Ackerman 1997). The people were not directly involved in the adoption of the 1814 Constitution (Efthymiou 2019, 24–50), nor were they ever granted a role in the formal amendment procedure. Until 1848, constitutional amendments that were approved by government and Parliament had to be adopted by an extraordinary assembly of Parliament, in the sense that the *Staten* would appoint additional members to vote for a constitutional amendment. Ever since 1848 the amendment procedure consists of two rounds ("readings") with intervening elections for the Lower House. The intervening elections do not function as a plebiscite about the proposed amendment but aim to guarantee

6. Article 53, DC (1814), defined the people of the Netherlands as all the inhabitants of the provinces and counties that together formed the territory of the Netherlands.

7. Article 56, DC (1814).

8. Article 62, DC (1814).

that the Lower House that decides on the proposed amendment in the second reading is truly representative of the people (Van Vugt and Van Gennip 2023, 260).

Indeed, the Dutch Constitution does not mention anything at all about a constituent power or sovereign entity from which this document derives its authority (Oomen 2016, 243; Grimm 2015, 40). Instead, it is often characterized as a sober document (Adams and Van der Schyff 2017, 363; Oomen 2016, 243). It lacks a ceremonial or symbolic preamble that "serves to consolidate national identity" (Orgad 2010, 715). The Constitution does not articulate the characteristics of the people of the Netherlands nor what they aspire to be. Until very recently, the Constitution simply began with Article 1, which states, "All persons in the Netherlands shall be treated equally in equal circumstances."

It is only since August 2022 that the Constitution starts with a general provision, numbered as Article ZERO. This provision states, "The Constitution safeguards the fundamental rights and the *democratische rechtsstaat*." This is the first time in the history of the Dutch Constitution that it clearly articulates some fundamental values. It does so in an unusual way, though. Article ZERO does not phrase these values as the foundations of the state or of the Dutch legal order, nor as the aspirations of the nation. Instead, they form part of what one could call a function description of the Constitution: Article ZERO clarifies and confirms that the provisions in the Constitution function as safeguards for fundamental rights, democracy, and the rule of law (Goossens and Kuijvenhoven 2022). The open-ended wording thereby leaves undetermined what these fundamental values entail or require (Stremler 2023). Their precise content has to follow from the interpretation of the constitutional provisions as a whole. In turn, individual provisions in the Constitution will—as of now—also be interpreted in the light of the fundamental values expressed in Article ZERO. The expectation is therefore that this provision will probably serve as a guiding framework for the interpretation of the Constitution (Orgad 2010, 715),[9] but not as a "binding agent" for society (Hertogh 2008).

2. The Legislature as the Primary Addressee of the Constitution

The Constitution does not provide the people with a sense of or guidance for a common constitutional culture and identity. As a matter of fact, its text is not even directed at them. The Constitution qualifies, rather, as a "soldiers handbook" for the institutions of the state (Oomen 2016, 244). It identifies several state institutions, assigns a particular (legislative, administrative, judicial or advisory) function to these institutions,

9. In that sense, one could qualify Article Zero as an interpretative preamble, one that is granted a guiding role in statutory and constitutional interpretation.

and broadly outlines their powers (Staatscommissie Grondwet 2010, 23–24; Julicher 2021b, 2501). At the same time, the Constitution leaves the institutions considerable room to give meaning and further effect to these constitutional norms. This applies in particular to the main addressee of the Constitution: the legislature. According to Article 81, laws in the Netherlands are enacted jointly by the government, formed by the king and the ministers, and Parliament, consisting of the Lower and Upper House.[10]

The Constitution grants the legislature a pivotal role in further developing constitutional law. A significant number of constitutional provisions assign to the legislature the task of regulating certain constitutional matters. Article 2 (1), for example, states that "the law" (to be interpreted as: the legislature) determines who is a Dutch citizen, and Article 132 (1) authorizes the legislature to regulate the organization of the provinces and municipalities and the composition and competences of their administrative organs. Other constitutional provisions first stipulate the general rule and then permit the legislature to give further meaning and effect to that rule (De Visser 2022, 222).[11] Article 53 (1), for example, states, "the members of both Houses shall be elected by proportional representation *within the limits to be laid down by law*." Another example is Article 91 (1), which states first that "the Kingdom of the Netherlands cannot be bound by treaties without the prior approval of Parliament" but in the second sentence determines that "the law stipulates the cases in which approval is not required."

The pivotal role of the legislature is also apparent in the constitutional amendment procedure. As described, this procedure consists of two rounds, or readings. In the first reading the legislature has to enact a law that declares that one or more changes to the Constitution shall be considered.[12] After publication of this so-called Consideration Act, the Lower House has to be re-elected before it can consider the proposed changes to the Constitution in the second reading. If the new Lower House fails to make a decision before the next elections, the proposal ceases to exist and the amendment procedure is ended (Van Vugt and Van Gennip 2023, 261ff.). If the Lower

10. Both government and the Lower House are permitted to submit proposals for legislation (Article 82 [1]). The latter also has the power to amend these proposals (Article 84). When the Lower House adopts a legislative proposal, it is sent to the Upper House (Article 85). The legislative proposal becomes law once it is approved by both Houses with a majority of votes and ratified by the government (Article 87 [1]). It should be noted that government and Parliament are two separate institutions: members of Parliament cannot also be ministers (Article 57[2]).

11. As stated by De Visser (2022), "[M]ost provisions are written in deliberately succinct and general terms to be operationalized and fleshed out by future legislation."

12. The adoption of this act takes place according to the ordinary legislative procedure, as regulated by Articles 81–88 of the Constitution.

House adopts the amendment proposal, it is sent to the Upper House. Both Houses can adopt the constitutional amendment in second reading only with a majority of at least two-thirds of the votes cast. The Constitution sets out only the procedures for amendment (Garoupa and Botelho 2021, 219). It does not lay down any substantive rules that determine what parts of the Constitution can and cannot be amended (De Visser 2022, 223).[13] Indeed, any change that the government and a qualified majority in both Houses of Parliament agree on will be made to the Constitution. The Constitution thus leaves fully to the discretion of the legislature—albeit the legislature 2.0—the reasons why and the extent to which the Constitution can be amended.

Since the Constitution is primarily addressed to the legislature and not to the people, it is written in a very technical-legal language. As a result, the Constitution is rather inaccessible for the general public. The complex language manifests itself particularly in the terminology used to indicate whether the legislature is authorized to delegate its regulatory competences to administrative organs. Article 116 (2), for example, states that "the organization, composition and powers of the judiciary shall be *regulated* by law." The word *regulate* is used to signify that the legislature is permitted to delegate its regulatory competences in these matters to administrative organs.[14] The same goes for the phrase "by or pursuant to law."[15] When a provision merely states "by law," "in accordance with the law," or "the law determines," "identifies," or "establishes" (instead of "regulates"), delegation by the legislature is prohibited (Kortmann 2008, 10). Even for lawyers it is difficult to notice and to understand the difference between the phrase "in accordance with the law" (delegation is not permitted) and "by or pursuant to law" (delegation is permitted), let alone for other members of society.

3. Constitutional Rights and the Emphasis on Competence

That the Constitution is not directed toward the people but to the legislature becomes even more clear upon close inspection of chapter 1 of the Dutch Constitution. Although chapter 1 lays down the constitutional rights of citizens and other residents of the Netherlands, the provisions read as an instruction for the legislature as to whether it may delegate its competence to restrict rights to administrative

13. As De Visser points out, nothing in the Constitution "declares itself, or is considered, unamendable." In her view, this "is typical of older constitutions but goes against a growing trend in favor of eternity clauses."

14. Article 59 states in a similar vein that "all other matters pertaining to the right to vote and to elections shall be *regulated* by law."

15. See, e.g., Article 79 ("Permanent bodies to advise on matters relating to legislation and to the administration of the state shall be established by *or pursuant to* law"), and Article 134 ("Public bodies for the professions and trades and other public bodies may be established and dissolved by *or pursuant to* law").

organs (Adams and Van der Schyff 2017, 363–64). While rights provisions in constitutions and international human rights treaties normally contain clauses that articulate the reasons for and the extent to which an individual right may be restricted,[16] the scheme of rights restriction in the Dutch Constitution is mainly based on the question which governing body is authorized to restrict these rights.

Article 7 (1), for instance, states that "no one requires prior permission to publish thoughts or opinions through the press, save for everyone's responsibilities under the law." The terminology ("under the law") tells us that the freedom of press can be restricted only on the basis of a statute and that the legislature cannot authorize other administrative organs to do so. Article 10 (1), however, stipulates that "everyone has the right to respect for his privacy, save for the restrictions laid down by *or pursuant to* law." Restrictions to the right to privacy can thus be based on a decision from an administrative organ that was authorized to do so by the legislature, but only in certain circumstances and in accordance with specific conditions and within the limits set by law.

In light of the foregoing, Gerards argues that the Dutch Constitution leaves fully "to the discretion of the legislature when and under which substantive conditions the right could be restricted and which guarantees should be offered against arbitrary application" (Gerards 2016, 219). Again, this demonstrates that "great trust is placed in the legislative process" and hence in the political institutions "to take wise and well-considered decisions and to respect the Constitution" (Gerards 2016, 212, 219). Adams and Van der Schyff similarly state that "the Dutch Constitution puts its faith in the wisdom of the legislature when it comes to deciding sensitive matters such as the conditions under which rights should be protected" (Adams and Van der Schyff 2017, 363).

4. The Prohibition on Constitutional Review and the Obligation on Treaty Review

Another reason why the Constitution does not really appeal to the people of the Netherlands is that they can rarely invoke their constitutional rights in court. This is because of the prohibition of constitutional review by the judiciary. Indeed, the Netherlands is one of the very few constitutional democracies in the world that still prohibit courts from reviewing the constitutionality of statutes (Van der Schyff 2020).[17] The (in)famous Article 120 of the Constitution states, "The constitutionality of statutes and treaties shall not be reviewed by the courts." The prohibition on constitutional review was introduced in 1848, when the Constitution was largely

16. Cf. the restriction clauses in para. 2 of Articles 8 to 11 of the ECHR.

17. Van der Schyff refers to this phenomenon as "Dutch exceptionalism."

revised with the objective to strengthen the position of Parliament. The purpose of this ban was to prevent courts from setting aside statutes they deemed unconstitutional, since in the absence of the ban the judiciary would become the most powerful branch of government. After all, such a verdict would force the legislature to bring the law in line with the court's interpretation of the Constitution (Fleuren 2018, 248). The prohibition on constitutional review hence imposes a strict separation of powers between the legislature and the judiciary (Adams and Van der Schyff 2006, 399), shows that it is the primary responsibility of the former to interpret and uphold the Constitution, and thereby expresses the idea of the primacy of the legislature (De Poorter 2013).

Given these provisions, one might be inclined to think that in terms of rights protection, the people of the Netherlands are largely left at the mercy of the legislature. That is not the case, however. While Article 120 prohibits the courts from reviewing the constitutionality of statutes, Article 94 of the Constitution obliges them to review the application of these statutes for their compatibility with treaty law. Article 94 states that statutes cannot be applied if that application is incompatible with self-executing treaty provisions (Besselink 2003; Hirsch Ballin 2021, 299, 305). Treaty provisions are self-executing when they can be considered to have direct effect by virtue of their contents (Fleuren 2018, 248).[18] An important category of self-executing treaty provisions is found in the European Convention on Human Rights (ECHR). Since these provisions are considered to have direct effect, they take precedence over domestic law. This means that a court cannot apply domestic law if this application is incompatible with obligations that follow from the ECHR.[19] International human rights treaties (especially the ECHR) have therefore become far more important than the Constitution for the protection of citizens against the government (Fleuren 2018, 258; Gerards 2016, 217–18).

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18. The Constitution does not use the word *self-executing* but refers to "provisions which may be binding on all persons by virtue of their contents" [*bepalingen die naar haar inhoud een ieder kunnen verbinden*]. The *travaux préparatoires*, however, clearly demonstrate that the phrase "een ieder verbindende bepalingen" is to be interpreted as self-executing provisions.

19. E.g., Article 137c of the Dutch Criminal Code (DCC) prohibits group defamation. A conviction for that crime would constitute an interference in the freedom of expression. Article 10 (2) ECHR stipulates that this freedom may be subject only to restrictions that are "necessary in a democratic society," *inter alia* for 'the protection of the reputation or rights of others. Article 94 obliges a criminal court to assess whether a conviction for group defamation would meet these criteria. If not, such a conviction would be incompatible with Article 10 (2) ECHR, and Article 137c DCC should therefore not be applied.

C. The Constitution as an Unreliable Source of Dutch Constitutional Law

For the reasons presented in the previous sections, the Constitution does not appeal to the people: it is not adopted by or in the name of the people, it is not written for the people, and the people can rarely rely on it in court. It therefore comes as no surprise that the constitutional literacy rate in the Netherlands is low. In 2008, a survey showed that 84 percent of the respondents indicated they had limited or no knowledge to what is in this document, even though 94 percent of the respondents found the Constitution "fairly or very important." Indeed, 94 percent of the respondents gave wrong answers to three or more of the six knowledge questions they were asked (Oomen and Lelieveldt 2008, 10). A more recent survey, commissioned by the Ministry of Interior Affairs, reveals a similar picture. Although 89 percent of the people in the Netherlands view the Dutch Constitution as (very) important, only 26 percent think they have (good) knowledge of its content.[20]

One would be inclined to think that a low literacy rate can be improved by stimulating people to read more. It is questionable, however, whether reading the Constitution would actually result in a better understanding of Dutch constitutional law. Indeed, even if people were to make an effort to read the Constitution and engage with its normative content, they would probably come to realize that the Constitution does not paint a complete and accurate picture of the actual configuration of public power. Even though this document is generally considered to form the core of Dutch constitutional law (Groen et al. 2023, 57–58), it is far from exhaustive. Given its open structure, many constitutional norms need to be inferred from other sources. Think of statutes like the Provinces Act, the Municipalities Act, the Electoral Code, the Dutch Citizenship Act, and the Act on the Approval and Publication of Treaties. The same goes for certain international human rights treaties (in particular the ECHR), EU law, the parliamentary rules of procedure, and unwritten principles, as well as conventions that govern the relationship between the government and Parliament (Groen et al. 2023, 57–58).

Another reason why not every aspect relevant to the organization of the state and the relationship with its citizens is codified in the Constitution is that the Constitution is difficult to change. The combination of two readings, intervening elections, and the qualified-majority-rule aims to ensure broad and lasting political support for any change (Van Vugt and Van Gennip 2023, 266). However, it also

20. *Flitspeiling Grondwet*, February 28, 2023, https://open.overheid.nl/documenten/ronl-3156130ae-73c03fc97f119e161336d770c0912a2/pdf.

makes constitutional amendment a rather cumbersome process, especially considering the political context (Adams and Van der Schyff 2017, 369). Ever since the electoral system changed into a system of proportional representation in 1917, not one political party has managed to single-handedly obtain a majority of the seats in the House. Instead, majorities have to be formed by at least two (and more recently even four) parties. Since different parties have diverging and often even clashing ideals and interests, the threshold of a two-third majority is seldom achieved.

Constitutional amendment in the Netherlands hence only takes place in roughly two situations: in the exceptional case that sustained consensus exists regarding a certain subject or in cases of a nonissue, with which hardly anyone can disagree. Constitutional amendment in the Netherlands thus rarely brings about revolutionary changes to the material constitution (Gerards et al. 2023)—that is, to the body of "norms that establish the basic structure of the state and that regulate the legal relations between state and citizens."[21]

The arguments that a diverse range of advisory and constitutional committees put forward throughout the years in favor of radical revisions , especially regarding the parliamentary system, could not persuade a (qualified) majority in Parliament (Groen et al. 2023, 74). This also explains why the basic contours of government, as set out in the Constitution, have remained largely the same since the nineteenth century. This applies in particular to the political domain. Kummeling and Zwart, for example, state that when an outsider reads the Constitution for the first time and sees the number of provisions devoted to the king, he must assume that constitutional life revolves all around him (Kummeling and Zwart 2001, 36–37). While the king was indeed at the center of government in the early years of the kingdom, the development toward a parliamentary system in the nineteenth century, as well as the incremental democratization of that system (Van Vugt 2021, 304–7), moved him to a rather "peripheral position in the Dutch political system" (De Visser 2022, 224).

Because of the difficulty of amending the Constitution, many important changes to the structure and operation of government are not registered or reflected in this document. For instance, despite their vital role in articulating the political will and the formation of the government, political parties are not mentioned anywhere in the Constitution (Borz 2017, 100).[22] The cornerstone of the Dutch parliamentary system—the rule that ministers need to step down from office in the

21. In other words, the material constitution. See Colón-Rios (2020, 186).

22. The Netherlands is one of the few European countries that does not mention political parties in its constitution. The other countries are Belgium, Denmark, and Ireland. Luxemburg's constitution was revised in 2008 for the sole purpose of giving political parties constitutional status.

event that they no longer enjoy the confidence of a majority in Parliament—is not laid down in the Constitution either (De Visser 2022, 224). The same applies to the rules on the formation of the government after elections, which are only partly enshrined in the Rules of Procedure of the Lower House. Last, the Constitution nowhere mentions the European Union, while one could definitely argue that the embeddedness of the Dutch legal order in the European legal order is a fundamental part of the Dutch constitutional identity (Hirsch Ballin 2020, 209).

As a result, the Constitution tells only part of the story of Dutch constitutional law. What the public might expect to find in the Constitution is not always there. Research shows us, for example, that a large part of what "informed laymen," like law students and high school teachers in the Netherlands, view as the "essentials" of the Dutch constitutional order is not codified in this document (Julicher 2021b). The content of what *is* written in the Constitution is, moreover, hard to understand. For most constitutional provisions, one needs considerable background information on the history of the Netherlands, on the particular context in which the 1814 Constitution was drafted, and on the societal, political, and legal developments that took place after 1814 in order to make any sense of them. Since that already seems too much to ask from most lawyers, let alone from other members of society, "the Constitution slowly sinks away in irrelevance, becoming a relic of old-day times rather than a living instrument that may provide guidance and inspiration" (Gerards 2016, 229).

III. THE CONSTITUTION OF THE NETHERLANDS IN TIMES OF CRISIS

This section discusses to what extent recent crises in the Netherlands, most notably the COVID-19 pandemic and the childcare benefit scandal, have led to renewed attention for and perhaps even a revitalization of the Constitution. Did these crises expose the importance or rather the inability of the Constitution to steer the debate and decisions on these matters? And to what extent did these crises change something about the legal and public perception of the Constitution or in the Constitution itself?

A. The COVID-19 Crisis

1. The "Intelligent" Lockdown

March 16, 2020. Dutch prime minister Mark Rutte addresses the nation on the COVID-19 pandemic in a televised speech.[23] A week later, the Netherlands goes

23. "TV-toespraak van minister-president Mark Rutte," *Rijksoverheid*, March 16, 2020, https://www.rijksoverheid.nl/documenten/toespraken/2020/03/16/tv-toespraak-van-minister-president-mark-rutte.

into an "intelligent" lockdown.[24] Schools and daycare centers are closed. People are urged to stay home and to keep a physical distance of 1.5 meter from other people. People in "contact professions" (e.g., hairdressers and beauticians) are not allowed to practice them and all events are canceled.[25] For months people work or are taught from home, offices are empty, and the motorway is silent. When the government gradually relaxes the COVID-19 measures in June and July, it almost feels like things have gone back to normal. After summer, however, the number of new infections increases rapidly. The government steps up its measures to try to stop the infection from spreading, but to no avail. Ten days before Christmas, the prime minister addresses the nation again in a speech from his office, where he announces another lockdown.[26] The arrival of new variants of the COVID-19 virus, moreover, prompts the government on January 23, 2021, to introduce a curfew.[27] As a result, people cannot leave their homes between 9.00 p.m. and 4.30 a.m. unless they have a valid reason to do so.

The curfew set the tone for the rest of 2021. Because of a sharp increase of infections, people are forced to stay inside for five more months.[28] In May the number of infections decreases, the vaccination rate increases, and the end of the second lockdown is finally in sight. On presentation of a personal "corona QR code," people who are vaccinated, have recently recovered from COVID-19, or have tested negatively in the past twenty-four hours are allowed access to different public locations like the theatres, restaurants and cafés, and gyms (De Bree 2022). The vaccinations, however, prove not to be as effective against the Delta variant of

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24. "Letterlijke tekst persconferentie minister-president Rutte, ministers Grapperhaus, De Jonge en Van Rijn over aangescherpte maatregelen coronavirus," *Rijksoverheid*, March 23, 2020, https://www.rijksoverheid.nl/documenten/mediateksten/2020/03/23/persconferentie-minister-president-rutte-ministers-grapperhaus-de-jonge-en-van-rijn-over-aangescherpte-maatregelen-coronavirus#:~:text=Minister%2Dpresident%20Rutte%2C%20minister%20Grapperhaus,met%20minder%20dan%20100%20mensen.

25. "Aangescherpte maatregelen om het coronavirus onder controle te krijgen," *Rijksoverheid*, March 23, 2020, https://www.rijksoverheid.nl/actueel/nieuws/2020/03/23/aangescherpte-maatregelen-om-het-coronavirus-onder-controle-te-krijgen#:~:text=Blijf%20zoveel%20mogelijk%20thuis.,sociale%20activiteiten%20en%20groepen%20mensen.

26. "TV-toespraak van minister-president Mark Rutte over de lockdown," *Rijksoverheid*, December 14, 2020, https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/documenten/toespraken/2020/12/14/tv-toespraak-van-Minister-president-mark-rutte.

27. *Staatscourant* [Official Gazette], no. 4191, January 22, 2021, https://zoek.officielebekendmakingen.nl/stcrt-2021-4191.pdf.

28. "Coronavirus Timeline 2021," *Rijksoverheid*, https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/2021.

the virus. In November 2021 the Netherlands enters a third, partial lockdown. The arrival of the Omicron variant prompts the government to scale up the lockdown in December 2021. This time the booster vaccinations appear effective. In 2022 the government gradually relaxes the measures and in April, after more than two years, the Netherlands finally goes "back to normal."[29]

2. The COVID-19 Measures in Light of the Dutch Constitution

When COVID-19 arrived in the Netherlands, swift action was needed. Unlike in some other countries,[30] however, the government did not declare a state of emergency (Loof 2020). Instead, the minister of health qualified the COVID-19 virus as an infectious disease that poses a severe danger to public health (Becker and Geertjes 2021, 43–44; De Jong 2021, 8ff.). In accordance with the Public Health Act, the minister took the lead and instructed the so-called *Veiligheidsregios* (Security Regions) to adopt measures to slow down the spread of COVID-19. Security Regions are functional bodies with powers related to firefighting, disaster management, and crisis control. They are governed by an assembly of mayors of all the municipalities in that region.[31] One of the mayors, usually the mayor of the biggest city, is appointed as chair of the Security Region and can exercise emergency powers that normally reside with mayors, such as the power to issue emergency decrees (Roozendaal and Van de Sande 2020, 938ff.). As of March 2020, the minister of health started to instruct the chairs of all Security Regions to adopt and enforce COVID-19 measures through the issuance of emergency decrees (Goossens et al. 2021, 203–4). These measures were changed, relaxed, or tightened throughout the pandemic, but in general they constituted severe interferences in the right to education (Franken and Klep 2022), the right to private and family life, the freedom of movement, the freedom of assembly, and the right to property (Becker and Geertjes 2021; De Jong 2021).

Although there was broad agreement that the gravity of the situation justified far-reaching measures in order to protect public health and the right to life,

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29. "Coronavirus Timeline 2022," *Rijksoverheid*, https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/2022.

30. For the United States, see "Declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Proclamation 9994 of March 13, 2020, vol. 85, no. 53. https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/

31. Articles 10 and 11 of the February 11, 2010, Security Regions Act containing provisions for the fire services, disaster management, crisis management, and medical assistance.

the construction whereby the minister gives instructions to the Security Regions to adopt emergency decrees received a lot of criticism from constitutional lawyers (Broeksteeg 2022, 248; De Jong 2021, 13–16). The main issue was the legal basis for the COVID-19 measures. Since these measures amounted to serious interferences in the constitutional rights of citizens, the Constitution required them to be based on a statute that was specifically designed for the purpose of restricting such rights (Groen and Verhey 2020, 435–36). Instead, they were based on emergency decrees. Although the power to issue emergency decrees came from the Municipalities Act and transferred to the level of the Security Regions through a conjunction of the Public Health Act and Security Regions Act, these statutes do not stipulate the conditions under which the mayor may deploy emergency decrees to restrict certain constitutional rights (De Jong 2021, 16–20; Brouwer et al. 2020). In fact, the adoption of emergency decrees concerns a general competence attributed to the mayor to deal with large-scale and unforeseen disruptions of public order. In this regard, emergency decrees could be used only as temporary measures, aimed at quickly restoring public order (Buyse and De Lange 2020; Wierenga 2021, 665).

According to the Council of State, the principal adviser to the legislature (De Visser 2022, 292–93), restrictions of constitutional rights require less specificity in times of an immediate and life-threatening crisis, when the state has a responsibility to protect the right to life, than in normal circumstances. However, the legitimacy of such a construction decreases as time passes.[32] The Council of State therefore pressed for the replacement of the emergency decrees by a specific statute.[33] The initial proposal for the "Temporary COVID-19 Measures Act" (TCMA) was, however, vehemently criticized. One of the key observations was that the bill granted the minister of health unrestricted authority to adopt all measures needed to curb the spreading of the virus in case of unforeseen circumstances without prior approval of Parliament. Moreover, the proposed TCMA did not include any substantive conditions for or limits to the adoption of rights-restricting measures. In addition, the bill provided a basis for imposing excessive penalties for breaches of the COVID-19 measures, resulting in a criminal record. Last, the TCMA would stay in force for a year, which the Council of State deemed too long (Julicher and Vetzo 2021).[34]

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32. Parliamentary Papers of the Lower House, 2020/21, 25295, no. 742. Cf. De Jong (2021, 20), who states that when an acute emergency situation evolves into a complex and protracted crisis, the legitimacy of emergency measures will crumble quickly.

33. Parliamentary Papers of the Lower House, 2020/21, 25295, no. 742.

34. Parliamentary Papers of the Lower House, 2019/20, 35526, nos. 3 and 4.

In response to the criticism, the government revised its proposal before it was sent to the Lower House. The Lower House subsequently took its time to consider and amend the bill before it was sent to the Upper House. All in all, it was not until December 2020 that the TCMA entered into force.[35] The TCMA resulted in a temporary adjustment of the Public Health Act and replaced the emergency decrees. It thereby provided a proper legal basis for the restriction of constitutional rights, including more detailed requirements for proportionality and subsidiarity for restrictions on constitutional rights and freedoms (Julicher and Vetzo 2021). In addition, the TCMA obliged ministers to send decrees for specific measures, like face mask obligations, to the Lower House. In case the Lower House was against the decree, it would terminate *ipso iure*.[36] Last, every three months both Houses of Parliament had to assess whether the TCMA was to remain in force, which ultimately happened four times.[37] In May 2022 the Upper House rejected the proposal to prolong the TCMA for the fifth time.[38]

3. COVID-19 Opposition Activists and the Constitution as Their Truncheon

At the beginning of the pandemic, the COVID-19 measures enjoyed broad public support. People in the Netherlands were frightened by the virus and understood the gravity of the situation. In the early weeks of the crisis, millions of them watched the press conferences on television in which the prime minister announced what COVID-19 measures adopted by the government.[39] Yet as the lockdown continued, popular support for the COVID-19 measures declined,[40] and the constitutional commotion regarding the emergency decrees and the TCMA did not go unnoticed by the general public. Indeed, the concerns that were expressed by legal scholars regarding the constitutionality of the measures clearly struck a chord with a wider audience. As the pandemic unfolded, the

35. *Staatsblad* [Official Gazette] 2020, no. 482.

36. This was the result of an amendment from MP Buitenweg and others. See Boogaard et al. (2021, 2908–9). For a critique of this amendment, see Bovend'Eert (2020, 2990ff.).

37. "Goedkeuringswet vijfde verlenging geldingsduur Tijdelijke wet maatregelen covid-19," *Eerste Kamer der Staten-General*, https://www.eerstekamer.nl/wetsvoorstel/36042_goedkeuringswet_vijfde.

38. Handelingen Eerste Kamer 2021/2022, no. 28, item 7.

39. "Miljoenen kijkers voor persconferenties kabinet—en dat merk je aan alles," *RTL Nieuws*, April 23, 2020, https://www.rtlnieuws.nl/nieuws/politiek/artikel/5100786/miljoenen-kijkers-voor-persconferenties-rutte-wat-valt-op.

40. RIVM, "Gedragswetenschappelijk onderzoek COVID-19: Resultaten onderzoek gedragsregels en welbevinden," https://www.rivm.nl/gedragsonderzoek/maatregelen-welbevinden.

necessity of a specific legal basis for measures that limit civilians in their freedom not only became a subject of debate among legal scholars but also was extensively discussed on talk shows, on radio programs, and in newspapers (Groen and Van Rooij 2021, 4). The major impact and the long duration of these measures triggered a fierce societal debate in the Netherlands, which also fuelled public opposition towards them. The national coordinator for security and counterterrorism (NCTV) observed that this opposition manifested itself in roughly three places: in courts, on the streets, and online.

First of all, activist groups went to court to challenge the choices and decisions made by the government to curb the spreading of the virus (Van Deursen and Vetzo 2021, 255). The most prominent activist group was *Viruswaarheid* (Virus Truth). According to its founder, Willem Engel, the infection fatality rate of COVID-19 (i.e. the number of infected people who will die from the infection) was similar to that of the ordinary flu.[41] *Viruswaarheid* therefore claimed in court that all the COVID-19 measures had to be "lifted immediately and unconditional[ly]." In its application, it repeatedly invoked the Constitution and constitutional rights, thereby echoing the criticism of legal scholars on the legal basis of the COVID-19 measures. It was obvious, though, that *Viruswaarheid* engaged in cherry-picking. The critiques were selectively used to substantiate the claim that the restrictions were not necessary, since COVID-19 "did not pose a real threat to public health"[42]—something that was never argued by legal scholars in the Netherlands. The District Court of the Hague therefore dismissed this claim of *Viruswaarheid*,[43] and it did the same with several other claims.[44] The only time the court ruled in favor of *Viruswaarheid* was when it challenged the legal basis of the curfew in February 2021.[45] That very same day the Court of Appeal in The Hague nevertheless suspended the execution of

41. See the *Sterfterapport* [Mortality Report] that was published on the website of *Viruswaarheid*, https://voorwaarheid.nl/wp-content/uploads/2022/11/2022-11-Sterfterapport-Viruswaarheid-1.pdf.

42. See also the English translation of the subpoena, published on the website of *Viruswaarheid*, https://voorwaarheid.nl/wp-content/uploads/2021/10/KG-Lockdown-maatregelen-25-06-2020-Dagvaarding-English-version.pdf.

43. Rechtbank Den Haag, July 24, 2020, ECLI:NL:RBDHA:2020:6856.

44. Like the one regarding the temporary obligation to wear a face mask (Rechtbank Amsterdam, August 19, 2020, ECLI:NL:RBAMS:2020:4057); the use of the PCR test and government communications about COVID-19 (Gerechtshof Den Haag, May 18, 2021, ECLI:NL:GHDHA:2021:869); and vaccination campaigns (Gerechtshof Den Haag, April 19, 2022, ECLI:NL:GHDHA:2022:643).

45. Rechtbank Den Haag, 16 February 2021, ECLI:NL:RBDHA:2021:1100. For more on Covid-19 inn the Netherlands, see also Julicher and Vetzo (2021) and Goossens et al. (2021, 247).

the District Court's judgment in an emergency appeal,[46] and it definitively quashed the decision of the District Court a week later.[47]

The second way in which activist groups manifested their dissatisfaction with the coronavirus policy was through public protests. The protests attracted hundreds, even thousands of people who gathered practically every week in the bigger cities to express their discontent with the lockdown. According to the NCTV, the protesters concerned a versatile group of people with a diverse range of motives. Some protesters assessed the risks of COVID-19 differently than the medical experts. Others deemed the measures to be disproportionate, considering the ruinous consequences for certain professions or for the mental health of vulnerable groups in society. Another group of protesters was driven more by a conspiracy-based aversion to politicians, the press, science, and experts—"the elite" (NCTV 2021, 8, 15). Moreover, the NCTV observed that the corona protests attracted hooligans and young people who deliberately started "rioting as an outlet, out of boredom or because of a lack of structure" (NCTV 2021, 7). Some of the protests therefore turned rather ugly,[48] requiring the riot police unit to intervene.[49] This was most notably the case during the "curfew riots," which made global headlines.[50]

Many protesters used constitutional language to convey their dissatisfaction with the lockdown, the corona QR code, and/or the vaccination campaign. *Viruswaarheid*, for example, organized multiple protests in order to "fight for democracy and the rule of law" and "because constitutional rights are being quashed." Activist group *United We Stand Europe* stated it organized a "corona protest" in Amsterdam "for freedom, constitutional rights, physical integrity and health."[51] And in

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46. Gerechtshof Den Haag, February 16, 2021, ECLI:NL:GHDHA:2021:285.

47. Gerechtshof Den Haag, February 26, 2021, ECLI:NL:GHDH:2021:252. At that point, the legislature had already adopted a specific act of law to serve as the legal basis for a curfew. See Staatsblad 2021, no. 85.

48. See, e.g., "Rotterdam Police Open Fire as Covid Protest Turns into 'Orgy of Violence,'" *The Guardian*, November 20, 2021, https://www.theguardian.com/world/2021/nov/19/the-netherlands-rotterdam-police-open-fire-as-covid-protest-turns-violent.

49. The police, e.g., arrested more than four hundred protesters after a demonstration in The Hague ran out of control. See Quekel (2020) at https://www.limburger.nl/cnt/dmf20200621_00165051. In addition, almost seventy protesters were arrested in Utrecht. See "Politie houdt bijna zeventig demonstranten aan in Utrecht en Wageningen," *Nu.nl*, July 4, 2020, https://www.nu.nl/coronavirus/6062393/politie-houdt-bijna-zeventig-demonstranten-aan-in-utrecht-en-wageningen.html.

50. See "Netherlands Shaken by Third Night of Riots over Covid Curfew," *Guardian*, January 26, 2021.

51. "Politie spreekt van rustige coronademonstratie, ondanks acht aanhoudingen," *Parool*, March 20, 2022, https://www.parool.nl/amsterdam/politie-spreekt-van-rustige-coronademonstratie-ondanks-acht-aanhoudingen~bbce7749.

Nijmegen, activist group *Samen voor Nederland* (Together for the Netherlands) organized a protest to "take a stance against the disproportionate measures and the way in which the freedoms are restricted and constitutional rights are bypassed."[52] During various protests people also held up banners with such statements as "Everyone that does not respect the Constitution is a fascist, like [names of mayors and ministers], the media and anyone that tolerates it"; "Constitutional rights gone by injection"; "The Netherlands is no democracy but a dictatorship"; "For freedom. Against the Temporary COVID-19 Measures Act" or a simple banner with the text "Disproportionate."

Again, many of these protesters misinterpreted the criticism of legal scholars and used it for their own purposes. This happened, for example, when Wim Voermans, a professor of constitutional law in Leiden and a welcome guest on Dutch talk shows, criticized the draft of the TCMA. Voermans was quite vocal in stating that the TCMA, as it was originally drafted, would result in "a government by ministerial decrees" because ministers would be granted unlimited and unchecked power (Voermans 2020). This criticism gained traction among COVID-19 sceptics and anti-government activists and went on to live a life of its own: they interpreted the criticism as a confirmation of their belief that the Dutch government was using COVID-19 measures to justify efforts to gain totalitarian control over its citizens. Even after the Lower House significantly amended the TCMA to strengthen its own oversight on the COVID-19 measures, protesters took to the streets to exclaim that the measures were unconstitutional, undemocratic, and dictatorial.

The third place where people expressed their discontent with the corona policy was on the internet. On social media platforms like Facebook, Instagram, LinkedIn, and Twitter, people voiced their opinions on the virus and their criticism against the COVID-19 measures (NCTV 2021, 5). Many of these messages contained misinformation about COVID-19 and touted conspiracy theories about the government. The narrative that COVID-19 was an artificially constructed phenomenon that forms part of a far-reaching plan of the "global elite" to bring the population under totalitarian control gained traction with a growing group of Dutch citizens (Klerks 2021, 78).[53]

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52. "Omstreden coronaprotest van actiegroep Samen voor Nederland naar Nijmegen," *de Gelderlander*, March 30, 2022, https://www.gelderlander.nl/nijmegen/omstreden-coronaprotest-van-actiegroep-samen-voor-nederland-naar-nijmegen~a1051a50.

53. This narrative clearly echoed the concoctions of QAnon supporters, who believe that there is a covert shadow government (the "deep state") of global elites that uses its power to oppress the population and to traffic and abuse children. During the COVID-19 crisis, this distrust of governments, science, and traditional media manifested itself in calls by social media influencers to "do your own research" and to "wake up." For more on conspiracy theories, see Bodner et al. (2021).

Messages on social media platforms often also contained references to the Constitution and constitutional rights. Research conducted by Leijten and But into the Dutch Twitter discussions on COVID-19 and the Constitution demonstrated that almost 80 percent of the investigated tweets contained criticism against the COVID-19 measures or against the government in general (Leijten et al. 2022).[54] Only 10 percent of the investigated tweets, however, contained correct information about constitutional rights, while 57 percent was clearly incorrect or misleading. The remaining 33 percent was not evidently wrong but not entirely correct either. Most misconceptions revolved around the idea that constitutional rights are per definition absolute, thereby rendering every COVID-19 restriction to be framed as a violation of the Constitution (Leijten et al. 2022, 1376).

B. The Childcare Benefit Scandal

1. False Accusations of Benefit Fraud with Disastrous Consequences

During the pandemic, another drama unfolded in the Netherlands. Over the course of 2019 and 2020, the news came out that the Dutch Tax Authority had falsely accused tens of thousands of parents of committing childcare benefit fraud. In the Netherlands, the state partially reimburses parents for childcare costs in the form of an allowance (PIC 2020, sec. 7–9). The amount of the allowance depends on the level of the parents' income (Amnesty International 2021),[55] and it covers only part of the childcare costs. Therefore, parents always have to pay a "personal contribution" as well (PIC 2020, sec. 7–9). To receive an allowance, parents have to submit to the Tax Authority (TA) an application by presenting an estimate of the childcare costs for the following year. The TA then grants every applicant advances for the allowance and scrutinizes the applications later (PIC 2020, sec. 13).

Since it is practically impossible to scrutinize every application, the TA had worked with a risk-classification model on the basis of a self-learning algorithm that assesses the risk of an incorrect application on the basis of dozens of indicators (Dutch Data Protection Authority 2020, 14–15). One of these indicators was nationality (Dutch Data Protection Authority 2020, 14–15; Amnesty International 2021). When the algorithm classified an application as low risk, the TA would

54. Someone tweeted, e.g., "For our freedom. . . . Against our care-taking cabinet that violates our constitutional rights."

55. Low-income households can be reimbursed for up to 96% of their childcare costs, whereas families with a high income are reimbursed for 33.3% of childcare costs.

automatically approve it. When an application was classified as high risk, however, payment was immediately suspended and the application subjected to review (Dutch Data Protection Authority 2020, 14). In case the TA identified an error or inconsistency, it flagged parents as fraudsters. Most mistakes, however, were made in good faith (PIC 2020, 16). Think, for instance, of a missing signature, or the situation in which parents could not demonstrate that they had (fully) paid their personal contribution because it was paid in cash.

Given the variety of preconditions and variables, the scope of error was much greater in the childcare benefit system than with other benefits. The TA nonetheless labeled any minor discrepancy between the estimated costs for childcare and the actual costs as fraudulent (PIC 2020, sec. 13), and it subsequently reclaimed the full benefit that parents had received for the year. Parents thus had to repay large sums of money they had already spent on childcare.[56] As a result, they ended up with serious financial problems, which put a severe strain on their mental health, relationships, and family life: people were evicted from their homes, they ended up in divorce, and their children were placed into care. In one case, a parent even committed suicide.

2. Institutional Bias, Unprecedented Injustice, and a Violation of the Rule of Law

The TA believed it was obliged by the Childcare Act and the General Act on Income-Related Schemes (AWIR) to set the allowance at zero and to reclaim the full amount that was granted in advance if parents could not provide a complete and correct account of their income and their childcare expenses.[57] Legal scholars have argued that these statutes do not impose such definitive obligations and thus allow for a proportionality test (Van den Berge 2021; Besselink 2021; Damen 2021; Van de Beeten and Van de Beeten 2021). The Administrative Jurisdiction Division of the Council of State (AJD), which is the Supreme Administrative Court in this type of cases, went along with the all-or-nothing approach for years. It was only in 2019 that the AJD radically altered its understanding of the law and confirmed

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56. Parents that had received greater than 10.000 EUR a year or had to pay back more than 3.000 EUR were automatically flagged for "deliberate intent or gross negligence." Consequently, these parents could not apply for a payment scheme to repay the TA by installments over a certain period of time. In 94% of the cases the designation of deliberate intent or gross negligence was unjustified. This situation was described by PIC as an "unprecedented injustice." See PIC (2021,16, 19–20).

57. Article 1.7 (1) of the Childcare Act determines that the level of compensation depends on the ability to pay and on the costs of childcare per child, and Article 26 of the AWIR stipulates that "[i]f a revision of an allowance or a revision of an advance results in an amount to be recovered or if a settlement of an advance with an allowance leads to this, the person concerned shall owe the entire amount of the recovery."

that the TA could have applied the Childcare Act and AWIR in a more proportionate manner.[58]

The AJD's change of direction took place in the midst of the process of unraveling the exact scope of harm that innocent parents had suffered. In 2017 the National Ombudsman reported that 232 families had been the victims of a disproportionately tough anti-fraud strategy of the TA.[59] When the state secretary of finance installed a committee to give advice on how to compensate these families, the committee observed that their cases were not isolated: approximately eighteen hundred persons had become the victim of an "institutional bias" (*institutionele vooringenomenheid*) in the fight against fraud. Moreover, the committee pointed out that there were thousands of other cases in which parents had not been specifically targeted but had simply fallen prey to the complex design and strict enforcement of the benefit system: their financial problems were not exceptional but a direct consequence of conscious choices made by the legislature, the administration, and the judiciary.[60]

In 2020 the Parliamentary Inquiry Committee (PIC) investigated "what ministers knew about the hardline anti-fraud approach in relation to childcare allowance, what guidance they gave in relation to that approach, and why it lasted for so long."[61] In its report, the PIC qualifies the childcare benefit scandal as a case of "injustice without precedent." The way parents were treated "was totally disproportionate to what they were—mostly wrongly—accused of." According to the PIC, these people were "powerless against the powerful institutions of the state, which did not offer them the protection they deserved."[62] The PIC moreover noted that core principles of the rule of law had been breached by all state powers.[63] The legislature bore responsibility for adopting harsh legislation. The Ministries of Finance and of Social Affairs as well as the TA administered childcare benefits as a mass process in which tiny mistakes were viewed as fraudulent and the human dimension was completely neglected. Administrative courts, in particular the AJD, in short, perpetuated "the ruthless application of the legislation on

58. See the judgments of October 23, 2019: ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:219:3536.

59. "Geen powerplay maar fair play," *De Nationale Ombudsman*, August 9, 2017, https://www.nationaleombudsman.nl/system/files/onderzoek/Rapport%202017-095%20Geen%20powerplay%20maar%20fair%20play_0.pdf.

60. "Omzien in verwondering 2: Eindadvies Adviescommissie uitvoering toeslagen," *The Hague*, March 12, 2020, pp. 3 and 16.

61. See PIC (2021, 5).

62. See PIC (2021, 6).

63. See PIC (2021, 5).

childcare allowance."[64] According to the PIC, the AJD had for too long dismissed the applicability of the general principles of good administration, in particular the principle of proportionality. Since these principles are "supposed to act as a buffer and protective blanket for people in need," the AJD had neglected its vital function of protecting individuals against the government.[65]

The childcare benefit scandal, moreover, exposed a major problem in the disclosure from the government to Parliament. Article 68 of the Constitution states that "[m]inisters and state secretaries shall, orally or in writing, provide the Houses of Parliament the information as requested by one or more members of Parliament, insofar as the provision of this information is not contrary to the interest of the state." When members of the Lower House requested information from the government regarding the problems in administering the childcare allowances, however, the information it received was often incomplete, inaccurate, or late. This was not only a consequence of the poor level of the government's information infrastructure. The Lower House was also misinformed and faced refusals to provide information by those wishing to protect the personal opinions of government officials, all of which is at odds with Article 68. The PIC hence stated that the Lower House was seriously hindered in subjecting the administration of the childcare allowances to effective parliamentary scrutiny.[66]

3. The Aftermath of the Childcare Benefit Scandal: Imminent Constitutional Change?

After the publication of the PIC report, the entire government of Prime Minister Mark Rutte offered its resignation to the king in anticipation of a no-confidence vote in the Lower House. The COVID-19 crisis, however, urged the resigning ministers and state secretaries to govern in a caretaker capacity until after the elections in March 2021. During the electoral campaign, the child benefit scandal was overshadowed by the COVID-19 crisis. For obvious reasons, the governing political parties paid little attention to the child benefit scandal and focused instead on their role in controlling the pandemic. This strategy paid off: although the child benefit scandal unfolded under the responsibility of Prime Minister Mark Rutte, his party did not lose any votes. Thanks to Rutte's image as a crisis manager, the *Volkspartij voor Vrijheid en Democratie* (VVD) became the biggest political party again.

After a (record-breaking) formation of 299 days, the exact same parties that had resigned because of the child benefit scandal formed the fourth government under Rutte.

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64. See PIC (2021, 5).

65. See PIC (2021, 5).

66. See PIC (2021, 6).

Large parts of their coalition agreement were clearly written in response to the PIC report. Besides their plans to compensate the wrongfully accused parents,[67] the parties announced that they would assess and improve legislative statutes on their simplicity, human dimension, and execution. They declared that "it cannot be the case that people who make unintentional mistakes are immediately labelled as fraudsters. If the application of rules results in disproportionately negative effects for individuals, there must be room to derogate from those rules."[68] The coalition also stated they want to increase transparency and improve the information supply from government to Parliament.[69] Last, the coalition expressed that it would "take up the implementation of constitutional review."[70]

The plan to implement constitutional review obviously aims to strengthen legal protection of citizens against government. A few months earlier, Advocate-General Widdershoven and Advocate-General Wattel delivered an opinion at the request of the AJD on the extent to which the court can assess the proportionality of administrative decisions.[71] The Dutch Supreme Court already held in 1989 that the prohibition to review (the application of) statutes for their compatibility with the Constitution implies that courts cannot review statutes for their compatibility with general principles of law.[72] Widdershoven and Wattel therefore argue that as long as the Constitution prohibits constitutional review, courts cannot give precedence to the principle of proportionality in cases where applying a statute would produce materially unacceptable results.[73] In their view, Article 120 of the Constitution thus hinders courts in effectively protecting citizens against the government, especially in areas like social security, where the ECHR and other international human rights treaties provide little remedy and the legislature consciously chooses to adopt a strict scheme of sanctioning.[74]

The Commission for Democracy through Law of the Council of Europe (better known as the Venice Commission) noted as well that the ECHR "did not serve as a safeguard against the problematic interpretation of the relevant legislation

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67. Attachment to Parliamentary Papers of the Lower House, 2020/2021, 35 788, no. 77, 2.

68. Attachment to Parliamentary Papers of the Lower House, 2020/2021, 35 788, no. 77, 1.

69. Attachment to Parliamentary Papers of the Lower House, 2020/2021, 35 788, no. 77, 2.

70. Attachment to Parliamentary Papers of the Lower House, 2020/2021, 35 788, no. 77, 2.

71. Council of State, July 7, 2021, ECLI:NL:RVS:2021:1468.

72. Supreme Court, April 14, 1989, ECLI:NL:HR:1989:AD5725 (*Harmonisatiewet-arrest*). This applies not only to unwritten principles of law but also to principles that are codified in statutes, like the principle of proportionality ex Article 3:4 of the General Administrative Law Act.

73. Supreme Court, ECLI:NL:HR:1989:AD5725, sec. 9.6, text between footnotes 323 and 324.

74. Council of State, ECLI:NL:RVS:2021:1468, sec. 9.6, text between footnotes 320 and 321.

concerning childcare benefits" (Venice Commission 2021, 25). Therefore, it advised the Dutch authorities "in the light of the experiences with the Childcare Allowance Case . . . to consider whether Article 120 of the Constitution should be amended" (Venice Commission 2021, 26).

In July 2022 the minister of interior affairs and the minister for judicial protection sent a letter to Parliament in which they sketch the contours of a constitutional review mechanism.[75] The idea is that every court in the Netherlands would be authorized to disapply a statute in a specific case if an application of that statute would result in a violation of the classic freedom rights enshrined in the Constitution. In April 2023 the letter was discussed in the Lower House and the minister of interior affairs was requested to specify the constitutional provision that courts would be authorized to review statutes against.[76] The childcare benefit scandal hence triggered a serious dialogue between the government and Parliament about the ban on constitutional review. The overall objective of this dialogue is undoubtedly to ensure that a proposal to amend Article 120 would be well developed. After all, for a constitutional amendment proposal to succeed, it will require broad and persistent political support.

Meanwhile, the AJD of the Council of State ruled in March 2023 in a case about a rejected application for childcare allowance that because of the imperative phrasing of the Childcare Act, it could not review the proportionality of the rejection. The AJD argued that "considering the current state of the development of the law, the prohibition on constitutional review, as enshrined in Article 120, does not allow for a proportionality review of Article 1.3 (2) of the Childcare Act."[77] In other words, as long as government and Parliament have not decided on the fate of Article 120, courts are not in the position to review statutes for their compatibility with general principles of law.

C. The Constitution during Crises and Scandals: Some Comparative Observations

Despite the obvious constitutional nature of the child benefit scandal—in other words, the failure of all state institutions to keep each other in check and to provide citizens effective legal protection against wrongful and disproportionate government action—the Constitution was rarely referred to in public. That is not unusual;

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75. Parliamentary Papers of the Lower House, 2021/22, 35 925 VII, no. 169.

76. Parliamentary Papers of the Lower House, 2022/23, 35 786/36 200 VII, no. 10; see also "Toezegging bij Constitutionele toetsing," Tweede Kamer Der Staten-General, https://www.tweedekamer.nl/kamerstukken/toezeggingen/detail?id=TZ202304-171&did=TZ202304-171.

77. Council of State, March 1, 2023, ECLI:NL:RVS:2023:772.

for reasons set out in the preceding section, the Constitution does not quite live in the hearts and minds of the people of the Netherlands. Taking also into account the legal and political complexities of the childcare benefit scandal and the time it took for the gravity of the problems to become clear, it is not surprising that the general public did not grasp the constitutional magnitude of the situation or feel passionate and upset about the grave injustices that had taken place.

The contrast between the child benefit scandal and the COVID-19 crisis could hardly be greater. It is not an exaggeration to say that the public attention for the Constitution in relation to the COVID-19 crisis was unprecedented—but then again, so was the pandemic. Whereas the disastrous effects of the child benefit scandal were felt by only a minority in society,[78] the COVID-19 crisis was the first time that virtually every member of society personally and simultaneously experienced what it means to be severely limited in one's individual freedom by a government that is trying to address a nationwide crisis. Against that background, it makes perfect sense that COVID-19 had put the Constitution, normally so absent in public debate, "in the spotlight" (Jensma 2022). After all, one would expect the Constitution to define the rights of the people as well as the scope of and limits to the power of the state.

One might think that attention for and awareness of the Constitution in debates on fundamental questions in society is something that ought to be encouraged. The way in which citizens invoked the Constitution to protest against the COVID-19 restrictions and against the government, however, gave little cause for optimism. Not only did it confirm the perception that the constitutional literacy rate of the Netherlands is low—which one could partly blame on the inaccessible and complex nature of the constitutional text—but it was also clear that the Constitution and the rights enshrined therein were mostly abused as a "heavyweight truncheon" to cut off all debate (Jones 2020, 2). Instead of guiding the debate on the proportionality of these measures to protect public health, constitutional provisions were weaponized to condemn any form of state action. Constitutional rights in particular were presented as sacred and inviolable, rendering every debate on the balancing of individual rights and freedoms against objectives of general interest impossible (Leijten et al. 2022, 1378).

While the Constitution was used during the COVID-19 crisis as a means to end the debate, the childcare benefit scandal actually triggered a debate about the Constitution. In light of strengthening the legal protection of citizens, it revitalized the debate among the legislative and judicial branch on Article 120 and the

78. In other words, low-income households of which one or more parents lacked Dutch citizenship. See Amnesty International (2023).

prohibition on constitutional review, the outcome of which is yet to come. Moreover, in response to the criticism of the PIC on the constitutional obligation of Article 68 for ministers and state secretaries to inform Parliament, the government expressed a "radical" commitment to more transparency.[79] The Lower House subsequently installed a working group,[80] which published a report in June 2023 on the meaning of Article 68. The report includes instructions to government and Parliament on how to improve the provision of information.[81] Thus, the childcare benefit scandal has given new impetus to the debate on Article 68, a cornerstone of the Dutch parliamentary system.

Both the COVID-19 crisis and the child benefit system demonstrate that the Constitution of the Netherlands plays a meaningful role in times of crisis. On the whole, it does not necessarily feature prominently in society, but it does steer the debate between the state institutions, which thereby draw on the publications and advice of constitutional scholars. After all, constitutional scholars pointed out that the legal basis of the COVID-19 measures was flawed, hampered by the constitutional requirement that rights restrictions need to be based on a specific statute that is approved by Parliament. This criticism ultimately steered the legislative debate on the emergency decrees and the TCMA to a considerable extent (Groen et al. 2023, 54–55). In the aftermath of the child benefit scandal, the government and Parliament intensified the dialogue about the correct interpretation and implementation of Article 68 of the Constitution and about introducing a certain form of constitutional review. Again, constitutional scholars were consulted on these matters.[82]

IV. CONCLUSION

Since the Constitution of the Netherlands is primarily written for the legislature, it is reassuring that government and Parliament actually engaged with its text

79. Parliamentary Papers of the Lower House, 2020/21, 35 510, no. 4, 16.

80. Parliamentary Papers of the Lower House, 2020/21, 35 752, no. 11.

81. "Grip op informatie," June 6, 2023, attachment to the Parliamentary Papers of the Lower House, 2022/23, 28 362, no. 67.

82. E.g., constitutional scholars wrote and presented position papers on constitutional review for the Lower House. On this issue see Tweede Kamer der Staten-General at https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2023A00306. On Article 68, see the Tweede Kamer der Staten-General scientific factsheet "De reikwijdte van de inlichtingenplicht van artikel 68 van de Grondwet," at https://www.tweedekamer.nl/kamerstukken/detail?did=2023D25312&id=2023Z10565. Both websites were last accessed February 22, 2024.

during and in the aftermath of the COVID-19 crisis and the child benefit scandal. By contrast, this article has argued that the Constitution does not usually play a tremendous role in society as a whole. The Constitution is rarely referred to in public, and the level of constitutional literacy in the Netherlands is low. Although virtually all persons in the Netherlands will say that they find the Constitution important, it does not live in their hearts and minds.

For a long time the lack of constitutional idolatry was not perceived as a problem. The Constitution aimed to provide a basic framework for government, not to inspire a nation. Its purpose was hence pragmatic rather than symbolic. This approach worked out well for the Netherlands. After all, the country is generally considered to be a mature democracy with a long history of respecting the rule of law. "Blessed is the country that has such a firm democratic order that the Constitution can be safely ignored," one may be inclined to think (Adams and Van der Schyff 2017, 378–79).

During the pandemic, however, it became clear that in times of crisis people look for something on which to rely. Indeed, the groups of citizens protesting against the COVID-19 measures and the government invoked the Constitution in the expectation that it would protect them. The way the Constitution was invoked demonstrated that these citizens had either little knowledge about the actual function and content of the Constitution or little interest in it. Yet, they felt that this document *should* serve to protect their rights and liberty against interference by the government.

Would the implementation of some form of constitutional review bring the Constitution of the Netherlands closer to that ideal? To a certain extent it could. That citizens can invoke treaty rights but not their constitutional rights before domestic courts naturally fosters the feeling that they are not protected by the Constitution. Would the implementation of constitutional review also lead to a renewed public awareness of the Constitution? That is difficult to predict. Court decisions to disapply statutes because of their incompatibility with the Constitution will presumably only draw the attention of a wider audience if that decision has major societal implications. Given a long history in the Netherlands of the primacy of the legislature and the corresponding judicial restraint, it is a legitimate question whether courts would dare to go that far.

If one is genuinely committed to strengthening the position of the Constitution in society, the implementation of constitutional review will not suffice. Nor will it help to improve the constitutional literacy rate in the Netherlands. Of course, the way in which constitutional rights were invoked during the COVID-19 crisis shows that a proper understanding of the Constitution requires more than just glancing

over the text and picking something to one's liking. But even when people genuinely try to read and understand the Constitution, chances are that they interpret the text incorrectly or remain with unanswered questions. That is because the document is old, incomplete, and difficult to understand. In the Netherlands, basic constitutional literacy almost requires a degree in Dutch constitutional law. It is therefore recommended that serious consideration be given to ways of making the Constitution a more clear, accessible, and reliable source of constitutional law. After all, a Constitution is too important for society to leave its interpretation solely to state institutions and a handful of legal experts.

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