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Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk

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Law and Convention in the Constitutions of the Netherlands and the United Kingdom: Summary

(Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk: samenvatting in het Engels)

1. INTRODUCTION

The text of the Constitution for the Kingdom of the Netherlands (de Grondwet voor het Koninkrijk der Nederlanden) is sober, devoid of legal and political doctrine. Given the restrained character of its text, the Dutch constitution has always left relations within and between political institutions on the national level such as the government (the *regering*) and parliament (the *Staten-Generaal*, composed of the *Tweede Kamer* and the *Eerste Kamer*) fairly unsettled. This exemplifies the explicit choice of the constitutional lawmaker (the *grondwetgever*) to have the exercise and distribution of government power be determined, to a significant extent, by political proceedings rather than primarily by legal rules.

Even in 2021, the structure of the Dutch constitution raises many questions regarding the distinction between law and politics. Indeed, it is still uncertain which characteristics determine when rules in the political process could be fairly characterised as legal. Is the legal character of a rule dependent on its enforceability by the courts, on its ability to constitute an obligation that does not allow for deviations, or is there another characteristic that is more important for establishing the legality of a rule? To answer these and other questions, a new perspective on the relation between law and politics in the Dutch constitution is required. This thesis aims to provide such a perspective by introducing the concept of conventions into Dutch constitutional doctrine.

Although the notion of convention is anything but new to the Netherlands, this term has always lacked a clear definition. In this thesis, a new definition of conventions was developed on the basis of the conceptualisation of this term in the United Kingdom. Rather than simply being the country of origin of the concept of conventions, the United Kingdom has a constitution comparable with that of the Netherlands in the sense that both constitutions are of an inherently political nature: they are built on the idea that it is the political process rather than the courts that should deter politicians from doing unconstitutional things. Moreover, both the Netherlands and the United Kingdom share a constitutional tradition that can be defined in terms of evolution: in both countries, constitutional change has largely been the result of an incremental process rather than of radical changes adopted by a (constitutional) lawmaker.

This summary contains the main findings of this thesis. First, the conceptualisation of the notions of conventions in the constitution of the United

Kingdom, which is the subject of part II of this thesis, is presented (section 2). Second, the main conclusions on the general structure of the provisions of the Dutch constitutions regarding the political process from part III of this thesis, which includes a proposal for the adoption of the notion of conventions in the Dutch constitutional doctrine, are outlined (section 3). Third, the most important suggestions for drawing the demarcation line between law and convention from part IV of this thesis are summarized (section 4). The remainder of this summary is devoted to the most important final remarks from part V of this thesis (section 5).

2. LAW AND CONVENTION IN THE CONSTITUTION OF THE UNITED KINGDOM

Unlike almost every other country in the western world, the United Kingdom lacks a single legal document that outlines the main rules on distribution of state power that institutions of the state have to adhere to. Instead of a codified document, the constitution of the United Kingdom solely consists of the doctrine of the Sovereignty of the Queen/King-in-Parliament. Following the orthodox approach, this doctrine holds that the UK Parliament has the legal right to make or unmake any law whatsoever and, further, that no person or body is legally recognised as having a right to override or set aside the legislation of Parliament.

Although at first sight it seems as though the Sovereignty of Parliament attributes almost absolute power to Parliament, this conclusion would not be correct. Rather, the Sovereignty of Parliament constitutes layers of legal duties for all state institutions, including Parliament: courts are obliged to enforce Acts of Parliament as the most important source of the law, whereas Parliament has the duty to not act outside the terms of the rules affecting its own composition and procedures whenever it seeks to act as a legislative body. Importantly, in contrast to any other part of the UK Constitution, the legal duties constituted by the Sovereignty of Parliament cannot simply be altered or overruled by a regular Act of Parliament. In this sense, the Sovereignty of Parliament can be seen as a higher ranked law similar to that of codified constitutions in other countries.

In the absence of higher-ranked constitutional rules with a legal character that can bind Parliament and its members, the notion of 'convention' could emerge. The term 'convention' is usually defined as a rule of behaviour that ought to be accepted as obligatory by those who occupy a relevant role in the working of the constitution if they have considered the precedents and reasons underpinning the rule correctly. Although conventions are not part of the law as such, their influence on the legal provisions of the constitution should not be underestimated.

In this regard, three ways could be distinguished in which conventions affect the working of the legal part of the constitution. First, conventions may make the use of a legal rule impossible. A convention to this effect is the rule that the monarch cannot invoke their (legally still existing) right to

refuse his assent to a law passed by Parliament. Second, a convention may transfer a power granted in the constitution from one person or body to another. An example of such a convention provides that the monarch can only use royal prerogative powers, for instance the power to prorogue Parliament, upon the advice of the Prime Minister. Third, conventions may provide additional rules to the constitution after a remarkable event. An example is the Salisbury Convention that emerged in 1945 after a landslide general election victory of the Labour Party. Although the new Labour party obtained a majority in the House of Commons, they only held a very small minority of seats in the House of Lords. At the time, the House of Lords was constituted on a hereditary basis which resulted in its heavily conservative composition. In order to prevent the House of Lords from opposing the policies that the Labour Party proposed in its election manifesto, the Salisbury Convention emerged under which the House of Lords shall not oppose the second or third reading of any government legislation promised in its election manifesto.

The bindingness of conventions should be seen as the result of the interaction between certain precedents and the reasons for acting pursuant to those precedents: the precedents determine the scope of the convention, whereas the convention determines the scope of the precedents according to which the actors involved should act. The key to understanding why the actors involved actually do consider themselves bound by conventions is the notion of reciprocity: holders of the most important political offices from the governing party respect conventions with the expectation that, if they lose their position to members of the opposition party, the new officeholders would also adhere to these rules. Moreover, many conventions exist because they work: conventions can usually be seen as the result of a delicate equilibrium that can most often not be reached any other way. This gives rise to the wording of a fascinating paradox: the binding force of a convention is often based on the belief among the actors involved that there is no other realistic political option than to adhere to the convention at stake, while the actors concerned in most cases have sufficient legal room to deviate from the convention. This explains why in practice, despite their inherently flexible nature, most conventions may remain unaltered for a long period of time.

The inherently flexible character of the convention gives also rise to the question whether conventions may be fixed in constitutional 'soft law' documents, such as the *Cabinet Manual* and the *Ministerial Code*. Although many conventions are not often subject to change in practice, their codification cannot prevent subsequent alteration of their content if the relevant practices and circumstances change. Therefore, codes and manuals may record the content of conventions at a certain time, but they cannot replace the behaviour of the political actors involved as the ultimate source of the rule. If a constitutional 'soft law' document is to play a continuing useful role in political practice, it will need to be updated periodically in order to reflect the developments that may change the content and meaning of the conventions it has recorded.

In most cases, it is relatively easy to draw the demarcation line between law and convention: both statute law and common law bind anyone but Parliament and its members (except for the doctrine of the Sovereignty of Parliament, which is both part of the common law and constitutes duties for Parliament) and can be enforced by the courts, whereas conventions bind political institutions despite not being enforceable by the courts. This is not to say that the distinction between law and convention is always crystal-clear. Two explanations could account for this. First, the UK constitution consists of statutes that are neither conventions nor directly enforceable by the courts. The Parliament Acts 1911 and 1949 may serve as an example. These acts contain a procedure pursuant to which Acts of Parliament can be passed without the approval of the House of Lords. Although this procedure is stipulated in statute law, it is the Speaker of the House of Commons rather than the courts who decides whether a bill has met the provisions of the Parliament Acts. This potential dispute is usually solved on the basis of the argument that even then the courts in a way do enforce the Parliament Acts 1911 and 1949. In this particular case, if the courts concede jurisdiction in cases on the application of the Parliament Acts, they do so on the basis of their ability to draw and enforce their jurisdiction as described by statute. Second, some conventions may overlap with common law principles. For instance, 'respect for regional autonomy' is regarded as a common law principle itself and as the expression of the Sewel Convention, according to which the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. This is usually considered a reflection of the reality that no sharp distinction between the political and legal spheres can be made.

3. THE STRUCTURE OF THE DUTCH CONSTITUTION

Despite being the second-oldest still-existing written constitutional document in the world, the Dutch Constitution has determined the political process only to a relatively small degree. Due to its rigid amendment procedure (see Art. 137 and 138) and its accommodational nature, the structure of the Dutch Constitution remained relatively unaffected after the enactment of its revised version in 1848. Yet, since then the Netherlands has seen many significant political developments, such as the growing influence of political parties, the expansion of the state's bureaucratic organisation and, in more recent times, the increasing electoral volatility that has resulted in fragmentation of the political party system.

From the beginning of the nineteenth century this has prompted the constitutional-lawmaker to remove rather than amend the provisions that could not be aligned with these developments. As a result, many important constitutional matters concerning the relations within and between political institutions (e.g. the formation of the new cabinet, the relation between ministers (*ministers*) and junior ministers (*staatssecretarissen*) and the relationship

between the two houses of Parliament (*Tweede* and *Eerste Kamer*) cannot be resolved through the text of the Dutch Constitution alone. Rather, issues such as these are considered to be partly determined by unwritten political understandings.

Interestingly though, Dutch constitutional doctrine has never included an elaborated concept as to how these unwritten practices relate to the written provisions of the Constitution. Two explanations can explain this omission.

First, the emergence of unwritten political habits and understandings came only twenty years after the 1848 version of the Dutch Constitution was enacted: the most important unwritten rule of the Dutch constitution (which still, even in 2021, has not been codified), the rule of confidence holding that individual ministers have to resign after losing a confidence vote in Parliament, dates back from 1866-1868. The emergence of this rule was especially notable back then, as it explicitly contravened a constitutional provision which held, until its removal in the 1983 version of the Constitution, that only the monarch was entitled to discharge ministers at their own discretion (Art. 73 Constitution of 1848). For this reason, the rule of confidence has been defined as a rule of unwritten constitutional law or customary law. This also explains why such unwritten political understandings could only develop by way of exception, as the text of the Constitution at that time was still tailored to the existing Dutch political situation. Hence, in constitutional doctrine it was generally accepted that a practice could only be accepted as a binding, unwritten constitutional norm in contravention to the provisions of the Constitution if this practice should be followed under all imaginable circumstances. Indeed, the legal certainty standards for the adoption of new rules of unwritten constitutional law are so high that it is practically impossible to find a rule (except for the rule of confidence) that can meet these standards. However, this strict criterion has also been applied after the beginning of the twentieth century when the written provisions increasingly started to fail to completely capture the conditions of the political situation. As a result, in Dutch constitutional doctrine unwritten constitutional norms also have to meet this strict standard of legal certainty if they do not contravene, but only supplement a written provision of the Constitution. There is however no reason to treat these two types of unwritten constitutional norms in the same way, which is particularly true given the openness of the Dutch constitution.

Second, there has never been agreement in legal scholarship on what constitutes an adequate definition of 'law' as regards legal rules applying within and between political institutions. Therefore, many publications on the notion of unwritten constitutional law (or customary law) have been devoted to the question as to when a practice could be reasonably called a legal norm. This question has never been properly resolved, which explains why there has never been a generally accepted method for distinguishing unwritten constitutional law in the Netherlands. Implicitly, however, a 'legal' rule in the political sphere is usually regarded as a rule that has

been accepted by the political actors involved and that does not allow for deviation in any way at all. This line of thinking is based on the idea that an unwritten constitutional rule can exist only as a binding rule if it can be defined with absolute accuracy. At first sight this sounds reasonable, given the difficulty to define the exceptional circumstances under which a rule does not have to be followed. The most important problem with this approach to legal rules is that it does not capture an element that is specific to legal rules. Indeed, there are many (written) legal rules that allow for exceptions without losing their bindingness, even if the exact exceptions are as of yet unknown.

In order to tackle these problems, another perspective on unwritten constitutional law in political context is needed. This thesis proposed to replace the concept of unwritten constitutional law with the concept of conventions in the Dutch constitution. As opposed to unwritten constitutional law, the conceptualisation of conventions from the United Kingdom has always been tailored to the flexibility of the political process. That is not to say however that the conceptualisation of conventions from the United Kingdom can directly be transposed to the Dutch constellation. In contrast to the United Kingdom, there is no commonly accepted definition of law in the Netherlands. This constellation requires clarity about the definitions of both convention and law.

In this thesis, the following way of distinguishing law and convention was proposed. Constitutional law was described as the body of rules that can be properly defined. In practice this more or less amounts to a definition according to which laws are written rules which have officially been promulgated by an authorised lawmaker in a proper legal form. There is however one additional unwritten rule that should be regarded as part of the (constitutional) law, namely the rule of recognition as regards the bindingness of conventions: the deviation of a constitutional convention is unconstitutional (i.e., in the Dutch context, a violation of constitutional law), except (i) for the situation in which (a) all the actors involved have accepted a particular deviation from the convention or (b) in which the deviation of the convention is allowed in the light of very exceptional circumstances and (ii) if the deviation of the convention in this situation does not amount to a violation of other constitutional (written) norms except for the (theoretical) situation in which a convention emerges of which the binding force is explicitly accepted by all actors involved as having *contra legem* force over the course of at least two parliamentary sessions.

This rule allows for the emergence of conventions as inherently flexible rules without having to be completely cast in stone in order to be recognised as legally relevant rules. Importantly, this rule of recognition itself can, contrary to the individual conventions of which it recognises the binding force, be regarded as fixed and thus as a part of the (constitutional) law.

4. REFLECTIONS ON THE DEMARCATION BETWEEN LAW AND CONVENTION IN THE NETHERLANDS

In the remainder of this thesis, the newly proposed definition of convention in the Dutch context was applied to the most important areas of the Dutch constitution, including the relations between the government and Parliament, the relations within the government and the Second Chamber (the *Tweede Kamer*, somewhat comparable to the House of Commons in the United Kingdom) respectively, the formation of the new cabinet, and, finally, the relation between the First Chamber (the *Eerste Kamer*, slightly comparable to the House of Lords) and the government. For each of these areas it was investigated to what extent conventions can be distinguished. Three conclusions were drawn from this investigational survey.

First, the constitutional lawmaker has provoked the development of new conventions by replacing the electoral system of first-past-the-post with the system of proportional representation in 1917 (see currently Art. 53(1) of the Constitution). Until 1917, the Netherlands was divided in separate constituencies, whereby each constituency selected one member of the Second Chamber. Since the introduction of the new electoral system of proportional representation, all the voters in the Netherlands simultaneously elect all members of the Second Chamber, regardless of the region in which they live. In order to be elected as a Member of the Second Chamber, candidates need to gain only a percentage of 1 out of 150 (the total amount of seats in the Second Chamber) of the total amount of votes cast in the whole country.

As a result, the change in electoral system has provided a realistic opportunity to gain a parliamentary seat to candidates of relatively small political parties. This legal change has prompted the emergence of conventions preserving a level playing field in the (newly elected) Second Chamber. Examples of such conventions are the rule providing that ministers and junior ministers need to resign on the eve of the general election (in order to prevent sitting government members having an undue advantage towards opposition parties during the period of the formation of the new government) and the rule according to which the members of an outgoing government (i.e. a government that is still in office, pending the formation of the new government) are not entitled to take far-reaching policy decisions.

Second, provisions of the Constitution attributing discretionary powers most of the time preclude the development of the conventions. This is due to the paradoxical nature of conventions of which the binding force, also in the Netherlands, depends on the belief among the actors involved that there is no other realistic option than to follow the rule at stake. There is however no fixed way as to how the most important discretionary powers should be applied. For instance, the discretionary powers of the parliament and government (e.g. the power of legislative initiative (Art. 82 Constitution) and the power to veto bills (Art. 87 Constitution)) can be applied in a myriad of ways. Therefore, it has not yet been possible to detect conventions in these areas, as the actors involved have never committed themselves to one par-

ticular application of their openly formulated (legislative) powers. In the unlikely event that conventions closing the gap of such discretionary powers would emerge, they may be termed *contra legem* conventions as they would overrule the political autonomy the constitutional lawmaker has attributed to the government and parliament.

Third, the observance of conventions has been explained through the mechanism of reciprocity: political actors in office observe conventions aware that their political opponents will also comply with these conventions once they attain office in the future. Crucially, the importance of this notion reaches beyond the observance of constitutional conventions. Indeed, the (written) legal norms of the constitution as regards the relations between political actors are also dependent on the responsibility of political actors themselves, as these norms are just as unenforceable by the courts as constitutional conventions.

This observation also greatly impacts the (im)possibilities of constitutional design, as the notion of reciprocity may give rise to patterns of behaviour that may be at odds with the provisions of the Constitution. For example, the text of the Constitution provides that it is only for the (senior) minister (*minister*) to decide who will be appointed as the junior minister (*staatssecretaris*) at their department (Art. 46(2) Constitution). However, in practice the politicians negotiating about the formation of the Cabinet make arrangements as to which persons will be appointed as junior ministers, even before the (senior) minister takes office. Therefore, once appointed the (senior) minister only has the power to veto the appointment of the prospective junior minister. This power can however only be used under very exceptional circumstances given the notion of reciprocity: if one (senior) minister decides to invoke their veto power as regards the appointment of a junior minister, it is very likely that their fellow ministers (especially those from other coalition parties) will react in the same way. Therefore, by invoking this veto power senior ministers basically spoil the agreements that were reached during the formation negotiations concerning the portfolio allocation of the Cabinet. This illustrates how the notion of reciprocity has in practice obstructed the original objective of the constitutional lawmaker to attribute full autonomy to (senior) ministers as regards the appointment of junior ministers.

5. FINAL REMARKS

This thesis has shown that the conceptualisation of constitutional conventions from the United Kingdom may help to better understand the Dutch constitution. Compared to the concept of 'unwritten constitutional law' that is commonly used to describe binding rules outside the Constitution, the notion of 'convention' allows for a perspective on binding rules in the political process as ultimately indefinite in nature. Moreover, it appeared that the bindingness of constitutional rules (i.e. both conventions and the writ-

ten provisions of the Constitution) in the Dutch political process in general cannot be taken for granted: these rules are only observed if they are both sufficiently neutral and account for the (long-term) interests of the political actors involved. All in all, it may be concluded that the concept of conventions helps to evaluate 'political' constitutions such as those of the Netherlands and the United Kingdom.