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CONSTITUTIONAL AND SOCIO-POLITICAL DYNAMICS IN THE NETHERLANDS AND BELGIUM

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INTRODUCTION: THEME AND METHOD

Political Power and the Governmental Process, by Karl Loewenstein, is one of those rare pieces of Modern scholarship that explicitly pays attention to the practical significance of constitutions. Writing in the 1950s, Loewenstein was interested in "the concordance of the reality of the power process with the norms of the constitution."[2] He noted the lack of attention for this topic and was very aware of the fact that a constitution does not operate automatically once it has been adopted: "A constitution is what power holders and power addressees make of it in practical application."[3] That provokes questions about the dynamics between constitutional law and socio-political practice, or between the formal and material validity of a constitution? Under what conditions can we, for example, speak of a constitution that is embraced in practice, to the benefit of a nation and of the well being of its population? Loewenstein, a Jewish émigré from Nazi Germany who became an American citizen, was troubled by these questions, and was one of the few scholars to study conflict and stability in the basic constitutional order in a more systematic way.[4] To be sure, there is, today, more attention than ever before for the types of —interdisciplinary— questions Loewenstein asked.[5] But this doesn't preclude the fact that, in European academic circles, a specifically legal or normative approach is still dominant.[6]

In this article I will study the dynamics between constitutional law and its socio-political environment by focusing on the two jurisdictions with which I am most familiar, i.e., Belgium and the Netherlands. Both countries, situated in the North-western part of Europe and neighbouring each other, are relatively small

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[2] The University of Chicago Press, Chicago/London, 1957 (2nd edition 1965), p. 147-148.

[3] *Ibid.*, p. 148.

[4] Loewenstein was trained as both a lawyer and a political scientist. For an intellectual biography, see Markus Lang, *Karl Loewenstein, Transatlantischer Denker der Politik*, Stuttgart: Franz Steiner Verlag, 2007, 353 pp.

[5] The work of for example Tom Ginsburg c.s. is relevant here. See, e.g.: *The Endurance of National Constitutions*, Cambridge: Cambridge University Press, 2009 (together with Z. Elkins and J. Melton).

[6] A. von Bogdandy, "Comparative Constitutional Law: a Contested Domain", in M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 28.

and highly affluent. They partly speak the same language. Yet they could not be more different in terms of the just mentioned dynamics.[7]

Comparative law can be of particular significance here. Indeed, comparatists must immerse themselves in at least two legal systems. However, such an 'involved' activity does not come naturally. It means that you have to deal with, and convey information about, legal systems whose 'language' (metaphorically understood) you do not necessarily speak, i.e., systems with specific institutions and unexpressed codes, their own history, ideolog(y)(ies) and self-image(s); systems you have not normally been trained, educated or disciplined in, and with which you are therefore not naturally or intimately connected. This process of trying to understand, and convey to the reader, foreign legal systems (or some of their elements) demands a particular approach because it goes far beyond mere fact-finding and the regular (i.e., purely national) way of interpretation and understanding the law, where one almost self-evidently and implicitly engages in its social context. In any case, the issues that the law addresses, as well as the solutions that it intends to provide them, are very much connected to the socio-political environment from which these problems and solutions arise. Therefore, comparative law *explicitly* calls for being able to relate to the socio-political and cultural context of the topic or issue that is being studied[8], and do so in a way that is comprehensible to the reader. Comparison can moreover sharpen the powers of description of each of the jurisdictions under consideration here because sensible—real![9]—comparison asks to describe these systems *vis-à-vis* each other (contrasting and connecting!).

Comparison and contextualisation is indeed what can be of particular help when we want to better understand the dynamics between a constitution and its socio-political environment. But lawyers are used to studying constitutions merely

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[7] Borrowing from David Nelken, I understand the term constitutional culture, in its most general sense, as one way of describing relatively stable patterns of behaviour and attitudes towards constitutional norms. D. Nelken, "Defining and Using the Concept of Legal Culture", in E. Örücü and D. Nelken (eds.), *Comparative Law. A Handbook*, Oxford: Hart Publishing, 2007, p. 113.

[8] On this, see M. Adams, "Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law", in M. Van Hoecke (ed.), *Methodology of Legal Research*, Oxford: Hart Publishing 2011, p. 229-233. Also M. de S.-O. –L É. Lasser, "The Question of Understanding", in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2004, p. 200-202 and J. Bell, "Legal Research and the Distinctiveness of Comparative Law", in M. Van Hoecke (ed.), *o.c.* , p. 155-176.

[9] This seems to be lacking many times; but as Shapiro in 1981 already noted, comparative law should nevertheless be something more than mere 'auslandrechtkunde': "For the most part [comparative law] has consisted of showing that a certain procedural or substantive law of one country is similar to or different from that of another. Having made the showing, no one knows quite what to do next. Or, alternatively, comparison consists of presenting descriptions of a number of legal systems side by side, again with no particular end in view." M. Shapiro, *Courts. A Comparative and Political Analysis*, Chicago: University of Chicago Press 1981, vii. This of course doesn't preclude that even the sheer description of a foreign legal system will inevitably, albeit implicitly, make the researcher reflect about her own legal system. F. von Benda-Beckmann, "Ethnologie und Rechtsvergleichung", 17 *Archiv für Rechts- und Sozialphilosophie* 1981, p. 310.

as legal phenomena, and political scientists, if they do so at all, tend to study constitutions exclusively as social phenomena.[10] The explicit aim in this text is to integrate these two approaches. "[K]nowledge of the constitutional text alone equate[s], [not] even nearly, to an understanding of political reality", some colleagues wrote a few years ago. "[B]ut", they added, "it is a necessary condition of that understanding."[11] This indicates reciprocity, and what we should pay attention to is how political reality and constitutional law inform and influence *each other*.

SOME FACTS ABOUT CONSTITUTIONS AND CONSTITUTIONALISM IN BELGIUM AND THE NETHERLANDS

Belgium[12]

Belgium today has some 10.6 million inhabitants, and is a small and affluent country. It is notorious for its many politically and constitutionally salient divisions: linguistically, ideologically, culturally, regionally, economically, etc. The proliferation of these divisions recently resulted in the country experiencing a profound political and institutional crisis, having no federal government for 541 (!) days,[13] a world record apparently.

Belgium is organised around two dominant language and cultural communities (*demoi*): the Dutch-speaking part in the north (called Flanders, with a population of some 6.1 million people, referred to as Flemings) and the French-speaking part in the south (called Wallonia, making up 55% of the land in the country and with 3.4 million residents known as Walloons). A language border, officially marked by the legislator in 1962-63 and entrenched in 1970 in Section 4 of the Constitution,[14] separates the two communities and has resulted in a rigid division of the country into linguistic areas. The fact that within such an area a language is recognized as the main official language means that it is also the

[10] Cfr. A. Harding and P. Leyland, "Comparative Law in Constitutional Contexts", in E. Örücü and D. Nelken (eds.), *Comparative Law. A Handbook*, Oxford: Hart Publishing, 2006, p. 322-323.
[11] S.E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions*, Oxford: Clarendon Press, 1995, p. 5.
[12] An English version of the text of the Belgian Constitution can be found on: http://legislationline.org/documents/section/constitutions
[13] Since 26 April 2010. The new federal government was installed on 6 December 2011. The government formation process of 2007 took 194 days.
[14] Since in the context of this chapter this is a telling provision, I quote the text in full: "Belgium comprises four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region. Each municipality of the Kingdom forms part of one of these linguistic regions. The boundaries of the four linguistic regions can only be changed or corrected by a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favor that are cast in the two linguistic groups is equal to at least two thirds of the votes cast."

language of administration, government, education and justice. As a result, Dutch is the official language in the north and French in the south. However, Brussels, with some 1.1 million inhabitants, has been constitutionally recognized as a bilingual area —Dutch and French-speaking— but has a predominantly francophone population.[15] In effect, some 60% of the Belgian population is Dutch-speaking and some 40% French-speaking. Constitutional recognition has also been granted to a small German-speaking part of the country (bordering Germany and with some 75,000 residents).

In addition, there are a limited number of municipalities —situated on the language border and also bordering the so-called Brussels-Capital Region (see below)— where a substantial number of Dutch and French-speaking people reside and where language facilities are granted to those who speak the 'minority' language, i.e., the language that is not the official language.[16] They can use the language of their choice in matters relating to, e.g., administration, schooling of children (6-12 years old) and justice. These municipalities are called 'facility municipalities' and are also obliged to communicate with these citizens in the language of the 'minority' language speakers' choice. So, too, do all forms and official communications have to be available in ―depending on the language area in which a municipality is situated― either Dutch and French, or German and French. However, in communications between such a municipality on the one hand and the regional or federal authorities under which the municipality resorts on the other hand, the official language is the norm, as it is for communications *within* the municipal administration itself. In other words, language facilities are a service for the citizens and not for the administration. To be sure, individual linguistic liberty is protected in Section 30 of the Constitution (and has been since 1831, when Belgium was established as an independent State), and the aforementioned arrangements are only applicable in the relation between the citizens and the state; the choice of language used in private and social life, including commercial activities, is in principle free.

Belgium, as Section 1 of the Constitution has stated since 1993, "is a federal state composed of Communities and Regions." Belgian federalism is organized, as is clear from this provision, on the basis of a double subdivision into Communities and Regions,[17] each having its own legislative and executive

[15] Historically Brussels was a Dutch-speaking city. Nowadays, during office hours, with many Flemish commuters coming to work there, it is a bilingual city.

[16] Which in practice might well be the majority language, since the official language ius based on a dated language count. As a result, where, for example, French is not the official language, this does not rule out the possibility that sometimes the majority of the population in these municipalities are first and foremost French-speaking. This can especially be the case in the municipalities surrounding Brussels.

[17] In this text I use capitals whenever I refer to these officially recognized *C*ommunities and *R*egions and their competences. When these capitals are not used I refer to the non-official, i.e., colloquial, meaning of the words.

jurisdiction. By way of several state reforms[18] there has, since 1970, been a progressive transfer of powers from the federal level to these Communities and Regions. Between them on the one hand and the federal level on the other hand, there is no legislative hierarchy; all can enact legislation, for which they are exclusively competent, and all legislation enacted by the Communities and Regions is on a par with federal legislation.

There are three constitutionally recognized Communities, of which the so-called Flemish and French Communities are the most prominent ones. There is also a small German-Speaking Community in the eastern part of the country. The Communities are mainly competent in relation to specific subject matters of cultural concern to the respective Dutch, French and German-speaking populations in Belgium. However, they also have exclusive jurisdiction over what are termed personal matters: certain aspects of health care, family policy, education, and such like. This competence is territorially defined: it stops at the language border.[19] For example, the Flemish Community is not competent in the French Community. The situation in Brussels, however, is an exception to the territorial rule. There the Flemish Community has competence in these matters with regard to the Dutch-speaking residents, and the French Community with regard to the French-speaking ones. To give but one example: it is the Flemish Community that has competence with respect to schools in Brussels that teach in Dutch, and the French Community with respect to schools that teach in French.

Belgium is further divided into three Regions: the Flemish, the Walloon and the Brussels-Capital Regions. These Regions are mainly and exclusively competent in certain economic matters in their respective areas: environment, agriculture, energy, employment policy, public transport, international cooperation connected to these competences, area development and planning, etc. There is no German Region; it is the Walloon Region that has competence in the German-speaking part of Belgium.

Complementing this federalized structure, the federal government and bicameral federal parliament have decision-making powers extending across the whole country, especially concerning issues that are not expressly left to the Regions or Communities. So, although the Regions and Communities have significant competences, federal institutions retain a fair share of powers. Key issues like social security, police, immigration, foreign policy, justice and fiscal policy are still, to a large extent, in the hands of the federal government and parliament.

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[18] Five in all: 1970, 1980, 1988-89, 1993 and 2001. At the time of this chapters composition there was more or less agreement on a sixth state reform, but it had yet to be laid down in legislation and implemented.

[19] Although there still is political disagreement on the issue of territorial competence: some French-speaking politicians claim that the competences of the Communities are personally rather than territorially defined. This would imply that the French Community would be competent with respect to the French-speaking population of Flanders. There is however an authoritative line of case law by the Belgian *Cour constitutionnelle* as well as the *Conseil d'Etat* that confirms the principle of territoriality in this context, although there are exceptions to this.

The federal government depends on a majority in parliament; Belgium is thus a parliamentary democracy (as well as a mainly ceremonial monarchy). In federal parliament, which has competence towards the federal constitution (the term is a tad deceptive, as it is in fact the only one in the federation), there is a clear Dutch-speaking majority: 62 of the members of the Chamber of Representatives belong to the French-speaking language group, while 88 belong to the Dutch-speaking language group; in the Senate the numbers are 29 and 44 respectively. From a numerical point of view, Dutch-speaking members of parliament could impose their will on the minority of francophone parliamentarians. In reality, of course, things are not quite that simple in a federation whose main organisational principle is language. Not only has linguistic parity been mandatory, in the Federal Council of Ministers since 1970 (Section 99 Constitution), decisions that concern the organisation of the state moreover have to be taken by a two-thirds majority in federal parliament, as well as by a majority in each of the two language groups in this parliament (the requirement is described in Section 4 of the Constitution and referred to throughout). Interestingly enough this can be done without constitutional amendment, but by so-called "special legislation"; it is a technique that is prescribed for most Belgian institutional reforms. So while a two-thirds majority can change the Constitution itself after a complicated and lengthy procedure, institutional reform must meet even stricter demands, even if such reform follows a 'regular' legislative procedure. Consequently, institutional reforms are impossible without a special majority in federal parliament, and 31 members of the federal Chamber of Representatives or 15 members of the federal Senate can block them. To put it differently, an institutional reform can never be achieved against the will of a majority in one of the language groups, even if this majority is representative of a minority in Belgium (as is the case with the French-speaking language group in federal parliament).

Moreover, whenever a 75% majority of one of these language groups in one of the chambers of federal parliament declares that the relations between the different communities in Belgium may deteriorate as a result of a federal legislative proposal (as long as they are not dealing with budgets and do not concern laws requiring a special majority), the legislative procedure will be postponed (Section 54 Constitution). This is known as the *alarm bell procedure* and the idea behind it is to prevent one of the language groups in federal parliament from pushing through a legislative proposal against the will of the other language group in parliament. When the alarm bell is raised, the Council of Federal Ministers, which is composed on the basis of linguistic parity, must then, within 30 days, advise parliament on the issue concerned. As can readily be imagined, such a procedure puts enormous pressure on the federal government+ if it cannot come to an agreement, it will almost certainly fall, with representatives of the two language groups subsequently having to negotiate a new government on a subject about which there is fundamental disagreement. Thus, the alarm bell

procedure has preventive or dissuasive quality and the political factions in parliament will not easily raise the alarm.[20]

Belgium's transition in the 1970s and 1980s, from a unitary state to a federal one, ultimately resulted in judicial constitutional review being accepted, initially solely in order to resolve conflicts of competence between the different levels of government. As there was no hierarchy of legislative instruments enacted by the various entities of the Belgian state, conferring those powers could cause conflicts of competence between the Communities/Regions and the federal state. To resolve these conflicts, it was felt that a constitutionally created body was needed, as leaving this to the parliaments would lead to a situation where Belgium would become ungovernable. Instead of assigning this role to the existing courts, the initiators of a constitutional amendment of 1980 chose to set up a special court, the so called *Cour d'arbitrage* (Court of Arbitration), which would adjudicate on disputes between the various legislatures of the federal Belgian state.[21] The *Cour d'arbitrage* could thus check whether legislation introduced by the Federal state, or the Communities or Regions was in line with the competences that were assigned to them by the Belgian constitution.

The twelve bench seats were evenly divided between Dutch-speaking and French-speaking Belgians, with at least one of the judges required to have an adequate knowledge of German. But the originators of the *Cour d'arbitrage* also paid particular attention to the background of these judges: three judges from each language group are former politicians, i.e., they must have served in a legislative assembly for at least five years. Through their work as parliamentarians, they are presumed to have developed the requisite skills needed to bring their knowledge

[20] This alarm bell mechanism exists next to the so-called *conflict of interests* procedure, which is applicable between the different entities of the Belgian federal state. More specifically it is about a conflict that arises when the profession of competences by one of the parliaments of the Communities, Regions or Federation is believed to be harmful to the interest of one or more of the other entities (thus possibly contravening federal loyalty, as laid down in Section 143 of the Constitution). When, after consultations between the different entities no solution for the conflict is forthcoming, the case is sent to a "consultation committee", composed of 12 members of the federal, Regional and Community governments, which has to find an agreement. If it does not, the issue is tabled again in the assembly where it was first dealt with (after which another assembly might initiate the procedure again). This procedure can delay a legislative procedure for quite some time. A similar procedure exists for conflicts of interest between the different governments.

Of course, since this procedure concerns the different autonomous entities of the Belgian federal state, the political consequences are not necessarily as drastic when compared to the alarm bell procedure (which, as we saw, deals within one and the same level of the Belgian federal state): the continued existence of any of the governments is not dependent on a political majority in a parliament to which it does not depend on.

[21] On this M. Adams and G. van der Schyff, "Political Theory Put to the Test. Comparative Law and the Origins of Judicial Constitutional Review", 10/2 *Global Jurist* 2010: http://www.bepress.com/gj/vol10/iss2/art8 and P. Peeters, "Expanding Constitutional Review by the Belgian 'Court of Arbitration'", 11 *European Public Law* 2005, pp. 475-479.

of political sensitivities in order to apply them to their judicial duties.[22] The other judges are jurists from the Court of Cassation or the Council of State, professors of law at Belgian universities, or clerks (called 'legal secretaries') within the Court itself. The purpose of this mixed composition, seeking to balance theory and practice, was to render the principle of judicial constitutional review palatable to the legislature. In addition, these judges are appointed by the King on the recommendation of one of the Houses of Federal Parliament, in an effort to partially obviate the 'democratic impediment' to constitutional review by the judiciary: namely that of unelected judges reviewing and nullifying legislation created by the people's chosen representatives. Moreover, the required two-thirds majority for appointment proposals was intended to make the *Cour d'arbitrage* reflect as accurately as possible the political and ideological movements in the country.

As said, the *Cour d'arbitrage* was originally only authorised to verify whether legislation enacted by the federal government, the Communities, or the Regions was in accordance with the constitutional division of legislative powers. In time, however, this jurisdiction gradually came to expand. For instance, since 1989 the Court was also required to determine whether the right to equal treatment, the right not to be discriminated, and the right to freedom of education were violated (encapsulated in the Sections 10, 11, and 24 of the Belgian Constitution respectively). Finally, the Court's formal powers were extended to include all provisions of Title II of the Belgian Constitution ("On Belgians and Their Rights"). As a consequence, the *raison d'être* of the Court is no longer the federalisation of the Belgian state alone, but also the judicial protection of its citizens and their fundamental rights. Eventually, the name *Cour d'arbitrage* was changed to *Cour constitutionnelle* (Constitutional Court) in order to do justice to its present powers.

In sum, Belgium can, on the one hand, be characterised by what might called warehouse federalism: a polity in which the different constituent parts of the state are competent in different matters, sometimes even in the same geographical area (i.e., Brussels). On the other hand, Belgium's layout is also characterized by what might be called a blocked constitution, i.e., a constitution on whose basis a minority can freeze any decision concerning institutional and constitutional reform. As far as state reforms and related matters are concerned, it is almost as if the majority is structurally in a minority position; it is a constitutional paradox.[23] Today, all this makes for eight parliaments and eight governments,[24] next to ten provinces and a constitutional court, and also one King (and two Queens!).

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[22] These court officials were not required to be jurists (unlike the other judges). It should be noted that appointing 'political' judges to the Belgian constitutional court did meet with criticism because of the lack of independence and impartiality this would allegedly bring about.

[23] J. Velaers, "De crisis van de staat en de achillespees van het staatsrecht" [The crisis of the state and the achilles heel of constitutional law], *Rechtskundig Weekblad* 2011-2012, p. 24.

[24] Each government comes with a parliament. The parliaments are: Federal Parliament (which is the only one with two chambers), Flemish Parliament (for both the Flemish Region and

The Netherlands[25]

The situation could not be more different in the Netherlands. This is remarkable in light of the fact that the two countries, at one point, were one. After the Napoleonic wars, the United Kingdom of the Netherlands was established in the Low Countries in 1815. This Kingdom encompassed both the northern provinces that nowadays constitute the Netherlands and the southern provinces that nowadays constitute Belgium. Support for the policies of the first monarch of the United Kingdom, King William I, was far less strong in the south than it was in the north. In the south, Roman Catholics and liberals pursued greater liberty in shaping their own identities. The Roman Catholics sought freedom of religion from the Protestant north, while the liberals wanted better representation: southern underrepresentation in the States General, i.e., the parliament based in the northern provinces, was indeed sorely felt by many in the region. In addition, the francophone population found it hard to stomach William's Dutch-language politics. Matters eventually came to a head when, in 1830, the pursuit of liberty sparked a revolution, and the southern part of the country seceded from the northern part.

Nowadays, the Netherlands is a small unitary country, with some 17 million inhabitants. Just like Belgium it is highly affluent and densely populated. It is also a (mainly) ceremonial monarchy.[26] The Netherlands has traditionally, and for a long time already, been a country of minorities, especially in religious and political terms. This also shows in electoral results: since the introduction of universal suffrage in 1917, no political party has ever been able to succeed in winning a parliamentary majority.[27]

Parliament, which consists of two chambers, is situated in The Hague. The so-called Second Chamber is the more political one of the two, and consists of 150 members, who are elected once every four years ―if there are no new

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Community); Parliament of the Walloon Region; Parliament of the French Community; Parliament of the German-Speaking Community; Parliament of the Brussels-Capital Region; Combined Assembly of the Common Community Commission; Assembly of the French Community Commission; and Assembly of the Flemish Community Commission. The last four parliaments/assemblies are composed of the same people, each time exerting other competences. Depending on the definition of parliament, the count may differ from the one given here. H. Vuye, for example, refers to nine parliaments, counting Federal Parliament, because of its two Chambers, double. H. Vuye, "België: een Staat in hervorming of in ontbinding?" [Belgium: a State in reform or in corruption?], *Ars Aequi* 2008, p. 719-724. To avoid making matters even more complex, I will disregard the ten provinces (each of which also have an assembly) and the 589 Belgian municipalities.

[25] An English version of the text of the Dutch Constitution can be found on: http://legislationline.org/documents/section/constitutions

[26] A useful and more detailed overview about Dutch political history and institutional shape can be found in R. Andeweg and G.A. Irwin, *Governance and Politics of the Netherlands*, Basingstoke: Palgrave Macmillan, 2009.

[27] *Ibid.*, p. 22-23.

elections as a result of government collapse— through a system of proportional representation. The First Chamber, also informally called Senate, consists of 75 members who are elected every 4 years by the members of the provincial councils (i.e., 12 councils with 564 members in total, accounting for 12 provinces). Its election, however, does not coincide with elections for the Second Chamber. The position of Senator is a part time one, for one day a week, with no parliamentary assistance. Its members come from all sectors of society. Although having more or less the same powers of governmental oversight as the Second Chamber, the First Chamber has no right of legislative initiative or even amendment, but nevertheless has to approve of legislation accepted by the Second Chamber. It can only fully accept or reject this legislation, making for a rather intricate and complicated relation between the First and Second Chamber. Constitutional convention has it that the First Chamber is supposed to mainly look at technical issues of legislative quality (chamber of reflexion), but once in a while it behaves more politically. Its existence and legitimacy has been a matter of debate for years already, especially when it contravenes the Second Chamber on political topics.[28] Just like Belgium, next to being a monarchy, the Netherlands is a parliamentary democracy, which means that the existence of the government is dependent upon a majority in parliament (especially the Second Chamber).

Dutch constitutionalism can be described as being a rich tapestry of customs and documents.[29] Two national documents nevertheless stand out in this regard. On the one hand, there is the *Charter of the Kingdom of the Netherlands* (1954), and on the other hand, we find the *Constitution of the Kingdom of the Netherlands* (the first version dating back to 1813, but with its last major revision in 1983). Of the two, the Charter is the less known, but the higher in terms of legal hierarchy nonetheless. It states that the Kingdom consists of equal partners, i.e., the Netherlands, Aruba, Curacao and Sint Maarten (the latter three islands being situated in the Caribbean), and regulates the relations between these constituent entities of the Kingdom. The Dutch Constitution itself however, is only applicable to the Netherlands and foresees a decentralised unitary state. I will focus here on this last document, which is in effect the most important and prominent one.

The constitutional dispensation of the Netherlands can reasonably be seen as that of a democratic *rechtsstaat*.[30] This means that the Dutch democracy is not intended to be left to its own devices completely, but that it is expected to operate within the recognised boundaries of a *rechtsstaat*, i.e., in terms of protecting fundamental rights through a bill of rights (ranging from classical to socio-

[28] On this M. Adams, "De nieuwe Belgische Senaat en het wetgevingsproces: kamer van reflectie of doublure? Enkele beschouwingen in het licht van de Nederlandse situatie" [The new Belgian Senate: Chamber of reflexion or duplication? Considerations with a view to the Dutch situation], in *RegelMaat. Tijdschrift voor Wetgevingsvraagstukken* 1996, p. 230-238.

[29] G. Van der Schyff, *Judicial Review of Legislation. Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa*, Dordrecht: Springer, 2010, par. 37 (on which this alinea is partly based).

[30] See about this also G. Van der Schyff, *o.c.* par. 35.

economic rights, prominently encapsulated in Chapter 1 of the Dutch Constitution) and respecting people's liberty.

Deserving special attention here, and in strong contrast to Belgium, is that the Dutch Constitution explicitly forbids judicial constitutional review.[31] The debate regarding constitutional review in the Netherlands is indeed an old, yet undecided one. It is also informative and typical of Dutch constitutional culture and design. As just stated, the Dutch Constitution was adopted in 1814 and was revised on a number of occasions since then.[32] Importantly, the revision of 1848 saw constitutional review prohibited by Section 115(2), which stated that "statutes are inviolable". This provision was included at the insistence of the government at the time and was contrary to the opinion of a State Commission entrusted with revising the Constitution, as the latter favoured constitutional review by the judiciary. Nonetheless, the prohibition became a standard feature of the Dutch Constitution, as J.R. Thorbecke, who chaired the State Commission and was a noted supporter of constitutional review, warned it would be.[33] As a matter of fact, it survived all constitutional revisions since 1848. However, while not affecting its function, its formulation was changed in the most recent revision in 1983.. The prohibition is now included in Section 120 and provides that "[t]he constitutionality of statutes and treaties shall not be reviewed by the judiciary."

Yet, it may not be deduced from the above that the Dutch judiciary may never review legislation for compatibility with higher norms. This is because the revision of the Constitution in 1953 recognised the power of the judiciary to review legislation for compatibility with international treaties. Section 94 states in this regard that "legislative regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or in conflict with resolutions adopted by international institutions."

When read together, Sections 94 and 120 lead to a rather peculiar situation. On the one hand the judiciary is barred from testing the constitutionality of statutes, but not from reviewing legislation that enjoys a lesser legal position than statutes, as Section 120 only applies to statutes in the sense of 'acts of parliament'. For example, the judiciary may review delegated legislation for compatibility with the Constitution, but not to the extent that the enabling statute is questioned. Testing the constitutionality of delegated legislation may then not be used as an excuse to test the constitutionality of the legislation from which it stems. On the other hand however, the judiciary may, on the basis of Section 94, review all forms of legislation for compatibility with international treaties and resolutions. In practice, this usually means that classical rights guaranteed in

[31] See on this also M. Adams and G. van der Schyff, "Constitutional review by the judiciary. A Matter of Politics, Democracy or Compensating Strategy?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2006, p. 399-414.

[32] For an overview, see J.W. Sap, *The Netherlands Constitution 1848-1998. Historical Reflections*, Utrecht: Lemma, 2000.

[33] J.R. Thorbecke, *Bijdrage tot de herziening van de Grondwet* [Contribution to the revision of the Constitution], 1921, p. 60.

international treaties are applied, but not socio-economic rights, bar a few exceptions, as the latter rights are usually judged to be not directly enforceable.[34]

This chequered situation has been the topic of much debate. Interestingly, a report drafted in 1966 by the Interior Ministry's Section for Constitutional Affairs recommended that the prohibition on constitutional review be partially lifted to allow the judiciary to test legislation in respect of the classical rights guaranteed in the Constitution.[35] It was felt that such rights provided their bearers with greater protection than rights guaranteed in international law, and therefore deserved the benefit of judicial protection: international law was seen as only providing minimum norms, and therefore, did not adequately protect rights.

The debate regarding the introduction of constitutional review by the judiciary gained momentum with the publication in 1969 of the second report of the State Commission, called upon to render advice in respect of the Constitution (and the Electoral Law).[36] The Commission considered the recommendation, by the Interior Ministry's Section for Constitutional Affairs, that the prohibition be partially lifted. It took note of the arguments commonly used against constitutional review. For example, the point was raised that constitutional review calls upon the judiciary to make *political decisions*, instead of entrusting this task to the legislature where it is normally considered to belong.[37] Furthermore, lifting the prohibition would potentially endanger judicial independence, as appointments to the bench could then become the object of political contestation and influence.[38] It was also considered that judicial review of international treaties presented a different case altogether and could consequently not be used as a base from which to argue for constitutional review. This was founded on the argument that the judicial review of international treaties was geared towards engendering respect for minimum norms across a variety of legal systems, whereas constitutional review was much "closer to home", as it were.[39] In other words, constitutional review would amplify the role of the judiciary in the *trias politica* to an unacceptable extent, thereby encroaching on the domain preserved for the legislature. These arguments are very much in line with those that dominated the European continent after the French Revolution and that found favour with numerous Dutch academics, namely that good governance amounted to a clear

[34] L. Prakke, J.L. de Reede and G.J.M. van der Wissen, *Handboek van het Nederlandse staatsrecht* [Handbook Dutch Constitutional law], Zwolle: Tjeenk Willink, 2001, p. 238.
[35] *Proeve van een nieuwe Grondwet* [Attempt of a new Constitution], 1966.
[36] J.L.M.Th. Cals and A.M. Donner, *Tweede Rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet* [Second Report of the State Commission concerning an advice for a new Constitution and the Electoral law], 1969.
[37] *Ibid.* at 39.
[38] *Ibid.*
[39] *Ibid.*

separation of powers.[40] In this case, this would mean a separation between the legislature and judiciary—each to its own.

Nonetheless, the State Commission came to the conclusion by 11 votes to 6 that constitutional review of classical rights had to be allowed. The point was made that such review was necessary to strengthen the position of the individual in relation to government. Classical rights were judged as the proper vehicle for this, as their primary function lay in keeping government intrusion at bay when it came to personal freedom. However, the successive government supported the minority of the State Commission in opposing the introduction of constitutional review by the judiciary. Political reluctance sealed the fate of reform, and as mentioned, the 1848 prohibition on constitutional review survived the 1983 constitutional revision, albeit with a different formulation.

This did not bring the debate to an end though. In 1988, the President of the District Court in The Hague, sitting in summary proceedings, gave a ruling in a case that achieved a large amount of attention.[41] The case related to three statutes on education, which were amended by the so-called 'Harmonisation Law'. This statute retrospectively limited state funding for students. An application was brought requesting the Court not to apply the statute, as it violated the general principle of legal certainty. It was argued by the applicants that although Section 120 prohibited constitutional review by the judiciary, it did not explicitly bar the judiciary from reviewing legislation against (unwritten) general legal principles not included in the Constitution – such as that of legal certainty *in casu*. The Court, however, rejected this argument. Section 120 could thus not be sidelined in this manner.

In addition, the applicants also averred that the Harmonisation Law violated the principle of legal certainty, as guaranteed in Section 43(1) of the aforementioned Charter of the Kingdom of the Netherlands of 1954. As said, the Charter, which acts as a basic law, states that the Kingdom of the Netherlands is composed of three equal partners, namely the Netherlands, Aruba, Curacao and Sint Maarten. It is distinct to the Constitution, as the latter applies only to the Netherlands as such. Moreover, the Charter is technically the highest law in the Netherlands. Interestingly enough, the Charter, in contrast to the Constitution, does not explicitly prohibit the judiciary from testing the constitutionality of statutes from being reviewed by the judiciary, yet also does not explicitly empower the judiciary to effect such review. The District Court in The Hague judged the absence of a prohibition as reason enough to engage in constitutional review of the Harmonisation Law. It consequently held that the Harmonisation Law did indeed violate the students' rights when tested against the Charter and

[40] Cfr. A. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge: Cambridge University Press, 1989, p. 252; M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford: Oxford University Press, 1989, p. 193-194.

[41] Pres. District Court, 's Gravenhage, 11 August 1988, *Nederlands Jurisprudentie* [Dutch case law] 1989, p. 489.

consequently refused to apply the offending provisions. This amounted to introducing constitutional review by the judiciary.

The matter was eventually lodged with the Supreme Court of the Netherlands (*Hoge Raad*). The Supreme Court joined the court *a quo* by noting that Section 120 could not be interpreted to allow the judicial review of legislation against general legal principles. Contrary to the District Court however, the Dutch Supreme Court took the view that the Constitution excluded any possibility of reviewing legislation in the light of any higher rule whatsoever, bar the exception of international law in Section 94 of the Constitution of course. The Court also pointed out that, during the revision of the Constitution in 1983, the legislature discussed the question whether it was desirable to abolish the rule in Section 120 prohibiting constitutional review by the judiciary, and that no fundamental objections had been raised against it. The Court went on to conclude that the rule prohibiting constitutional review by the judiciary, including extra-constitutional legal norms, was therefore entirely consistent with the "traditional position"[42] occupied by the courts in the institutional structure of the Dutch state. The ultimate judgment on the meaning of the Constitution should accordingly be entrusted to the *democratically-elected legislature*. The Supreme Court noted though that the need for civil society to be protected against government had increased since 1983, but that it was not for it to exceed its boundaries in this respect. In other words, positive law had to prevail, which meant upholding and applying the prohibition on constitutional review contained in Section 120 of the Constitution. The Supreme Court proceeded to overturn the finding by the court *a quo* that the Harmonisation Law could be tested against the guarantee of legal certainty contained in Section 43(1) of the aforementioned Charter. The Court also stated that although the Constitution contained an express bar to constitutional review by the judiciary, the absence of a similar provision in the Charter could not be interpreted as allowing judicial review by implication. The Court explained that such a turn of events would neither accord with the intention embodied in the Charter, nor would it accord with the principle in the Kingdom of the Netherlands, of avoiding judicial review of compliance with constitutional documents. The prohibition on constitutional review by the judiciary in Section 120 of the Constitution could thus not be outflanked by testing the contested legislation against the Charter instead.

This decision did ―again― revive the debate in the Netherlands regarding constitutional review by the judiciary. In 1991 the Dutch government presented a policy note to, *inter alia*, the Supreme Court for its considerations in an advisory opinion.[43] The central question, according to the government, no longer revolved around *whether* constitutional review had to be introduced, but centred on the *form* that it had to take. The Supreme Court supported the idea of lifting the prohibition on constitutional review in respect of a number of, mostly

[42] *Ibid.*

[43] *Nota inzake rechterlijke toetsing* [Policy note concerning judicial review], 1991.

classical, rights.[44] The Supreme Court also supported the idea of de-concentrated judicial review, in other words, empowering *all judges* to carry out constitutional review, instead of reserving this function for a few selected judges or a special constitutional court. However, differences of opinion led to the government not proposing a constitutional amendment. The government in 1997 again asked the Supreme Court for its opinion on constitutional review, but again failed to act, and in 2002 submitted a policy note to the legislature.[45] This time, it noted that although much could be said against constitutional review by the judiciary, it nonetheless had a slight preference towards the introduction of de-concentrated review. The timing largely coincided with the proposal to amend the Constitution, which was tabled by a prominent opposition member of the Dutch legislature.[46] This proposal built on earlier arguments that sought to allow the courts to conduct judicial review. It was also met with some success; but in order to amend the Dutch Constitution, the proposal had to satisfy the usual criterion of passing two readings.[47] The first reading implies that both houses of the legislature accept the proposal with a simple majority, after which the proposal is subsequently reconsidered in a second reading after a general election. The proposal becomes a constitutional amendment if passed by a two-thirds majority in both houses during this second reading. At the moment, the Second as well as First Chamber of Dutch parliament have accepted the proposal ―the First Chamber with a single vote majority!―and so the first reading is complete. It is however at this very moment widely agreed upon that the proposal will not pass the second reading, and that as a result judicial constitutional review will thus not be introduced in the Netherlands in the near future. As all this shows, one might characterise Dutch constitutional order as rather open, thereby strongly emphasising parliamentary democracy.

A POSSIBLE EXPLANATION FOR BELGIAN AND DUTCH POLITICO-CONSTITUTIONAL DESIGN

Theory

How can Belgian and Dutch constitutional culture and accompanying design be explained? Arend Lijphart's political theory could well offer an explanation for the specific institutional configuration of both politico-constitutional systems, and also of the behavior of the actors shaping these configurations. Lijphart has

[44] Published in 7 *NJCM-bulletin* 1992, p. 243.
[45] Tweede Kamer vergaderjaar 2000-2001 [Second Chamber of Parliament, meetings of 2000-2001] , 27, 460, no. 1.
[46] Tweede Kamer vergaderjaar 2001-2002 [Second Chamber of Parliament, meetings of 2001-2002], 28, 331, no. 2. Cfr. Tweede Kamer vergaderjaar 2002-2003 [Second Chamber of Parliament, meetings of 2002-2003], 28, 331, no. 9.
[47] Section 137 of the Constitution.

termed his theory 'consociational democracy'.[48] It means "government by elite cartel to turn a democracy with a fragmented political culture into a stable democracy."[49]

A consociational democracy is most often found in societies, as is clear from the definition just cited, that are strongly divided. It was generally assumed that political stability was beyond reach for such societies, but Lijphart has demonstrated that this *nec plus ultra* is not untenable for them; political *in*stability is thus not a predestined terminus for fragmented or disunited societies. The potentially destabilizing effects of division are on the contrary likely to prompt the established political actors to search for pragmatic ways to deal with societal cleavages. Alternative methods of political accommodation, contrary to regular majoritarian politics, are thus explored, and the different segments in society actively strive for cooperation, consensus and stability: they seek to find each other and to cherish common ground as much as possible. Political differences between the ruling groups are, as a result, not politicized or exaggerated and a substantial number of the political leaders cooperate in governing the country, thus neutralizing destabilizing tendencies. This also prevents major political groups from becoming estranged from the political system. As a result, although political decision-making in consociational democracies is strongly affected by the interplay of past and present political and other tensions, in practice, so the theory goes, it operates in a way that defuses these tensions and encourages compromise.

The hallmarks of a consociational democracy are broad government coalitions, political proportionality (in elections and representative bodies, but also in advisory bodies, the civil service, etc.), mutual rights of veto in political decision-making, and 'pillarisation'. Pillarisation is a term that described the vertical organisation of a society along traditional ideological, religious, and/or politico-economic divides. Pillarised societies are divided in several smaller segments or pillars according to different religions or ideologies. All of these pillars have their own social institutions (broadcast companies, newspapers, schools and universities, sports clubs, mutual sickness funds, etc.) and resources, with each group retaining autonomy of how to use them.

The Dutch and Belgian societies for the greater part of the twentieth century play an important part in (the development of) Lijphart's views and theories. They were both deeply ideologically divided between liberals and socialists, and between Catholics and Protestants (in the Netherlands) and between Catholics and non-confessional groups of society (in Belgium). According to Lijphart, Dutch society from the 1960s onwards was a classic

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

[49] A. Lijphart, "Consociational Democracy", 21 *World Politics* 1969, p. 216.

example of both a pillarised society and a consociational democracy. And he considered Belgium "the most thorough example of a consociational democracy."[50] Both Belgium and the Netherlands have nevertheless developed into completely different political and constitutional cultures. What is common however, is that although in both countries the pillars have crumbled as religious division have weakened (although more in the Netherlands than in Belgium), elite compromise still remains a key theme and operational devise.[51] Indeed, when essential societal issues cannot be resolved or addressed via the regular political channels, for example because of potential structural political deadlock between the political factions in parliament, other elitist bodies are many times empowered to cut the knots.[52] The issue of judicial constitutional review, dealt with in the previous paragraph, is again telling here.

Belgium

It might be good to mention here that the demise of the Belgian federal government in 2007, which was mentioned previously in this article, was the direct result of a decision by the Belgian Constitutional Court on a highly sensitive issue: the constituency of Brussel-Halle-Vilvoorde (BHV), which for the federal elections comprised the central bilingual district of Brussels and some neighboring parts of Dutch-speaking Flanders (where as a matter of fact many French-speaking Belgians live), together containing some 1.6 million inhabitants. It has been a politically exceptionally difficult issue for decades. In 2003 the Constitutional Court ruled that, after a 2002 electoral reform which was the result of a hard-fought political compromise, this constituency contravened the equality and non-discrimination clauses of the Constitution. It was the only constituency in the country that did not come with a single monolingual province. As a result of this 2002 reform, voters in parts of Flanders could vote for French-speaking politicians. The Court declared unconstitutional parts of the law concerning this compromise,[53] also stating that a solution for this situation had to be reached

[50] A. Lijphart, "The Belgian example of cultural coexistence in comparative perspective", in A. Lijphart (ed.), *Conflict and Coexistence in Belgium. The Dynamics of a Culturally Divided Society*, Berkeley (University of California): Institute of International Studies, 1981, p. 1 (italics added). See also A. Lijphart, *Democracy in Plural Societies. A Comparative Exploration*, New Haven: Yale University Press, 1977, p. 223-238.

[51] R. Hague and M. Harrop, *Comparative Government and Politics*, Basingstoke: Palgrave MacMillan, 2007, p. 115.

[52] On this, see, e.g., C. Guarneri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2002, pp. 161-180. Hirschl too refers to this work (p. 33).

[53] Judgement 73/2003 of 26 May 2003. To be found in Dutch, French and German on: www.const-court.be/public. See D. Sinardet, "From consociational consciousness to majoritarian myth: Consociational democracy, multi-level politics and the case of Brussel-Halle-Vilvoorde", 45 *Acta Politica* 2010, p. 346-369 and S. Lindemans, "Het probleem Brussel-Halle-Vilvoorde. Analyse van een staatsrechtelijke doos van Pandora" [The problem Brussel-Halle-Vilvoorde. Analysis of a constitutional Box of Pandora], *Jura Falconis* 2005-2006, p. 473-504.

before the 2007 federal elections. A solution however was not reached, and its contention made the post-election coalition negotiations very difficult. In November 2007, the Dutch-speaking members of parliament almost unanimously voted to split up the constituency. This was the first time ever a single language group did so in view of a sensitive issue like this, which put a lot of pressure on the relations between the different language groups. The dire prospect of the *conflicts of interest*[54] and *alarm bell*[55] procedures loomed largely, and the 'conflicts of interest' procedure was actually resorted to. This caused considerable delay in resolving the issue, institutionally and otherwise. In 2010 the government fell again, before agreement on this topic between the different political factions was reached.[56]

What may not be immediately obvious to outsiders however is that the difficulties surrounding this electoral district have to do with territorial-linguistic claims. Due to the constituency's hybrid nature, the Dutch-speaking Flemish political parties wanted it to be split, which would create two separate electoral districts: one for the Brussels Region and one district for the Province of Flemish Brabant. This would prevent the francophone political parties from attracting French-speaking voters outside of bilingual Brussels and put a brake on the frenchification of parts of Flanders (especially in the municipalities surrounding Brussels) something so greatly feared by the Flemish.

This is a highly sensitive issue in Belgian politics and society. Brussels has, over the centuries, developed from a Dutch-speaking city into a French-language enclave in Flanders. The legislative fixation in 1962-63 of the language border (which was based on the language count of 1947), was meant to stop the frenchification of Brussels and its surrounding area. The border was not to be based on language counts anymore. The granting of linguistic facilities and rights to the French-speaking population in some municipalities was to compensate for this. The frenchification however didn't stop, resulting today in French-speaking majorities in officially Dutch-speaking municipalities. The debate as it unfolds today is partly put in terms of whether or not the language facilities were introduced as a temporary measure to give the French-speaking population the opportunity to learn to speak Dutch (of which many Dutch speakers say has been to no avail), or introduced as some sort of fundamental right which almost by definition cannot be temporal (as many of the French speakers claim).

The Netherlands

[54] See footnote 19.

[55] See main text surrounding footnote 19.

[56] All this provokes the question whether the 2007 and 2010 elections in the aforementioned constituency were conducted in a legally correct manner. Opinions differ. The issue was, however, negotiated in the 2011 government formation, and a settlement was reached. In July 2013, the particulars were being put in legislation.

Consider the Netherlands now. Dutch society and its institutions have long availed themselves of channels, other than judicial constitutional review, to deal with social or political conflicts and interests, including the protection of fundamental rights. Whereas previously, societal problems were solved within the pillars, today, pivotal organizations dealing with these problems include, next to parliament, the Council of State, the Social and Economic Council, the Auditor's Office, the Scientific Council for Government Policy, the High Council of the Judiciary, Ombudspersons, and other public advisory, controlling or decision-making bodies ('poldering' bodies).[57] This fact might tone down one of the essential arguments put forward in the aforementioned proposal to introduce judicial constitutional review in the Netherlands, namely, that it would be more beneficial to have an extra link in the chain to create new legislation or regulation and essentially that an extra-legislative check is necessary to secure proper checks and balances.[58]. More particularly, it is argued that the dwindling influence of parliament makes judicial constitutional review necessary in order to safeguard or enforce the protective function of the law. But from a systemic perspective, there would not appear to be a dearth of checks and balances in the Netherlands, despite the courts not being able to review the constitutionality of legislation.

What is important to note here, is that as a result of all of this, in the Netherlands, there has been, for many years, talk of a mild or moderate constitutional culture, and of a strong distance between constitution and politics: "It is virtually impossible to find any politician in The Hague [the seat of Parliament, MA] who would want to win or lose a political debate on the ground that a certain topic would be contravening the Dutch Constitution."[59] As a result, there are very few people, besides those who belong to the inner circle of constitutional specialists that consider themselves as the 'guardians of the constitution.' Concerning significant topics, Dutch constitutional life is developing next to the written Constitution, in constitutional customary law for example, with all the dubiety that accompanies this last source of constitutional law. To give but a few examples: the development and limitation of the monarch's power is predominantly arranged without the Constitution, as such, being amended; even stronger: the Constitution is to a large extent silent about this topic. The same is true for cabinet formation proceedings, which are arranged by means of constitutional convention. Also, nothing can be found about political parties or the independence of the judiciary in the Dutch Constitution, and there is no word whatsoever in the Constitution about the European Union or about the 'rule of law', neither is there any inspiring preamble or prelude. In addition, to give a last example, the independence of both Chambers of parliament is only

[57] The Council of State for example advises, next to being the highest administrative court, on the legislative quality (including the constitutionality) of pending bills.

[58] *Parliamentary Proceedings* II, 2001-2002, 28 331, no.3, pp.13-15.

[59] L.F.M. Besselink, "Constitutionele klimatologie" [Constitutional climatology] *Nederlands Juristenblad* 1998, p. 212. Also about Dutch constitutional culture G.F.M. van der Tang, *Grondwet en grondwetsidee* [*Verfassung* and the idea of a constitution], Arnhem: Gouda Quint 1998, p. 373-375.

implicitly acknowledged, through the Section that states that each Chamber chooses its own chair (Section 61).

Contrasting

The contemporary constitutional and institutional structures of Belgium and the Netherlands, as set out previously in this article ("Some Facts About etc."), can indeed be understood or explained from the point of view of consociationalism. In Belgium, federal government coalitions usually have a fairly broad support base with a minimum of three coalition partners (and often more), and it is clear that changes in the country's institutional set-up cannot possibly be decided by a simple majority in parliament; there are many institutionalized mechanisms in place to reach political consensus or pacification on these issues. For this reason, Pinder has defined consociational arrangements as "institutions and procedures that encourage consensus rather than allowing the will of those who represent a simple majority of the population to prevail."[60] Majority-type democracy, from this point of view, is "the antithesis of consociational democracy."[61] All this means that the Belgian Constitution has a rigid and highly political nature, being expressly called upon in public and political discourse; possibly with the Constitutional Court as leverage or as a background threat, especially whenever the relations between the two communities that make up the country are at stake.

And although the Netherlands is also essentially ruled by elites, and in this respect still has a distinctly consociational flavour to it, its constitutional culture is nonetheless rather different from the one that is prevalent in Belgium. In the Netherlands, the accommodation of political conflicts is arranged by many means, but not through evoking constitutional law. In line with Lijphart's reasoning, it could well be argued that the renowned late 20th-century Dutch 'polder model' (consultation model) is an offshoot of a consociational democracy. The phrase 'polder model' has uncertain origins, but is mostly used to describe the typically Dutch version of consensus politics, developed in the 1980s and 90s in socio-economic affairs.[62] It is a short hand, referring to the typical Dutch 'polders'[63], for an institutionalized form of cooperation and consensus seeking between political actors, social partners and other societal organizations. The term was, however, also quickly adopted for a broader meaning, i.e., pragmatic elite consensus decision-making in the face of diversity and plurality in general. So, following the gradual dissolution of the old 'pillarised' way of organizing Dutch society, the

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[60] J. Pinder, "Multinational Federations", in M. Burges and J. Pinder (eds.), *Multinational Federations*, London: Routledge, 2007, p. 9.

[61] A. Lijphart, "The Belgian example of cultural coexistence in comparative perspective", *o.c.*, p. 1.

[62] J.J. Woldendorp, *The Polder Model: From Disease to Miracle? Dutch Neo-Corporatism 1965 – 2000*, Amsterdam: Thela, 2005, p. 28.

[63] A 'polder' is a low-lying piece of land, which was originally flooded by water and was later won as land. It is enclosed by embankments to prevent the land from flooding. It is a very typical (though not exclusive) Dutch phenomenon.

Dutch system of political decision-making found new, distinctly non-judicial ways to channel potential bottlenecks in the political decision-making processes; ways which were completely different from the ones that prevailed in Belgium.

As a result of all this, Dutch constitutional culture is not really marked by the use of normative language and obligations that come with the concept of law, and which is so typical for Belgian constitutional discourse. We might thus typify Dutch constitutional culture as relativistic and the two aforementioned constitutional documents —i.e., the Charter and the Constitution— can be understood as more general maps as opposed to robust guarantees in the service of the democratic *rechtsstaat*. This is even more so, since courts in the country generally show great restraint in their dealings with higher law (as the European Convention on Human Rights for example).[64] The Constitution does not function as a strong normative document; it is rather a codification of political practice than the other way round.[65] The Dutch Constitution as such, as is also generally agreed upon, is moreover rather uninspiring; a construction with no character, the builders of which were rather provident and drifty.[66] All this of course does not necessarily mean that political life develops arbitrarily. It might also mean that political and social practice are intimately in tune with the constitution)and the democratic values it expresses). And since the Netherlands is generally regarded as a tolerant and democratic nation, the Dutch might as well praise themselves with such a situation. If that is a correct evaluation, it would not be unfair to state, with Loewenstein, that the Dutch constitutional suit fits very well and is moreover actually worn.[67]

CONSOCIATIONAL TROUBLES

Do Belgian and Dutch constitutional layout promote societal consensus and stability? The short answer to this question is that both its track records are not optimal. I will in this paragraph elaborate on this, and again split up my analysis in a Belgian and a Dutch part.

Belgium

Constitutional design in Belgium, as much as it fosters cooperation, structurally hinders accommodation techniques. As it develops, consociationalism can harden

[64] G. van der Schyff, *o.c.*, par. 40.
[65] As Dutch scholar Van der Hoeven already in 1958 observed, in his seminal *De plaats van de grondwet in het constitutionele recht* [The place of the written Constitution in constitutional law], Zwolle, Tjeenk Willink, 1958.
[66] About this G. van der Tang, "Een Grondwet voor de politieke samenleving"[A constitution for a political society], in *De Grondwet herzien, 25 jaar later* [Rethininking the Constitution; 25 years later], p. 91 and 94.
[67] K. Loewenstein, *o.c.*, p. 148.

or rigidify pre-existing group differences[68], and it is clear that the Constitutional Court is not necessarily conducive to accommodation. At least two problems stand out.

The first can be found on the level of political parties and elite estrangement. In a consociational democracy, Stephen Holmes has aptly observed, the political elites must both represent and not represent their constituencies: "They must hold their followers' loyalty, but not reproduce their uncompromising attitudes in national negotiations. Such cross-sectarian cooperation among elites requires 'a strengthening of the political inertness of the non-elite public and their deferential attitudes to the segmental leaders.'"[69] The trouble is that in Belgium this seems hardly possible since *national* political parties no longer exist. Since the 1960s Belgium has had regional political parties, and today quite a few of these parties have no ideological counterpart on the other side of the language border. And even when they do (as is the case with the Christian-democratic, liberal and social-democratic political parties) they are split on many important issues. Today, the discursive focus of politics and of public opinion is almost exclusively geared towards the regional level and its sentiments. Federal politicians are first and foremost representatives of their respective regions in which they are elected. This makes for a not necessarily Belgian minded political elite with hardly any Belgian identity.[70] All this has removed incentives for moderate consensual and electoral politics, and has resulted in a big gap between regional electoral pledges and the reality of national politics. This gulf has been widened by a split media landscape,[71] and the fact that since the 1990s it is possible to form different or asymmetrical regional and federal government coalitions.[72] Consociationalism asks for the willingness and ability to

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[68] R.H. Pildes, *o.c.*, p. 333.

[69] S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy*, Chicago: University of Chicago Press, 1995, p. 212 (referring to Lijphart). Peters describes this as follows: "The federal nature of Belgian politics means that the party leaders must be thinking about their role in the context of a multi-level governance arrangement, and must conceptualise their role as the cement that binds the various elements of the system together." B. Guy Peters, "Consociationalism, Corruption and Chocolate: Belgian Exceptionalism", 29 *West European Politics* 2006, p. 1081.

[70] Deschouwer therefore talks about distrust at the top: the elite does not trust the system, because the political system is perceived to benefit the other more. K. Deschouwer, *The Politics of Belgium. Governing a Divided Society*, Basingstoke: Palgrave MacMillan, 2009, p. 233.

[71] Which, if it even reports on this issue, gives a very one-sided and even partial account of events and political life on the other side of the language border. D. Sinardet and M. Temmerman, "Political journalism across the language border: communicative behaviour in political interviews by Dutch- and French-speaking journalists with Dutch- and French-speaking politicians in federal Belgium", in J. Darquennes (ed.), *Multilingualism and applied comparative linguistics: vol. 2: cross-cultural communication, translation studies and multilingual terminology*, Cambridge: Cambridge Scholars Publishing, 2008, p. 110-138.

[72] K. Deschouwer, *The Politics of Belgium*, p. 233-236. H. Van Goethem, *Belgium and the Monarchy. From National Independence to National Disintegration*, Brussels: EPA, 2010, p. 269-271. B. Guy Peters rather neutrally observes that "there is not necessarily a greater identification of the public with Belgium as an entity than with the constituent parts." He adds that the regions

compromise and reach consensus between the language communities, but before that is possible, in Belgium, "elected politicians wanting to govern at the federal level must first solve the problems that they have created themselves."[73]

The second consociational fault line, which lines up to the first one in that both stimulate calls for more, in this case, Flemish autonomy (and in both cases the solutions desired become part of the problem for consociationalist theory and politics), has to do with the specificity of Belgian federalism. Federalism is mostly intended to bring the separate units of a state together.[74] The Belgian variety of federalism however has the exact opposite aim of separating its two main components[75]; Belgian federalism is thoroughly bipolar. While federalism tends to work well when there are more than two basically equal partners, "[Belgian federalism] is the juxtaposition of two peoples moving in different directions."[76] As a result, social tensions among the groups can easily worsen, since 'the problem' can always be traced to "the same other":[77] political parties belong to one language group, as do members of parliament (including the accompanying veto mechanisms), federal government is based on linguistic parity, etc. This is even more so since the rather far-reaching allocation of competences to the Regions and Communities highlight the differences rather than the commonalities between the two main regions and language groups. To put it in financial terms, the fact that there are significant financial transfers from one economically solid region —Flanders— to the economically less well off region —Wallonia— has a profound impact on Flemish public opinion. Many would reason that the financing region should also have a more decisive say in the other's state of affairs and in their institutional and constitutional relations (i.e.,

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have become the arena in which the conflict between both parts of Belgium are played out. B. Guy Peters, *l.c.*, p. 1083 and p. 1084.

[73] K. Deschouwer, *The Politics of Belgium*, p. 237. I believe that this is the core of one of the main criticisms of consociationalism by Donald Horowitz: the granting of autonomy to different communities not necessarily promotes attitudes and behavior that promotes stability. D. Horowitz, "Constitutional Design: an Oxymoron?", in I. Shapiro and S. Macedo (eds.), *Designing Democratic Institutions*, New York: New York University Press, 2000, p. 253-284 and "Constitutional Design: Proposals versus Processes", in A. Reynolds (ed.), *The Architecture of Democracy. Constitutional Design, Conflict Management, and Democracy*, Oxford: Oxford University Press, 2002, p. 15-36. For an excellent overview of the debate between Lijphart and Horowitz, see S. Choudhry, "Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies", in S. Choudhry, *o.c.*, p. 15-26. See also, R.B. Andeweg, "Consociational democracy", 3 *Annual Review of Political Science* 2000, p. 509-536.

[74] Interestingly, Lijphart himself seems to have recognized this early one: "A multiple balance of power among the segments of a plural society is more conducive to consociational democracy than a dual balance of power or hegemony by one of the segments, because if one segment has a clear majority its leaders may attempt to dominate rather than cooperate with the rival minority." A. Lijphart, *Democracy in Plural Societies*, p. 55.

[75] Belgian federalism might have this in common with Canada or Spain, or possibly the United Kingdom (devolution).

[76] As former prime minister Tindemans said in 1971: *Parliamentary Proceedings*, Senate, 7 July 1971, p. 2368.

[77] K. Deschouwer, *The Politics of Belgium*, p. 235.

how they relate to each other).[78] However, as we have seen, decision-making on the future of the Belgian state, including its financial allocation mechanisms,[79] always involves the other veto player who is perceived to be radically different. And since calls for more autonomy tend to come from the Dutch-language part of the country, this 'other' is also a linguistic minority.

But how long will this situation last? "Prediction is difficult, especially concerning the future", Niels Bohr reportedly once said. The complexity of the Belgian situation makes predicting an even more hazardous challenge than it normally is. From the perspective of this article, the one million dollar question is whether Belgium's constitutional and institutional set-up is conducive to societal stability and peace (and in line with this: whether Belgium will survive its seemingly permanent political crisis). So far it seems as if it has indeed been conducive to societal stability: Belgium is not marked by riots and violent uprisings between the different communities. And even the relative instability of Belgian governments can be seen as systemically functional because governmental break-up might also be understood as one of the means of reducing the possibilities for political deadlock and blockage.[80] Even so, there are indications that in Belgium consociational strategies can no longer be fully relied upon. For example, the cries for more autonomy have in recent years led to the rise of a strong democratic nationalist political party in Flanders, NV-A (*Nieuw Vlaamse Alliantie*, New Flemish Alliance), which is currently part of the Flemish government coalition. The NV-A would appear to have replaced the more extremist and separatist right-wing *Vlaams Belang* (Flemish Interest) as the voters' favourite *nationalist* political party; until recently the latter did rather well in elections, but politically it has remained a marginal force because of its xenophobic views of foreigners and the resulting exclusion of any government coalition.[81] It is also at heart an opposition party. The current enormous success of the NV-A might be a sign of a changing political constellation —separatism is becoming a real issue in political discourse; maintenance of the status quo does not appear to be the only option any longer, at least not for the Flemish part of the country, nor is it realistic given the institutional and historical weaknesses of the Belgian state.[82] And although demands for more autonomy seem to come mainly from the Dutch-speaking side of Belgium, these demands are highly relevant to

[78] H. Van Goethem, *Belgium and the Monarchy*, p. 271.

[79] Which are not fully federalized: the division of competences between the two Regions and Communities does not always come with the full fiscal autonomy necessary for employing these competences; the financing mechanisms remain in federal hands. On this W. Swenden and M.T. Jans, " 'Will It Stay or Will It Go?' Federalism and the Sustainability of Belgium", 29 *West European Politics* 2006, p. 885.

[80] B. Guy Peters, *l.c.*, p. 1088.

[81] In 2004 some of its satellite organisations were convicted for racist crimes. See M. Adams, "Geen woorden maar daden? De vrije meningsuiting van het Vlaams Blok" [Not words, but actions. Freedom of opinion of the Flemish Interest], *Rechtsfilosofie en Rechtstheorie* 2004, p. 189-196.

[82] H. Van Goethem, *Belgium and the Monarchy*, p. 276.

the French-speaking part. Previously, when tensions ran high and one of the actors insisted on institutional reform, the other side perceived that as a quasi-obligation to negotiate a solution for the problem concerned.[83] Today however, the positions are hardening and some development towards a more confederal system seems to be the unavoidable next step.

Logically, a desire to coalesce implies a need for it.[84] So in the light of what has been said so far, we might well wonder why Belgium does not split up. The most convincing explanation for the current situation is Brussels. There are at least two elements that are relevant here. The first is the economically vital position of Brussels: it is a significant place of employment for many people from out of Brussels. Breaking up comes at considerable cost, possibly too high to even seriously consider. The second element is the emotional element: although nowadays Brussels is essentially a French-speaking city, geographically surrounded by Flanders, historically it is of Dutch-speaking origin. The frenchification of Brussels, which started in the mid-nineteenth century, is a "romantic" source of frustration for many. "If Flanders were not to claim or need Brussels, the structure of Belgium could be much less complicated. Both communities see Brussels as their (capital) city and that is what has created the double federation of Regions and Communities."[85] In the meantime, tensions continue to build up and Flemish calls for more autonomy are becoming stronger and stronger, and the willingness to federally cooperate in a consensual manner seems to be losing ground.

The Belgian Constitution has institutionalized political distrust and instability, by installing a kind of disintegrating federalism. As a result it has not been capable of installing a sense of nationhood —with mutual respect and common interests between the (populations of the) different communities— or *Verfassungspariotismus* in its nationals.[86] The Belgian Constitution is an encumbering one, and the type of decision-making it encourages can hardly serve as the 'germ of a nascent sense of political community' or promote the general interest beyond the regional interests.

The Netherlands

In the Netherlands, consociational structures and pillarisation have been waning for quite some time already—because of secularization and emancipation—, but new social cleavages have arrived instead. The composition of Dutch society has

[83] K. Deschouwer, "And the Peace Goes On?", p. 906.
[84] As Lijphart himself admits in "The Wave of Power-Sharing Democracy", p. 43.
[85] K. Deschouwer, *The Politics of Belgium*, p. 244.
[86] K. Lemmens, "De Belgische Grondwet, een model voor Europa? Over natie en identiteit" [The Belgian Constitution; A model for Europe? About nation and indentity"], *Rechtsfilosofie en Rechtstheorie* 2005, p. 185. Elazar puts it like this: "Federalism can exist only where there is a considerable tolerance of diversity and willingness to take political action through the political arts of negotiation even when the power to act unilaterally is available." D.J. Elazar, *Exploring Federalism*, Tuscaloosa: University of Alabama Press, 1987, p. 181.

been changing significantly through immigration in the last few decades, especially as a result of the influx of new ethnic and religious minorities, Muslims in particular.[87] This presents the country with many pressing issues surrounding integration, even more so since these immigrants, in many instances, turn out to be members of disadvantaged groups. The pressures were amplified by e.g. the murder of politician P. Fortuyn in 2002 and of public commentator T. Van Gogh in 2004. As Andeweg and Irwin make clear, the elitist character of Dutch politics has, as a result, been under increasing attack in the last decade or so: political competition seemed to intensify with no guaranteed voters available anymore (a result of depillarisation), the rise of the populist right, and calls for a more direct democracy have been multiple.[88] There have however hardly been any institutional or political reforms.

In the same vein, the Dutch Constitution still has no role to play in the process of societal integration: in the Netherlands constitutional relativism still prevails, even in the context of fundamental rights, and even though this relativism might not be adapted to contemporary Dutch society anymore. To give but a few examples in the context of integration and diversity: the judicial section of the Dutch *Conseil d'État* (*Raad van State*), the highest administrative court in the country, has for some time already been limiting the rights of refugees to a considerable and impressive extent (also when compared to other European countries!). The same is true for the right to family reunification, i.e., a legally recognized reason for immigration in many countries, enabling a family to immigrate to a country where one (or more) of their family members already resides. Although the Netherlands, in these contexts, has been convicted for contravening human rights law on several occasions already, there has been hardly any policy or judicial change. The 2010 Government, in its coalition agreement, even stated that there would be a "restrictive and selective" policy, where possible, concerning migration, even if that would mean changing the European Convention of Human Rights.[89] Such policy can certainly be understood as a response to the aforementioned attacks on elite political culture and the increase of political competition.

It should be clear though that we are not dealing here with a 'mere' normative issue ("Fundamental rights should of course be upheld!"), but with an issue that is explicitly instrumentally relevant too: what does it do with human beings when they are —or feel— excluded from full citizenship, are treated as outsiders or bestowed with marginality? What loyalty can one then expect from the community in which they are present? What kind of unrest and social instability will be the result of this? These are questions that are rarely asked. Let it be clear that the aim should then not be to erase differences amongst people.

[87] On this see R.B. Andeweg and G.A. Irwin, *o.c.*, p. 44 ff.
[88] *Ibid.*, p. 51.
[89] About all this, see T. Spijkerboer, "Subsidiariteit 2.0", in J. Gerards and A. Terlouw (red.), *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens* [Amici Curiae. Advice for the European Court of Human Rights], Nijmegen: Wolf Legal Publishers, 2012, p. 252.

What is nevertheless important and necessary is to create and support a political and moral climate where everyone has a change to make something out of his or her life. This is what Rosanvallon refers to as 'relational equality' or 'equality as social relation'[90]; a form of equality that is not only dealing with the distribution of wealth, but on the basis of which it is also possible to recognize and acknowledge the individual as a full member of a society. There is a clear role for a type of constitutionalism here, which can be conducive in recognizing full equality and thereby enabling loyalty to the democratic *rechtsstaat* (*citoyen*; citizenship). A constitution in this respect represents not just a (incidental political) majority, it also and most importantly defines principles for the whole community.

ROUNDING UP: LESSONS TO BE LEARNED

In *Passions and Constraint*, Stephen Holmes writes that a constitution disables political decision-making in that it sets up procedural roadblocks by, for example, introducing supermajority decision-making rules or by enacting bills of rights; the idea is to thereby prevent tyranny and other abuses of power.[91] Holmes terms this 'negative constitutionalism'. In a divided society, as in any liberal society, constitutions must fulfill this negative or disabling role.[92] A constitution at the same time can, according to Holmes, also assume an enabling role, which he calls 'positive constitutionalism': it can help create the very *demos* which governs itself through the constitutional regime. In this sense a state can also use its powers to achieve cooperation and support. Even stronger, if a divided society also wants to be a free society, negative and positive constitutionalism should be connected to each other. Choudhry puts it like this:

> [B]ecause of a history of conflict or a lack of shared existence, the constitution is often the principal vehicle for the forging of a common political identity, which is, in turn, necessary to make that constitutional regime work. To some extent, the constitution can foster the development of a common political identity by creating institutional spaces for shared decision making among members of different ethnocultural groups. Concrete experiences of shared decision-making within the framework of

[90] See P. Rosanvallon, *La société des égaux*, Paris: Le Seuil, 2011.
[91] S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy*, Chicago: University of Chicago Press, 1995, xi-xiii, p. 5-7 and p. 161-164. Also S. Choudhry, "Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies", in S. Choudhry (ed.), *Constitutional Design for Divided Societies. Integration or Accommodation?*, Oxford: Oxford University Press, 2008, p. 5-6.
[92] S. Choudhry, *o.c.*, p. 6.

> the rule of law, and without resource to force or fraud, can serve as the germ of a nascent sense of political community.[93]

I submit that in both Belgium and the Netherlands negative and positive constitutionalism are not connected and thus cannot be (mutually) reinforcing. Although the Belgian Constitution does play a significant role in channelling and/or constraining the local politico-institutional situation, it does not succeed in taking up an enabling role. The Constitution itself is at best a rational construction, possessing an accidental nature and a complex technicality; it represents a *status quo* and a form of federalism that does not create any Belgian public space. In the Netherlands, the Constitution is fading ever more into oblivion, neglecting its possible enabling role too.

As a result both the Belgian and Dutch Constitutions are in danger of no longer being able to govern the dynamics of the power process and become instead governed by it: a warning of the demise of a state's capacity to effectively act as the agent of its citizens' well being. In such conditions, the constitution runs the risk of falling prey to political manipulation. They are developing into nominal constitutions, i.e., constitutions that lack existential reality. Loewenstein compared such constitutions to a badly tailored suit.[94] The democratic *rechtsstaat*, a concept which is given authority and effect through constitutions and constitutionalism, can however not fly on autopilot; it needs maintenance and active direction. The introduction of judicial constitutional review in the Netherlands might be one way of doing this, or the creation of better developed form of constitutional literacy, as might be the installation of a Belgian public space through (re)introducing a federal electoral district for federal parliament.[95]

All this of course raises more general questions of a constitution's normative and practical value, i.e., questions similar to the ones Loewenstein was troubled about and with which I started this article: under what conditions are political actors usually prepared to comply with constitutional requirements or take them into account? The answer to questions like this are, I believe, highly contingent and not clear cut; there does not seem to exist an objective set of rules for matching a people and their situation with a set of institutions.[96] Nevertheless,

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[93] S. Choudhry, *o.c.*, p. 6. Choudhry adds that a constitution can "constitute a demos by encoding and projecting a certain vision of political community with the view of altering the very self-understanding of citizens."

[94] K. Loewenstein, *o.c.*, p. 148-149. Nominal constitutions, so Loewenstein asserts, find their limits in the given power structures, political as well as economical.

[95] D. Sinardet, "Direct democracy as a tool to shape a united public opinion in a multilingual society? Some reflections based on the Belgian case", in D. Sinardet and M. Hooghe (eds.), *Public Opinion in a Multilingual Society Institutional Design and Federal Loyalty*, Re-Bel ebook 3, 2009, p. 59. About this D. Horowitz, "A Federal Constituency for Belgium: Right Idea, Inadequate Method", in Kris Deschouwer and Philippe Van Parijs (eds.), *Electoral Engineering for a Stalled Federation*, Re-Bel e-book, 2009.

[96] D.S. Lutz, *Principles of Constitutional Design*, Cambridge: Cambridge University Press, 2006, ix. Loewenstein too discards the idea of trying to devise a "perfect theoretical constitution",

both the Belgian and Dutch cases can, so it seemed, be instructive in telling us a bit more about the constitutional conditions that might be conducive to societal stability. It is however of the utmost importance to generate more knowledge about this, because societal unrest usually comes with an array of negative consequences (the possibility of violence being one of them). Democratic politics without positive constitutionalism is in any case troublesome; in the long run no democracy can survive such a state of affairs.[97]

instead claiming that "an ideal constitution has never existed, and will never exist." K. Loewenstein, *o.c.*

[97] Cfr. H.R. van Gunsteren, "Het staatsrecht in de politiek" [Constitutional law in politics], *Nederlands Juristenblad* 2010, p. 1111-1114.