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The European Constitution of the Netherlands
Reflections on Interdependent Statehood

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Abstract

The emerging constitutional structure of the European Union does not show a hierarchical relation with the constitutions of the member states, but rather a network relation including hierarchical and cooperative elements. Even if they are aware of the unprecendented character of European unification, many constitutionalists and politicians still conceive this as a problem of European law and nothing more. In their own constitutional thinking, Europe just has to be defended against "loss of democratic control", "loss of sovereignty", and "loss of national identity". They dwell on the illusion that national institutions are as able and even better and more reliable than foreign or European institutions in serving the public good. The author regards this approach as dangerous, not only because it can foster nationalistic views and intolerance, but above all because it is based on an illusion that will end up in frustration and a possible fatal retardation in developing shared political values.

1 Events to commemorate

1.1 A special year

1998 is a special year for Dutch constitutionalists. The Dutch Ministry of Internal Affairs decided to celebrate "150 years of Constitution", in remembrance of the far-reaching amendments to the Dutch constitution adopted in 1848. This peaceful change in Dutch political life was not only due to the vision of the statesman J.R. Thorbecke, but also to the prudence of King William II who understood the sign of the times when revolutionary movements shook several capitals of Europe. From a legal point of view, however, the constitution in force in the Netherlands today is still the (since amended) Basic Law that was adopted in 1815 after the Vienna Congress. Before as well as after 1848, the

constitution underwent many other important changes. It would definitely be an exaggeration to say that the rule of law had already been established in the Netherlands in 1848. If we just mention one aspect: France had abolished slavery in its colonies in 1848, whereas the Netherlands maintained this deeply humiliating system until 1863 (Oostindie 1997: 219) In the nineteenth and twentieth centuries, the Netherlands have not been, in comparison with other European countries, pioneers where constitutional changes are concerned. The ideal of the rule of law did not induce a grand revolution in this country, but rather a process of continual adaptation, through which the Dutch constitution has proved to be both stable and open.

1.2 Three memorable events

The Germans have a saying, "Man muß die Feste feiern wie sie fallen." (Salingré 1870. English equivalent: Christmas comes but once a year.) The fact that there was no radical reversal of Dutch constitutional history in 1848, but only the occurrence of one of the major events in a steady realization of democracy and the rule of law, should not withhold us from a celebration in 1998. The year 1848 brought with it the acceptance of some constitutional rules of fundamental importance:

- "Full ministerial responsibility" (Kranenburg 1958:112) towards Parliament, laid down in Article 53 (now Article 42, par. 2): "The Ministers, and not the King, shall be responsible for acts of government."
- Constitutional rank of citizenship. Ever since, citizenship has been determined by statute, and not by the government, which means the revocation of a royal prerogative (Article 7, par. 1, now Article 2, par. 1): "Dutch citizenship shall be regulated by Act of Parliament."
- Rule of law in the sense of a legal system with parliamentary supremacy and equality in law. Equality in law had existed since 1815 in the sense of equal protection (Article 4 in the original text of the constitution adopted in 1815), but it was reinforced in 1848 through the abolition of the class system in the provincial elections and the full recognition of Parliament as a law-making body in cooperation with the Government. In 1848, the Second Chamber of Parliament was given the power to amend a bill (Article 107, now Article 84).

These undoubtedly fundamental changes were neither the starting point nor the end of constitutional development in the Netherlands. Two other events to commemorate in 1998 put the celebration of "1848" in perspective: both are related to the Netherlands' role within Europe.

1648

Three hundred and fifty years ago, on January 30 1648, the Peace Treaty of Münster was signed by the representatives of the King of Spain, hereditary ruler of the Dutch principalities, and the States General of the United Provinces of the Netherlands. On May 15 1648, after ratification of the treaty, representatives of the parties confirmed the same treaty by oath. In the treaty the Habsburg ruler conceded the sovereignty to the States General, and recognized their freedom and independence.[1] This treaty was a component of the Westphalia Peace Treaties finalized later that year, on October 24 1648. The treaties put an end to devastating independence and religious wars that had lasted for decades.

According to the treaty, the Netherlands were also freed from the old ties with the venerable Roman German Empire, bearer of the traditions of Charlemagne's multi-ethnic European realm.[2] Long before the remaining parts of the Holy Roman Empire, the Netherlands established their own nation state (Dunn 1979:91). In the sixteenth century:

> Europeans would certainly not have agreed that the world they inhabited could be described as a set of independent areas, each governed by a ruler of its own, and within which one agency had the ultimate right to use force. Still less could its components be thought to have in any but a few instances any sort of unity which might be called 'national'. (Roberts 1996: 239)[3]

The Westphalian Peace Treaty may be celebrated as the recognition of the territorial integrity of states towards each other, with the both promising and fateful congruency between a state, its people and its legal system.[4] There was, however, "no sudden transition to the modern 'state': it took centuries and often old forms." (Ibid.: 254) And in many European states feudal intermediate powers protracted political and legal modernization. In comparative constitutional history, the Netherlands appear as an early example of the modern notion of a sovereign state. In the twentieth century, before the end of the Cold War, the territorial division of the world had become the very foundation of international relations (Kriele 1980:95). Exclusivity of power is the corollary of sovereignty over a territory (ibid.: 97).

1953

The other commemoration is more or less the counterpart to the Westphalian Treaty, though not its reversal. Forty-five years ago, in 1953, the States General and the Government of the Netherlands adopted, with remarkable foresight,

an amendment to the constitution that paved the way for full and irreversible integration of the Netherlands into an encompassing European legal and political structure. This event may be celebrated as the end of the one-to-one relations between the state and its legal system, people and territory. In the Netherlands, earlier than in most other European countries, minds were already disposed to engage in true European integration.

The most fundamental amendment was laid down in a new article, Article 63: "When required by the development of the international rule of law, a treaty may depart from provisions of the Constitution. In such cases the Chambers of the States General can only approve the treaty with a majority of at least two-thirds of the votes cast." (Since 1983, the Constitution has a slightly different wording in Article 91 par. 3 in conjunction with Article 90.) Moreover, the courts have been denied the power to declare a treaty unconstitutional (Article 60, par. 3, now Article 120).

The second renewal was that the Constitution authorized the conferal of legislative, executive and judicial powers on international institutions by or pursuant to a treaty (subject, where necessary, to the above mentioned two-thirds approval rule).

In the third place, the Constitution adopted in 1953, with the new Articles 65-67 (now Articles 93-94), a monistic view on the relation between international law and domestic law, and internal supremacy for international law, though limited to "provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents."

The adoption of a limited monistic view rightly attracted a lot of attention from Dutch constitutionalists (see, for example, Duynstee 1954; Kortmann 1997: 162-169). It gives rise to difficult questions of interpretation (Kummeling 1995: 369-385). It is, however, from the point of view of constitutional history definitely not the most remarkable element in the 1953 amendments. Louis Henkin draws attention to the fact that the classical monism-dualism debate is hardly addressed in modern international law (1995: 65). Although, in relation to EC law, Articles 93 and 94 are neither necessary nor decisive, the innovative feature of the 1953 amendments was the early decision to subordinate Dutch national sovereignty to the development of the international rule of law and new forms of international cooperation (Boekhorst ibid.: 859-60). Through its supreme law, the Netherlands renounced the pretended exclusive character of sovereignty – long before specialists of international law dared to demythologize this conception (cf. Henkin ibid.: 8-12; Hirsch Ballin 1995).

2 Three processes of change

2.1 Sharing sovereignty

The establishment of the European Coal and Steel Community in 1952 (treaty of April 18 1951) and the unsuccessful attempts to form a European Defense Community and a European Political Community were followed in 1958 by the establishment of the European Economic Community (since November 1 1993 the European Community) and the European Atomic Energy Community (treaties of March 25 1957). A few years later, questions of principle about the relation between national law and community law had to be decided by the Court of Justice, one of the institutions of the then EEC. According to its judgment on February 5 1963 in the case *Van Gend en Loos* (26/62, [1963] ECR 1):

> the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields (...); Community law therefore not only imposes obligations on individuals but also confers upon them rights which become part of their legal heritage.

Soon after that, on July 15 1964, in its judgment in the case *Costa v. ENEL* (6/64, [1964] ECR 585), the Court ruled that the constitution of the aforesaid new legal order implied that:

> their sovereign powers underlie a permanent restriction, with the consequence that they do not have the power to counteract the Community's legal system through later statutes.

In the decades to follow, the Community manifested itself as a subject with internal law-making powers and external treaty-making powers, and, depending on the subject of treaty, either acting by itself or in cooperation with the member states (opinion 1/94 [1994] ECR 1-1567). The EC is clearly more than just another international organization. Its identity resembles to some extent that of a state, although at the same time the EC has merely functional powers (McGoldrick 1997: 24).

Taking into account that the member states have irreversibly lost part of their sovereign powers, and that the EC does not possess more power than that which has been conferred upon it, it is reasonable to say that nowadays *the Community and the member states are sharing sovereignty*. Gradually, the division of power between the EC and its umbrella organization, the European Union, has shifted from a delegation of power by treaty to a constitutional intertwinement. One of the indications of this process of change is the

acknowledgement, in Article 3b of the EC Treaty as amended by the Treaty of Maastricht (Treaty on European Union, signed on February 7 1992), of the subsidiarity principle. A *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, attached to the Treaty of Amsterdam, signed on October 2 1997, reconfirmed the constitutional nature of the actual relationship.

Most lawyers look upon the *"common foreign and security policy"* and the *"cooperation in the fields of justice and home affairs"*[5] (the so-called "second and third pillars" of the EU) as a structure fundamentally different from that in the European Communities (the "first pillar"). In this view, the structure of the European Union is profoundly dualistic. On the one hand, the Union has a supranational structure – putting the member states in a subordinate position as regards the application of the EC Treaty (along with the European Atomic Energy Community and the European Coal and Steel Community). On the other hand, the Union has an intergovernmental character as far as the second and third pillars are concerned. This representation of the Union may be historically appropriate, but looking to the future, a different approach may be more relevant. Articles C and K.13 of the Treaty on European Union (renumbered 3 and 41 in the Treaty of Amsterdam) ensure that the Union's institutional structure is common to all three pillars. According to Article 3 the Union "shall be served by a single institutional framework", and the Council and the Commission shall be responsible for ensuring external consistency in the Union's policies.

In the light of the Treaties of Maastricht and Amsterdam, there is less and less reason to look upon the second and third pillars as a traditional treaty arrangement. They include so-called supranational elements, such as, the role of the Court of Justice, whereas the first pillar continues to rely in part on decision-making by unanimity, which is typical of intergovernmental negotiations rather than of supranational ones.

The connections between the three pillars, for example, in development and immigration policies, support this new approach, viewing the Union as a single differentiated structure. There is no compelling reason to limit public decision-making to its hierarchical appearance. On the contrary, 'open' decision-making processes, aiming for coordination between rather than for command of citizens and private bodies (see Donner 1998), is a promising form of governance in an era of educated citizens, as Anthony Giddens put it, "a world of *clever people.*" (1994: 7) The problem with the so-called intergovernmental decision-making in the second and the third pillars (and to an extent in the first pillar) is not so much the impossibility of out-voting a minority, but the existing possibility for either one or a number of governments to block any result. Departing from a dogmatic federalistic position, Wolfgang Schäuble recognizes that applying the majority principle

in European decision-making depends on a degree of political homogeneity that has not yet been reached in the fields of policy concerned. As an alternative to making the cooperation hostage to a single blocking government, he rightly advocates the acceptance of a variable geometry and possibilities to 'opt out' (Schäuble 1998: 233-234).

2.2 Politics: from hierarchy to network

Another process of change affects the role of politics within society. Not so long ago, politics and law could be seen as being at the very centre of society.[6] "Institutional, and very frequently legal, definitions were held to constitute the core of the relationship (...)." (Albrow in Bolkestein et al. 1998: 198.) The political left and right held different opinions on the degree to which politics should control society through regulation, but they shared the view that politics was at the top of the societal structure.

This politics-centered and legalistic view on society was especially powerful in the 1970s and early 1980s and triggered an over-production of legislation. Negative experiences with the over-regulation generated fundamentally different approaches. Contrary to common belief, free market thinking is not the only alternative for big government. Continuing a well-established line of Christian social ethics, politicians in Germany, Belgium, the Netherlands, and other European countries emphasized the importance of the societal midfield and the significant role of institutions resulting from ideal-driven initiatives. They share many of their views with the so-called new communitarianists in the United States (Etzioni 1995; Etzioni 1996).

As a result, it makes more sense to see political institutions as a separate segment of social networks – linked with individuals, market participants and social institutions – rather than as a hierarchical superstructure. This change may counterbalance the consumerist approach to citizenship. According to David Osborne, the "old paradigm (...) dealt with most social issues by using entitlements (...). New paradigm leaders stress 'opportunity' more than 'entitlement' – and with opportunity comes responsibility." (Osborne 1995: 283-290.) Citizenship can (and should) be regarded as the distinctive qualification for members of a civilized society to participate (also) in political life. The very same process of change generates a different role model for the state. The state will "no longer fit into the classical categories of sovereignty, but grow into the role of initiating, moulding and guaranteeing relations in the fabric of society." (Schäuble 1998: 78.)

2.3 Beyond territories

The third process of change that affects the notion of the state and the significance of its constitution relates to the very significance of territorial extension. Social relations in the global era cannot be confined to distinct territories. In trade, culture, communications and crime, the significance of state borders is fading away – with the exception of the political and legal structures. Albrow may overestimate this process when he writes "the nation state has failed to confine sociality within its boundaries, both territorial and categorical." (Albrow in Bolkestein et al. 1998: 164.) Nevertheless, it is true that no state on earth is in a position to have complete control or the sole control of some of the most important public functions, including combating crime, prevention of environmental pollution, poverty reduction and fair trade.

The necessity of cross-border cooperation through international organizations undermines the historic congruity of state, law and society. (See Hirsch Ballin and de Moor-van Vugt in van Gestel et al. 1996; Wetenschappelijke Raad 1998.) The acceptance of cross-border responsibilities is, of course, not only the result of a realistic worldview, but at least as much a result of trust in neighbours, partners and authorities in other countries. The absence of the fear of being dominated by other nations encourages states to take a more flexible approach in questions of sovereignty and territorial exclusivity. Peter Malanczuk touches this point when he compares the change of attitude in the West with the doctrine in developing countries:

> While in the West the doctrine of sovereignty has been losing much ground in view of increasing international interdependence, developing countries still value it highly as a 'cornerstone of international relations' to protect their recently gained political independence. (Malanczuk 1997: 18.)

At first sight, the European Union substitutes the territoriality of the single nation state for its own extensive territoriality. Within and beyond the territory, we can observe the usual degree of differentiation. From the outset, the EC Treaty has included a limited application to the self-governing overseas countries constitutionally linked to the member states (for example, the Dutch Antilles and Aruba). Since the Treaty of Maastricht, it has been accepted that some member states engage in more far-reaching forms of cooperation than others (European Monetary Union, Social Chapter).

The Treaty of Amsterdam extends this approach to the field of application of the Schengen Agreements and introduces the possibility of "enhanced cooperation" between some of the member states as a general system. The advantages of this more flexible approach go beyond the legal and political dimensions. A less hierarchical view on political structures allows for more

variety in the development of an ever closer European Union, gradually including new member states without national and regional cultural and political identities becoming stifled.

3 Networks of decision-making and legal development

We shall now examine how these processes of change affect the three characteristics of the reform of Dutch constitutional law in 1848:
- full ministerial responsibility towards Parliament;
- constitutionally anchored citizenship;
- a legal system with parliamentary supremacy.

These characteristics go back on political and constitutional ideals, and the question arises whether or not their realization could be threatened by the closer European cooperation.

3.1 Responsible government

Members of the European Council of Ministers, and Members of the European Council of Heads of Government have to act in the interest of the European citizens. Their cooperative decision-making, however, continues to reflect national political responsibility, rather than responsibility to the European Parliament. Only the European Commission can be called to account, to some extent, by the European Parliament.

Fortunately, the number of issues on which the Council can decide with qualified majority has grown over the past decades. But, wherever unanimity among the representatives of the fifteen governments in the Council of Ministers or the European Council is required, their primarily national orientation is the origin of the much-debated ineffectiveness of European decision-making.

The centrifugal orientation in national politics and mass media makes a 'no' in the so-called national interest more rewarding than a 'yes' in the common European interest. For many years, the Netherlands have tried to strengthen the role of the European Parliament in combination with full application of the (qualified) majority principle in the Council of Ministers. (Hirsch Ballin and Verkleij 1985: 275-284.) The negotiation process that preceded the Treaty of Maastricht showed a slow-down in the movement towards a European federation. For the time being, in the second and third pillars and in some domains of the first pillar, decision-making by unanimity will be preserved. In the political thinking of several member states, a decisive role for European

institutions, including the European Parliament, in the so-called traditional core areas of sovereignty is simply unthinkable.

Wolfgang Schäuble justly argues that the European capacity to act suffers from the continuing disparity between the necessary level of practical integration and the legitimization through institutional and political support (Schäuble 1998: 224). A truly European level of legitimization being unachievable, a majority in the Dutch Parliament felt that – as a second-best solution – the political control over European "inter-governmental" decision-making had to be strengthened. The persisting "democratic deficit" in Strasbourg and Brussels had to be compensated through national parliamentary control, simply because a real Europeanization turned out to be unachievable (and perhaps also in the eyes of some Netherlanders, undesirable).

In the approval statutes for the Treaty of Maastricht (and before that, for the Schengen Agreement), the Dutch Parliament reserved itself the power to examine in advance each proposal for a resolution that has binding effects for the Kingdom of the Netherlands.[7] Without the (tacit or explicit) consent of both parliamentary houses, the representative of the Dutch Government may not accept the proposal, with the result that in the European body concerned, no conclusion whatsoever can be reached.

This provision was certainly valuable as a compensation for the democratic deficit in European decision-making. In practice, however, the States General is confronted with a distressing difference between this new procedure and the legislative procedure. The take it or leave it style of giving consent to inter-governmental decisions within a two week time limit, generates an unbalanced workload and continues to frustrate the Members of Parliament: in many cases they do not have enough well-examined reasons to endorse the proposals, but aware of the consequences, they do not feel free to reject them either. Only the negative aspect of the ideal of accountable government can be realized: national parliaments can block the decision-making process, but they cannot bring about the result they would like to see.

We must, therefore, look for an alternative. When ministers and heads of government come together, in their role as representatives in the decision-making outside the sphere of competencies of the European Parliament, it is not always and only to approve (or not approve) the decisions that have been pre-cooked by their staff, but also to negotiate. A parliamentary control system with a duration of 15 days prior to the meeting is inappropriate for a process of on-going negotiations. The model of parliamentary approval may be suitable for the treaty-making process, as negotiations are completed before the treaty is open for signature. In this case, however, we should develop forms of parliamentary control 'closer' to the negotiation process. I suggest setting up a special committee, composed of members of the national parliament, and members of the EP elected in their home country. The power to give or withhold consent would then be delegated to this special committee. Because it could build up a better information position and act more swiftly than the entire Houses of Parliament, it could also react effectively and timely to changes in a proposal, which could take away initial objections. To establish such a Europe-oriented, special sort of parliamentary control, an amendment to the Constitution of the Netherlands is, of course, required. On the whole, the ideal of responsible government would be served better than through the present obstacle system.

3.2 Layers of citizenship

Turning to the constitutional ideals connected with "citizenship" – another feature of the renewal of the Dutch constitution in 1848 – the introduction of European citizenship in the Treaty of Maastricht comes to our attention. This point in the treaty is so remarkable, because citizenship – in the sense of belonging to the nation – has in modern times always been an element of distinction and differentiation between states. "The question of whether a human being 'belongs' to a state, is not a psychological, but a legal question." (Koja 1993:14.) Citizenship and full enjoyment of political rights are two sides of the same coin. Usually, the right to vote and eligibility will depend on citizenship (Koja 1993: 163).

The Treaty of Maastricht made the Union look more like a (federal) state when it introduced European citizenship. The relevant provisions, slightly modified in Amsterdam in 1997, are now a part of the Treaty establishing the European Community. The provisions were rearranged and slightly revised in the Treaty of Amsterdam. The new Article 17, par. 1 (cf. old Article 8) states: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship." The rights that the citizens enjoy are specified in the Articles 18-21 and other rights may be added (Article 22). These rights include, with some exceptions and limitations:

- the right to move and reside freely within the territory of the Member States (Article 18);
- for citizens of the Union residing in any Member State the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides and at elections to the European Parliament (Article 19);
- in the territory of a third country in which the Member State of which he is a national is not represented, the entitlement to protection by the diplomatic or consular authorities of any other Member State, under the same conditions as the nationals of that State (Article 20);

– the right to petition the European Parliament, to apply to the Ombudsman and to write to the European institutions in any of the twelve official languages of the Union (Article 21).

According to the preamble, the drafters of the treaty aimed for "a citizenship common to nationals of their countries." It is quite possible to understand the establishment of a European citizenship as another step towards an emerging European statehood. For more than fifty years, personalities from different European countries have encouraged their audiences to give up old antagonisms and develop institutions for an ever closer union. Political leaders such as Monnet, Schuman, Adenauer and De Gasperi played an important role. Their efforts were rooted in their common adherence to the values embedded in Europe's Christian and humanistic traditions. By now, globalization has evoked a backlash of nationalism, and fear for a dominating bureaucracy has triggered scepticism towards the establishment of a federal state in Europe. Nevertheless, it is quite possible to understand the establishment of European citizenship as a further step towards the realization of an ever-closer European Union, gradually assuming the role of a fully-fledged democratic entity with supranational powers. This idea continues to have my full sympathy. But, we should not close our eyes to three important transformations that are occuring in Europe. They affect the very feasibility of a European citizenship in the traditional nation-like sense.

Citizenship has lost much of its prestige. During and following the French Revolution, citizenship was considered to be a position of recognition and respect in the community, ensuring full enjoyment of political rights. Immanuel Kant justified limiting citizenship to those who enjoyed an economically or otherwise well-established position in society (Kant 1968: 46-47). In some countries, such as Switzerland and the United States, the stringent requirements for admission to citizenship still reflect the view that full citizenship is a privilege rather than a natural right. The citizens were the people who discussed political affairs amongst themselves (Habermas 1962: 92-94/110); who established forms of cooperation and mutual solidarity; and who saw it as their duty to serve their country for better or for worse. Political parties merged on the basis of this ideal-oriented citizenship as associations striving for the realization of their view on the common good.

In many west European countries, including the Netherlands, society has lost much of its traditional embedding in shared traditions and value systems.[8] That does not necessarily mean that society is falling apart. In an individualistic pattern of social life, however, mutual interests in particular tend to become the basis for social harmony. Most members of a society assume the role of consumers, aware of the degree to which providers of services meet their demands.

This is not only the case in citizens' relations with suppliers and public service corporations, but also with communities and the state. Support for political parties will depend more and more on the degree to which they serve the voters' interests, rather than on their life-long commitment to the principles or ideals of a political movement. As a result, citizenship is at the risk of being transformed into a qualified consumer's role. Acquiring another (possibly a second) nationality is often viewed as an admission ticket to the full enjoyment of social security, educational facilities and other advantages, rather than as the apex of integration into another national community. The fact that people talk of "having a Dutch (German, Belgian, etc.) passport" instead of "being a citizen of the Netherlands, etc." reflects this transformation.

In this way European citizenship will be at risk of being 'profaned' even more than national citizenship, because it is so much in need of shared values. Nevertheless, a more positive development is conceivable. I (believe we should) aim at the possibility of a European citizenship in the sense of the institutionalized ability to participate in a network of relations backed up by the institutions of the European Union. In order to be more than merely a ticket for admission to European services, European citizenship should be based on meaningful cross-border relations. And, in order to be more than an upgrading of national citizenship, European citizenship should be linked to meaningful areas of European participation. Layers of citizenship can encompass national commitments as the basis for traditional citizenship (nationality), transnational commitments as addressed in true European citizenship, and the equally value-laden commitment to mankind that might be called "world citizenship".[9]

Unfortunately, the rules on European citizenship in the EC Treaty are still mainly limited to some consumer-like entitlements (the right to support from diplomatic representatives outside the EC; the right to submit complaints and requests). The right to participate in municipal elections in countries other than a person's home country will only affect a small part of the population.

European citizenship, however, can acquire a growing importance in the eyes of the peoples concerned if, and only if, networks of cooperation develop in addition to the institutional cooperation in the European Union ("Brussels") and also alongside the flourishing economic cooperation. European citizens should have things of which they can be proud, or at least of which they are aware, as part of their common heritage and future. I do not oppose friendly forms of national or regional self-confidence. But what we do need is some form of European self-confidence; not as ethnic prejudice, of course, but rather as an effect of value-laden initiatives across borders. Almost without exception, newspaper and television programmes continue to rely on national or sub-national frames of reference.

Even universities are still primarily national institutions with some visiting professors from abroad. They could make a difference by giving priority to the very values of European Christian and humanistic traditions mentioned above by conforming to established expectations. Interdisciplinary research and teaching has been recognized as offering valuable access to ethical questions, but universities would do better if they included approaches from different 'national' traditions. Discovering the value-laden common ground in the exchange between European cultural and educational institutions can open the perspective for a generation of people who will be proud to introduce themselves not only – though rightly – as, for example, Brabantian, and Belgian or Dutch, but also as Europeans among Europeans.

3.3 The rule of law

The third feature of the constitutional reforms of 1848 that we have discussed, strengthened the role of parliament as the highest power in law-making.

Among the characteristics of statehood, the sovereign power to decide on the law of the country has been decisive for legal development. Within each of the states established under the Westphalian state system, the rulers had the power to unify the law internally and to distinguish it as the law of their state and from that of other countries. The differentiation between national law and the reduction of the old "ius gentium" to inter-state law were important results of the sovereign law-making power vested in the kings and princes and later in the elected parliaments. The abandonment of natural law and the embrace of positivism in legal teaching served as an ideological support of the state monopoly in law-making. In the legal-philosophical discourse of the nineteenth and twentieth centuries, voluntarism gained the upper hand over rationalistic theories.[10]

The actual situation, with innumerous cross-border legal relations and an unstable division of competences between the national, supranational (e.g. EU) and international level, necessitates a review of the state-centered positivistic legal theory. The hierarchical answer, since the past century underpinned with democratic legitimization, will not suffice. Network approaches will have to replace the hierarchical model (Hirsch Ballin 1997: 113-120). The call in Dutch politics for a "recovery of the political primacy", especially in the first years of the government headed by Prime Minister Wim Kok, attempted in vain to stop the erosion of the state-centered concept of law-making.[11]

It is a misunderstanding to say that, within a state, legal development in a hierarchical setting is the only possibility, and that cooperative legal development belongs either to private law or to international law. As a matter of fact, the European Union applies both types of legal development

throughout its operations. Therefore, it will, in the foreseeable future, be impossible to look on the Union as an emerging super-state, stifling the Member States.

Public authorities in a world of interdependent states, international organizations, and non-governmental organizations will be entangled in an unstable network of power sharing. In relation to their critical audience of educated citizens, they will have to give their *reasons*, and their reliability will be judged by standards accessible to all. The network structure of law will not do away with democratic institutions, but with democratic authoritarianism. Authorities who have to compete with other authorities cannot be authoritarian. Apart from having the skill to look up the law as it stands and interpret laws and judgements, an educated lawyer will need the ability to perform legal reasoning beyond the delimitation of positivist law. For that reason, ethics and natural law should be included in legal education, side by side with methods in common and civil law.

4 Conclusion

The birth of the modern state system in 1648 was based on the ideal of a neat separation between states as their rulers' domains, sovereigns over their own people of 'subjects' (cf. Schrijver 1998).

> The constitutional changes made by the treaty had far-reaching effects. For Germany, the settlement ended the century-long struggle between the monarchical tendencies of the Holy Roman emperors and the federalist aspirations of the empire's German princes. The Peace of Westphalia recognized the full territorial sovereignty of the member states of the empire. They were empowered to contract treaties with one another and with foreign powers, provided that the emperor and the empire suffered no prejudice. By this and other changes the princes of the empire became absolute sovereigns in their own dominions. The Holy Roman emperor and the Diet were left with a mere shadow of their former power.
> (http://render.clumet.yorku.ca/com4tom/westp.htm)

Two centuries have passed since the Westphalian Peace Treaty was realized through the constitutional reforms of 1848. The actual state of affairs, 150 years later, concerning three characteristics of the 1848 constitutional reforms confirms our hypothesis that the constitution of the Netherlands nowadays must be seen and interpreted in a European context. The legal and political form of cooperation within the framework of the European Union is not of a kind that will replace the statehood of the Member States and reduce them to mere segments of a new state. Rather, the European Union is a part of a historically new kind of redistribution of sovereignty, one based on functional

needs rather than territorial domination. Tilman Evers rightly argues that the European Union differs from the multi-national Empires such as the Habsburg Monarchy and the Osman Empire. The profoundly democratic character of the European societies rests on the principles of shared powers, accountability and subsidiarity. Transnational forms of cooperation must have a bottom-up character. If the European Union is able to overcome nationalistic remnants, it can serve as a model experiment for future political organization across borders. (Evers 1997; Evers forthcoming.)

The openness of the Constitution of the Netherlands towards "the development of the international rule of law" turns out to be equally promising. It is a truly adaptive mechanism. Finally, the Constitution of the Netherlands is not something that is about to disappear. On the contrary, it can function as a profoundly European Constitution. It allows for truly responsible national and local decision-making in harmony with its European environment. Moreover, it integrates Dutch and European law into one multi-layered legal system. And at the same time, it legitimizes Dutch representatives to act as partners in the European decision-making process.

Recent history has demonstrated the impossibility of a mere upgrading to a larger political unity, composed of merged states. The emerging constitutional structure of the European Union does not show a hierarchical relation with the constitutions of the member states, but rather a network relation including hierarchical and co-operative elements.

Even if they are aware of the unprecedented character of European unification, many constitutionalists and politicians will still conceive this as a problem of European law and nothing more. Their own constitutional thinking just has to be defended against "loss of democratic control", "loss of sovereignty" and "loss of national identity". They dwell on the illusion that national institutions are able to serve the public good, and are even better and more reliable than foreign or European institutions in doing so.[12] I regard this approach as dangerous, not only because it can foster nationalistic views and intolerance, but above all because it is based on an illusion that will end up in frustration and a possibly fatal retardation in developing shared political values.

For that reason, it is time to open up the interpretation of the national constitutions to a less positivistic and less separatist attitude. There is nothing wrong with a celebration of the Dutch constitution in 1998, provided that we understand that the establishment in 1648 of national independence (an exclusive identity) has since been transformed into national interdependence (identity connected with others). A European identity – in the sense of unity in diversity – will grow with the institutional release of such forms of cooperation (Habermas 1996: 191). There is definitely a promising future for the constitution of the Netherlands – as a European constitution amidst European constitutions.

Notes

1. Article 1 of the Treaty. See Groeneveld and Van der Weel 1998.

2. Article 53 of the Treaty, which had to be confirmed by the Roman German Emperor and the Empire.

3. According to Roberts (1996: 240), only "Spain, Portugal, England and France looked on the map somewhat like their modern equivalents."

4. Cf. Thomas Fleiner: "The so-called right to territory often gives different nations overlapping rights, which reasonably cannot be questioned. (...) But just because there is no clear criterion to distribute territories among nations, the conflicts on territories are merciless (...)." (van Willigenburg et al. 1995: 193)

5. As soon as the Treaty of Amsterdam becomes effective, the third pillar will be renamed "police and judicial cooperation in criminal matters."

6. See for an early critical appraisal H.R. van Gunsteren (1976) and cf. recently my contribution 'Vanaf de dijk gezien', in: F. Bolkestein, E. Hirsch Ballin and T. Wöltgens (1998: 61-98).

7. Article 3, *Rijkswet van 17 december 1992, houdende Goedkeuring van het op 7 februari 1992 te Maastricht tot stand gekomen Verdrag betreffende de Europese Unie* etc., Stb. 1992, 692.

8. Anthony Giddens (1990) means by "the disembedding of social systems (...) the 'lifting out' of social relations from local contexts of interaction and their restructuring across indefinite spans of time-space."

9. See on "world citizenship" as an expression of respect for fundamental rights, where necessary prevailing over state sovereignty: E.M.H. Hirsch Ballin (1995). Albrow (*op.cit.* 177) proposes a far more idealistic "global citizenship", which is "world citizenship focused on the future of the globe".

10. "A theory or doctrine that regards the will as the fundamental principle of the individual or of the universe." (*The American Heritage Dictionary of the English Language* 1996.)

11. See the articles by Willem Konijnenbelt, I.A.M. Pröpper and others in *RegelMaat, tweemaandelijks tijdschrift voor wetgevingsvraagstukken*, 1998, Nr. 1.

12. Cf. Schäuble argues rightly that giving up sovereignty will enhance the capacity to act, among other things in law enforcement (1998: 227/231).

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