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- ¹ This report is partially based on denederlandsegrondwet.nl (the English translation of constitutional articles is also taken from there) and Broeksteeg H and others, 'Kroniek van Het Constitutioneel Recht' (2023) 33 *Nederlands Juristenblad* 2855. Furthermore, it is partly based on our report for the International Review of Constitutional Reform from last year.

I. INTRODUCTION

The Netherlands is known for its rigid constitution ("Grondwet"), which has little relevance to everyday political life.² 2023 barely posed an exception to this rule: one constitutional amendment passed, but its legal consequences are limited. Two other potential constitutional amendments were not even introduced in parliament. In this contribution, we first describe two important aspects of the Dutch constitution: the difficulty of changing it and the ban on judicial constitutional review. In part II, we describe both the passed and the not-introduced amendments, whose nature we discuss in part III. In part IV, we look ahead to see whether 2024 is likely to be more eventful in terms of constitutional change.

The Dutch Constitution is notoriously hard to change. An amendment needs to be introduced as a bill in parliament, either by the government or one or more members of the Lower House ("Tweede Kamer" consisting of 150 representatives, directly elected). It then needs to pass with a majority in both the Lower House and the Upper House ("Eerste Kamer"; 75 representatives, indirectly elected through the provinces). When a bill to amend the Constitution has passed, both chambers of parliament are dissolved (this is always timed to coincide with the end of their term), and the bill again needs to pass the Lower and Upper House, this time with a 2/3rd majority. This means a constitutional amendment needs broad political support and takes a long time. The rigidity of the Dutch Constitution is exacerbated by the non-codified requirement of "constitutional ripeness," which requires the government to only introduce a bill to amend the constitution if it can be expected to have broad political support.³ This rigidity should be considered a feature and not a bug of the Constitution: the original idea is that the Constitution should be a "quiet property": it should not be an object of political controversy but only arrange the most important matters in a way that is largely agreed upon and leaves a lot of room for the political actors to decide on policy.⁴

² See among many others Gerards J, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It" (2016) 77 *Revue interdisciplinaire d'études juridiques* 207.

³ Gerards 2016, referring to the memorandum of the minister of the Interior an Kingdom Relations, Kamerstukken II 2014/15, 31570, no 25, p. 4; the Cabinet's response to the report of the State commission on constitutional revision, Kamerstukken II 2011/12, 31570, no 20; Council of State, Kamerstukken II 1995/96, 24431, no A, p. 1; C.A.J.M. Kortmann, *Weg met de Grondwet!*, in: H.R.B.M. Kummeling and T. Zwart, *Constitutioneel lapwerk: over de lotgevallen van voorstellen tot grondwetsherziening in de periode 1997 tot 2000*, p. 45.

⁴ Kortmann C, 'Prof. Mr. J.A. Peters, Wie beschermt onze Grondwet?' (Review), [2003], p. 314.

The relevance of the Constitution for day-to-day politics is further limited by the ban on judicial constitutional review. The Constitution bans judges from assessing the constitutionality of acts that have been passed by both houses of parliament.⁵ Since, at least in theory, the most important governmental measures are laid down in such an act, this ban on judicial constitutional review severely limits the practical importance of the Constitution. The constitutionality of acts is reviewed by the Dutch Council of State ("Raad van State"), but its review is purely advisory. This means that the Dutch judiciary generally offers legal protection based on international treaties, which have a direct effect in the Netherlands and supersede national law (even the Constitution). Particularly, the European Convention on Human Rights is an important safeguard of the rights of Dutch citizens. In the future, the ban on judicial constitutional review might be lifted since a majority of the parliament and the previous governments no longer supports this ban. Whether it will indeed be lifted and what kind of judicial review might be allowed will largely depend on the outcome of negotiations for a new government, which are still ongoing at the time of writing: at the moment, it looks like the new coalition will have both a strong proponent as well as a strong opponent of constitutional review as members.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

A. INTRODUCTION

The general rigidity of the Dutch constitution was not fully reflected in 2023. It did see a successful amendment: the change of Article 1, in which the principle of equality and the ban on discrimination is enshrined. However, 2023 should not be seen as a very significant deviation from the norm: the bill to amend Article 1 is unlikely to have meaningful practical consequences and was part of a larger package of amendments, the others of which were definitively decided upon in 2022. The two other proposed amendments, one regarding the appointment process for the Supreme Court and one requiring the King to pay tax were not even introduced in parliament. These three amendments are now discussed in turn.

⁵ Technically, it is allowed to assess the compatibility with the Constitution but cannot attach any consequences to its judgement. Cf. Kelsens distinction between prüfen and entscheiden: H. Kelsen, *Allgemeine Staatslehre*, Berlin: Julius Springer 1925, p. 287.

B. AMENDMENT OF ARTICLE 1: PRINCIPLE OF EQUALITY

Since the last main constitutional overhaul, in 1983, article 1 of the Dutch Constitution read:

“All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, or on any other grounds whatsoever shall not be permitted.”

This article contains a general ban on discrimination and explicitly lists some categories. This explicit mention has limited legal consequences but mainly serves a rhetorical function.⁶ In 2010, members of parliament introduced a bill to add “disability” and “hetero or homosexual orientation” to the explicitly listed categories. During the discussion in the Lower House, the bill was amended: it mentioned “sexual orientation.” Last year, the bill finally passed its second reading in the Upper House, the new article reads.

“All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, disability, sexual orientation or on any other grounds whatsoever shall not be permitted.”

The consequences of this change are very marginal: discrimination based on disability or sexual orientation was already illegal, based on the article. Article 1, in general, however, does have important legal consequences as well as a symbol function: it can, for example, be seen on a big art work in front of parliament.⁷ The inclusion of sexual orientation and disability in the listed specific grounds for discrimination could mean the people benefit from this symbolic function. Furthermore, explicitly listing certain grounds is considered to have “certain effects for legal practice,” and *not* including certain grounds could cause people to feel alienated.⁸

The members of parliament that submitted the initial proposal mainly referred to this symbolic function: they hoped that the explicit inclusion of sexual orientation and disability would encourage them to keep taking responsibility to prevent unequal opportunities⁹ and mentioned that explicit inclusion in the Constitution would have effects on societal relations and contribute to the recognizability of the Constitution. According to the initiators, the objections expressed during the creation of the current Article 1 (which was implemented in 1983) no longer apply. Back then, the leading notion was that the term “equal treatment” was not useful as people with disabilities actually needed extra effort to function. Law and case law has now progressed to the extent that this objection no longer applies. Adding the ground of sexual orientation was deemed not fitting the contemporary “leading

convictions.” Since 1983, law and societal perceptions have changed to the extent that this argument no longer applies. Lastly, the initiators pointed to international developments: other countries and organisations now also explicitly list sexual orientation and disability as illegitimate grounds for discrimination.

The proposal remained “sleeping” for a long time until new members of parliament took over the defense of it in 2017. In 2019, they amended the proposal so that “sexual orientation” rather than “hetero- or homosexuality” would be listed. Also, in that year, the Dutch Party for Elders (“50Plus”) introduced a motion to list age as a specific ground discrimination on which should be banned. This motion was rejected. In 2020, the motion was finally voted on for the first time. While only a “regular” majority was needed for this first reading, the motion passed with broad support. In the Senate, the same parties voted in favor and against, meaning the motion also passed with a very broad majority there.

The second reading added little: in their motivation, the defenders of the amendment simply referred to the file of the first reading. The same parties voted in favor, meaning the threshold of a two-third majority was passed with ease. Voting in the Senate also followed very similar patterns.

We feel that the treatment of this process reflects the difficulty in amending the Dutch Constitution: even a very inconsequential and relatively uncontroversial proposal amendment takes years to become part of the Constitution.

C. FAILED AMENDMENT: APPOINTMENTS FOR THE SUPREME COURT

This year also saw a discussion about the procedure through which members of the Dutch Supreme Court (“Hoge Raad”) are appointed. The Supreme Court is the highest judge in Civil, Criminal, and Fiscal Legal Matters. While the Netherlands lacks constitutional review, the Supreme Court is allowed to review all kinds of regulation and other acts of government against international law, meaning it could potentially play an important role in policy formation. Classically, the Dutch Judiciary has been reluctant to interfere with political decision making, but in recent years started posing more controversial and influential verdicts.¹⁰ The prime example is the *Urgenda-case*, in which the Supreme Court was the first court in the world to rule that states have an obligation to limit their CO₂-emissions. These kinds of rulings have also attracted criticism and have drawn attention to the appointment procedure for the Supreme Court.

Article 118, first member of the Constitution reads:

“The members of the Supreme Court of the Netherlands shall be appointed from a list of three persons drawn up by the Lower House of the States General.”

In practice, the Supreme Court itself sends an ordered list of six potential members to the Lower House. The Lower house pretty much always takes the top three of this list and sends it to the government, which – through Royal Decree – appoints the person on top of the list to

6 See for example J.P. Loof & N. Jägers, *Artikel 1 – gelijke behandeling. Wetenschappelijk commentaar*, <https://www.nederlandrechtsstaat.nl/grondwet/inleiding-bij-hoofdstuk-1-grondrechten/artikel-1-gelijke-behandeling/>.

7 Loof & Jägers.

8 Loof & Jägers, referring to Gerards J, ‘Artikel 1 Grondwet – Goede gronden voor wijziging’, NTM/NJCM-Bulletin 2016, p. 304-218.

9 The file for first reading is 32411, for the second reading 34741; see for a summary https://www.denederlandsegrondwet.nl/id/viglehnaykay3/32411_initiatievoorstel_toevoeging_aan.

10 See for example J.E.M. Polak, ‘De polsstok van de rechter in een repressieve samenleving’, *NJB* 2022/1755.

the Supreme Court.¹¹ As such, in practice, the Supreme Court appoints its own members. In theory, however, parliament could, based on political motives, deviate from the Supreme Court's recommendation. This risk of politicization of the appointment procedure motivated an advisory committee ("De staatscommissie herziening parlementair stelsel") to recommend amending this procedure.¹² The government came up with the following proposal:

"The members of the Supreme Court of the Netherlands shall be appointed from a list of three persons, drawn up in joint consultation by a person appointed by the Lower House of the States General, a person appointed by the President of the Supreme Court and a person appointed by the Lower House of the States General and the President of the Supreme Court together, who is not a member of the States General or from a college established by law and charged with jurisdiction"

This joint procedure would prevent the politicalization of the appointing procedure and improve the balance between the judiciary and the legislative, as the decision was no longer solely made by a political organ. This would stimulate the independence of the Supreme Court.¹³

After the proposal had been open for Internet consultation from the end of 2019 to the beginning of 2020, it was sent to the Council of State for advice (a mandatory procedure for all legal changes). The Council of State advised against the amendment: it found that the proposal significantly altered the balance between the legislative and the judiciary without adequately considering the constitutional meaning of the lower houses' right to propose. It was also of the opinion that the proposed procedure was ineffective and potentially even counterproductive. In February 2023, the government informed parliament that it agreed with the criticism of the Council of State and would henceforth refrain from introducing the proposal in parliament.¹⁴

We feel that this failed procedure again shows the difficulty of changing the Dutch constitution and the consensus-based character of the process: controversial amendments like these are not even introduced in parliament.

D: FAILED AMENDMENT: TAXATION FOR THE KING

The head of state of the Netherlands is the King. Even though he formally has a lot of power – acts can only come into force when signed by him, he appoints cabinet members, judges, and other important officials – his role is mainly symbolic. He gets a yearly income from the state, which is tax free. This is laid down in Article 40 of the Constitution:

1. The King shall receive annual payments from the State according to rules to be laid down by Act of Parliament. The Act shall also specify which other members of the Royal House shall

11 https://www.denederlandsegrondwet.nl/id/vix5blhj7lq/voordrachten_hoge_raad.

12 Staatscommissie parlementair stelsel, *Lage drempels, hoge dijken. Democratie en rechtsstaat in balans*, Boom: Amsterdam 2019, p. 216.

13 See https://www.denederlandsegrondwet.nl/id/vl4pgm3v4gm9/voordrachtscommissie_benoeming_leden.

14 Letter by the Minister for the Interior dated 6 February 2023, 2023-0000033738.

receive payments from the State and shall regulate the payments themselves.

2. The payments received by them from the State, together with such assets as are of assistance to them in the exercise of their duties, shall be exempt from personal taxation. In addition anything received by the King or his heir presumptive from a member of the Royal House by inheritance or as a gift shall be exempt from inheritance tax, transfer tax or gifts tax. Additional exemption from taxation may be granted by Act of Parliament.

3. Bills containing legislation as referred to in the previous paragraphs may be passed by the States General only if at least two-thirds of the votes cast are in favour.

The rationale behind this general tax exemption is the difficulty in distinguishing between the private expenditures of the king and expenditures made in his capacity as head of state.¹⁵ The question of whether the king should pay more tax has for a long time been a divisive one.¹⁶ In October 2022, a motion was introduced in parliament that requested the government to propose a constitutional amendment that would abolish the tax exemption for members of the Royal Family.¹⁷ It would also have been possible to propose an actual amendment rather than "just" a motion, but that would have required significantly more effort. The motion was discouraged by the government but still passed with 90 out of 150 votes.¹⁸

In February 2023, the government informed parliament it would not carry out the motion and not introduce the amendment.¹⁹ The main reason for this refusal to carry out the motion is the fact that it was not passed with a two-thirds majority, indicating a lack of political consensus. A refusal to carry out a motion is constitutionally permitted but can be grounds for a vote of no confidence, meaning a government has to resign. So far, parliament seems to accept the refusal in this case. The government's reasoning can be criticized: parties could be persuaded, and the size of different political parties could change. However, the failure of this proposal clearly fits with the difficulty of changing the constitution: even if a motion is passed with a relatively clear majority, it still does not even make it into a proposed amendment.

E: CONCLUDING REMARKS

In summation, the notion of the Dutch constitution as rigid and of little relevance to everyday political life seems to have been confirmed in 2023: the only change was a technical one, which took over ten years. Two more controversial proposals did not even make it to the point where they would be introduced in parliament for the first time.

Lastly, we would like to mention there have been some developments in uncoded constitutional law. Firstly, after some difficult formations of new cabinets, there was a vivid debate about the way the formation process works in the Netherlands. In the end, little changed.²⁰

15 https://www.denederlandsegrondwet.nl/id/vgrncbjvirzs/artikel_40_uitkering_leden_koninklijk.

16 <https://nos.nl/artikel/2505392-voor-het-eerst-is-twee-derde-van-tweede-kamer-voor-belastingaanslag-oranjes>.

17 Motion van Baarle, 36200-III-16.

18 Voting on the motions Budget General Affairs and King 2023.

19 Letter by the Prime Minister dated 2 February 2023, 4314341.

20 https://www.denederlandsegrondwet.nl/id/vm7lllove1yx/nieuws/tweede_kamer_geen_rol_koning_bij.

Secondly, the Netherlands will start with “confirmation hearings” for new members of the government.²¹ Since these changes concern unwritten law and due to length constraints, we will not discuss these changes further.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

A. NATURE OF THE CHANGES

We believe all three proposed amendments to be indeed amendments, rather than dismemberments: they fit well within the broader system of the Constitution and do not seem to seek to fundamentally alter it, let alone the core of the system. To be more precise, all three amendments seem to be elaborative. This is most clear in the amendment of Article 1: discrimination based on sexual orientation or disability is now seen as sufficiently important to be explicitly listed in Article 1. The Constitution is then altered to broaden this explicit protection. The amendments with regards to the appointment procedure for the Supreme Court and taxation of the king could be classified as corrective: they do not broaden the scope of the Constitution but rather correct specific parts of it. However, we believe the proper classification remains “elaborative”: the amendments are not a case of recalibrating the articles with expectation, but rather of the Constitution reflecting societal views that have now changed.

B. JUDICIAL REVIEW

This section can be short: the Dutch judiciary is not allowed to review acts that have been passed by parliament, including amendments to the Constitution, against the Constitution. Theoretically speaking, parts of the Constitution can be declared non-binding or non-applicable when they counteract international treaties, but that seems unlikely in the case of this amendment due to its technical nature.

Part of the procedure for any act – including constitutional amendments – is an advisory review by the Council of State. This advice focuses on compatibility with higher law, technical correctness of the amendment, and potential consequences. Even though this advice is non-binding, it is generally held in regard and often influential. An example of the influence of this kind of review was the proposal regarding the appointment procedure for the Supreme Court: the government decided not to introduce its own bill to parliament since it agreed with the strong negative feedback from the Council of State. The scrutinizing of amendments by the Council of State contributes to the rigidity of the Dutch Constitution, as it forms another barrier that amendments need to pass before becoming law.

IV. LOOKING AHEAD

A. INTRODUCTION

Lastly, we discuss some subjects in which interesting developments are to be expected in the coming years. This is not an exhaustive list of all

proposals that parliament is currently contemplating,²² we instead focused on subjects where important developments have taken place this year. Three new amendments were introduced: the implementation of the right to family life, the possibility for a corrective referendum, and the option for the Senate to send a proposed act back to the Upper House. These subjects are discussed very briefly, after which we will discuss developments regarding constitutional review.

B. RIGHT TO FAMILY LIFE

The Dutch Constitution lacks an explicit right to family life. Members of the Christian Dutch parties have proposed an act that would enshrine this right, mainly because they feel government policy at this moment does not always adequately consider the consequences of policy for families.²³ Therefore, they have proposed the insertion of an article 10a, which would read as follows:

- “1. Everyone has the right to respect of their family life, except in cases to be determined by Parliamentary Act where the physical, mental or moral interests of the child are severely threatened.*
- 2. Rules regarding the economic, social and cultural protection of the family may be laid down by Act of Parliament.*
- 3. Children have the right to know their biological parents, except in cases determined by Act of Parliament.*
- 4. The Government reports annually on the state of the family to the States General.”*

C. BINDING CORRECTIVE REFERENDUM

Currently, the Netherlands does not know a binding corrective referendum. An amendment to introduce referendums was rejected last year, falling just short of the required two-third majority in the second reading.²⁴ The defender of this proposal immediately introduced a very similar amendment that also seeks to make referendums possible. This proposal has now (by regular majority) its first reading in the Senate.

D. RIGHT TO RETURN FOR SENATE

The Dutch Senate does not have the authority to amend Acts of Parliament but can only accept or reject them altogether. In constitutional practice, a route has been created in which the Senate rejects a proposal for a specific reason, after which the Lower House passes a new act in which that reason has been addressed, creating an informal right to amend. The proposal, introduced by the government, seeks to create a formal procedure: the Senate would be allowed to amend an Act of Parliament, after which it is sent back to the Lower House, which has to decide whether it accepts the amendments made by the Senate.

E. CONSTITUTIONAL REVIEW

As mentioned above, the Netherlands currently has no judicial constitutional review. Throughout the years, most recently because of a

²² Which can be found at denederlandsegrondwet.nl.

²³ See file 36.459 and for a short summary https://www.denederlandsegrondwet.nl/id/vm7vmin15zdy/nieuws/initiatiefvoorstel_over.

²⁴ See our report from last year for an elaborate discussion.

²¹ Votes in the Lower House, 24 October 2023, Motion nr. 35788-226.

political scandal, however, political support for constitutional review has grown.²⁵ This year, a member of parliament introduced a memorandum that proposed allowing judicial constitutional review and the creation of a constitutional court.²⁶ In response, the cabinet informed the parliament that it does support a limited kind of review but opposes a constitutional court: the authority to review should simply be granted to the “regular” judiciary.²⁷ The government now being in favor is an important development. Whether the Netherlands will see constitutional review heavily depends on the ongoing formation negotiations, which include a party heavily supporting and a party heavily opposing constitutional review.

V. FURTHER READING

Gerards J, “The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It” (2016) 77 *Revue interdisciplinaire d'études juridiques* 207

Boogaard G, “De Grondwet waarborgt de ‘gemengde democratie’” [2018] *RM Themis* 240

Broeksteeg H and others, ‘Kroniek van Het Constitutioneel Recht’ (2023) 33 *Nederlands Juristenblad* 2855

²⁵ See our report from last year for more detail.

²⁶ Memorandum by Member of Parliament Omtzigt, 20 April 2023.

²⁷ Letter from the Minister for the Interior and the Minister for Legal Protection dated 2 April 2024, 2024-0000194928.