

# The Netherlands Constitution: Implications for Countries in Transition

Paper prepared for International IDEA on the Occasion of the Bicentennial Anniversary of the Constitution of the Netherlands 2015

## Abstract

*On the occasion of the bicentennial of the Netherlands Constitution of 1815, International IDEA's Constitution Building Processes (CBP) Programme<sup>[1]</sup> commissioned a project to look at what lessons the Constitution offers for countries in transition. This paper, written by Professors Tom Ginsburg of the University of Chicago Law School and James Melton of University College London, examines the factors behind the endurance of the Dutch Constitution. It argues that the Dutch Constitution has evolved gradually over time to meet changing needs, and to fit in with changes in the broader world. The distinct relationship between the constitutional order and international law is an important feature that other countries can learn from.*

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## 1 Introduction

In 2015, the Netherlands celebrates the bicentennial of its Constitution, a very rare achievement indeed. Only two other such documents have endured as long, the 1789 Constitution of the United States and the 1814 Constitution of Norway.<sup>1</sup> Out of the more than 900 constitutions written since then, only 14 (1.5 per cent) lasted more than a one-hundred years (see Table 1). Two of these—New Zealand's and Canada's—are anomalous cases of former British colonies in which the “constitution” consists of multiple documents, and might be seen as distinct species.<sup>2</sup> It is perhaps surprising that

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<sup>[1]</sup> The CBP Programme aims to raise awareness of the role constitution-building plays in managing conflict and consolidating democracy. For more on the Programme's work, visit [www.idea.int/cbp/](http://www.idea.int/cbp/) or [www.constitutionNet.org](http://www.constitutionNet.org).

<sup>1</sup> We recognize that there is in actuality some disagreement on the date of origin for the Netherlands Constitution – 1814 or 1815. The 1815 Constitution was passed as new document but modeled closely on the 1814 document. See Karel Kraan, *The Kingdom of the Netherlands*, in *Constitutional Law of 15 EU Member States* 591-648. Whether on dates the Constitution from 1814 or 1815, it is one of the three oldest in the world.

<sup>2</sup> We exclude the uncodified British Constitution from the analysis entirely.

so few constitutions have lasted more than a century. After all, constitutions are meant to enhance political stability, and many of the world's most famous constitutions have shown remarkable endurance. However, research has shown that most constitutions do not endure for very long. For all constitutions written since 1789, the expected life span is a mere 19 years.<sup>3</sup> Given that so few constitutions endure for more than a couple of decades, it is important to understand how the Dutch constitution managed to survive for 200 years.

**Table 1: Constitutions that Endure to Age 100**

Rank	Country	Years	Lifespan
1	United States	1789-	226
2	Norway	1814-	201
3	<b>Netherlands</b>	<b>1815-</b>	<b>200</b>
4	Belgium	1831-	184
5	Sweden	1809-1974	165
6	New Zealand*	1852-	163
7	Canada*	1867-	148
8	Luxembourg	1868-	147
9	Argentina	1853-1966; 1983-	c.145
10	Tonga	1875-	140
11	Liberia	1847-1980	133
12	Switzerland	1874-2000	125
13	Australia	1901-	114

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<sup>3</sup> Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (2009).

14	Colombia	1886-1991	105
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Is there anything in the Dutch experience that can help countries undergoing constitutional transitions today enhance the endurance and efficacy of their new constitutions? We argue that there is. Even though Europe and the world have changed a good deal since 1815, the Netherlands' experience offers some lessons for today's constitutional designers who would like their work to last. Three key lessons stand out. First, constitutions must adjust with the times. The Dutch have reinvented the constitutional framework several times in the course of their history, to adapt to new conditions and to become more inclusive. In particular, in the early years of the constitution, the country had to adapt to major challenges to the state which are similar to those faced by many developing countries today. Second, the Constitution facilitated and did not undermine a political process based on elite cooperation across social and political divisions, known in the social science literature as consociationalism. Third, the Netherlands is a leader in terms of integration of the constitutional order into the broader international legal order. As a small state buffeted by forces outside its own making, the Netherlands has championed international law as a means of enhancing both internal stability and international order. In this sense, it foreshadowed a more global era, and provides a model for countries seeking constitutional stability.

Looking at the other enduring constitutions listed in Table 1, we observe that a number of them were European, and indeed, the three European countries with significant Dutch-speaking populations are included in the list. One might think that constitutional endurance is simply attributable to a benevolent environment (or perhaps even to the Dutch language!) But, of course, European history, in general, and Dutch history, in particular, has not been smooth sailing during the period. The Netherlands has suffered multiple invasions, has lost significant amounts of territory, and has seen its fair share of internal conflict. These are the kind of shocks that induce constitutional replacement in most countries, but not in the Netherlands. The Constitution has twice been subjected to major amendments that have transformed its content, while preserving the country's basic institutional structure.

## 2 Constitutional History: Early Instability and Major Reforms

The experience of the Netherlands played an important role in informing the modern era of written constitutionalism. The Dutch republics were influential on the American founders, being one of the six “ancient and modern confederacies” selected by James Madison for close study on the eve of the Federal Convention.<sup>4</sup> Madison was intrigued by the alliance among politically independent units that had lasted from the 16th century until 1795.

Yet Dutch constitutional history in the period from 1795 to 1815 was notable for its turmoil. The French Revolution of 1789 triggered a comparable transformation in the Netherlands, and new constitutions in 1798, 1801 and 1805 reflected significant French influence. After more than two centuries of a republican government, the Netherlands adopted a monarchy beginning in 1806, with Napoleon’s installation of his brother Louis as King. This led to a period of constitutional tension, culminating in the absorption of the country by France from 1810-1813.

With the defeat of Napoleon, the Netherlands re-emerged in 1814, and adopted a kind of middle ground form of government with the establishment of a constitutional monarchy.<sup>5</sup> The transition from the Stadtholder William V to his son Prince William I in 1814 took 2 bitter years, with numerous constitutional documents, and the renaming of the Prince as the King in 1815. The 1815 constitution being celebrated this year drew heavily on the document from the previous year, although it changed the unicameral parliament to a bicameral one to reflect the union with Belgium. In addition, the 1815 constitution clarified the relationship between church and state, notably omitting an established church, and guaranteeing religious freedom.

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<sup>4</sup> Notes on Ancient and Modern Confederacies, in 9 THE PAPERS OF JAMES MADISON 3, 3-24 (Robert A. Rutland et al. eds., 1975). See also William H. Riker, *Dutch and American Federalism*, 18 J. Hist Ideas 495, 495 (1957). Dutch institutions second most frequent set of foreign institutions discussed in the Federal Convention, after Britain.

<sup>5</sup> Martij van der Burg, *Transforming the Dutch Republic into the Kingdom of Holland: the Netherlands between Republicanism and Monarchy (1795-1815)*. European Review of History 17(2):151-70 (2010).

Besides being one of the few historical instances in which a country switched from a republic to a constitutional monarchy, the governance scheme had several distinguishing features. The constitution involved a relatively unified government structure, certainly when compared to the federal system in existence prior to 1795 that James Madison had so admired. The monarch was relatively powerful, retaining independent law-making authority. The text also lacks a preamble, about which we will say more below. At the same time, the union with Belgium was a source of tension, leading to dissolution after an uprising by the southern provinces in 1830. The constitutional reform of 1840 acknowledged this breakup.

In short, the Dutch experience in the early 19<sup>th</sup> century, both before and after the adoption of the 1815 constitution, was one of great turmoil. Basic constitutional issues—such as the form of government, relative powers of the King and parliament, and territorial boundaries—were not at all resolved. In this sense, the Netherlands has something in common with many of today's developing countries, where consensus on basic institutions and principles is often lacking.

The Netherlands has opted to accommodate major reforms of the political system through formal amendment of the earlier constitution, rather than through replacement. The first major reform, so significant that some consider it to be a distinct constitution, came in 1848. It reflected lingering discontent among liberals, Catholics, and the lower classes who were feeling economic pain throughout Europe. A major internal issue was the religious division between Protestants and Catholics, who felt that their share of public funds was disproportionately low.

The 1848 constitution established the basics of the modern governmental structure. Provincial and municipal governments were authorized and made uniform. The groundwork for ministerial responsibility was laid in a simple statement in Article 53, though elaboration required a further statute. The Tweede Kamer (House of Representatives) became directly elected, with limited suffrage, and grew in power, with the abilities to inquire into government action and to introduce legislative amendments; however, it could be disbanded by the Crown.

As in other European countries, the ultimate victory of parliamentary responsibility took some years and political crises to finally become established. A key mechanism was the rise of political parties; without them, the Crown was able to dominate parliament. By 1868, however, ministers had to enjoy the confidence of the Tweede Kamer. Further developments included the reduction of monarchical rule-making, first through a Supreme Court decision in the *Meerenburg* case (1879) and later ratified in the constitutional revision of 1887. The 1887 reforms also introduced a system of administrative law jurisdiction, which has proven to be very important in structuring the state. Franchise expansions also continued, culminating in the possibility of universal suffrage for men and women in 1917 (women gained the vote by statute in 1919). Also in 1917, the electoral system for the Tweede Kamer switched to proportional representation, allowing the representation of diverse interests in the society. Much of the 20<sup>th</sup> century, with the exception of the Nazi occupation during World War II, was marked by gradual modernization, in which the constitution was slowly adapted to environmental changes but the basic institutional structure remained intact.

The next major revision, in 1983, was the culmination of an effort that began in the 1960s and took two decades to proceed through expert committees.<sup>6</sup> This reform involved extended debate among political elites, with popular participation for the first time. The extensive modernization greatly expanded the protection of fundamental rights, including social and economic rights that were protected to a greater degree than had previously been recognized. The 1983 reforms also delegated many areas of law to legislation and included a kind of technical modernization, updating language to reflect actual political practice that had developed over many decades. Subsequent reforms added an Ombudsman (1999), clarified the role of the military (2000), and limited the conditions for entry into one's residence (2002). Reforms continue to be debated, and there are several active proposals at present.

### **3 Explaining Endurance: Flexibility, Specificity, and Inclusion**

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<sup>6</sup> The so-called Cals-Donner Committee. Kraan, *The Kingdom of the Netherlands*, at 593.

We identify and describe three key features of constitutional design that can help a constitution to withstand even major shocks: inclusion, flexibility and specificity. Inclusion refers to the process of making a constitution. The more citizens and interest groups are involved in the process, the more likely it is that they will know what the constitution includes, and perhaps they will feel some attachment to it. This means they may be willing to join together to enforce the constitution when there are threats to it.

There are several indicators of inclusion: for example, when a constitution is produced by an elected constituent assembly or ratified by a public referendum, we treat it as inclusive. Inclusion also refers to ongoing governance: how much of the population has a say in political life? Even countries that are not formal democracies vary in terms of their level of inclusion.

Flexibility refers to the ease with which a constitution can be adjusted over time as circumstances change. A constitution that is too rigid and cannot adjust to the times will force its subjects to replace it. Constitutions can change either through formal amendment or through reinterpretation, including by the courts. We find that constitutional endurance is associated with judicial review and constitutions that are easy to change.

Specificity refers to the level of detail in the constitution. While many Americans celebrate their country's constitution for its level of abstraction and generality, we find that, across all countries, more specific constitutions are the ones that endure. This is partly because specificity means that the parties to the constitution were able to agree with each other during the negotiation process, itself an indicator of political trust. Specificity also provides for clarity during times of crisis. Furthermore, in some cases, detail involves promises of political goods to powerful interest groups. This will give groups a stake in constitutional endurance.

Which of these factors are key to the Dutch experience? We believe that the key factors are inclusion and flexibility tied to a certain kind of pragmatism. Over the course of its long history, the Dutch constitution has gradually but continuously become more inclusive, through extension of the franchise and the emergence of democratic control over the government. The franchise was expanded from male citizens older than 30 to

women, at the discretion of parliament, in 1917. Age requirements were lowered to 23 (for men) in 1917, 21 in 1963 and 18 in 1972.

In terms of inclusion, a crucial issue was how the constitution dealt with major political cleavages in society, particularly those involving religion. Until 1917, there were major conflicts over the funding of schools, with denominational parties seeking to have equal funding of private and public schools. With the amendment of the education provision in 1917 to allow public funding of denominational schools, a major conflict was resolved and a key feature of what is known as the “pillar” system was established. Under this system, which lasted into the 1960s, society was organized into four major groups that cooperated at the top in a kind of super-majoritarian arrangement. No single group could dominate, but instead all major groups shared in the benefits offered by government. Gradually, new social forces arose in the 1960s, and the relevance of religious cleavages declined, so the pillar system broke down. But the political system was able to accommodate these changes. The constitutional system has thus provided a way of channelling political conflict, and allowing diverse communities to live together by accommodating their differences.

In terms of flexibility, most analysts characterize the Dutch constitutional amendment rule as relatively rigid. The original rule required an ordinary legislative majority to propose an amendment, after which the provincial councils would be brought in to double the size of the assembly. In the current scheme, a supermajority of 2/3 of the second chamber, as well as  $\frac{3}{4}$  of the members present, is required to approve an amendment. But, after an amendment is proposed through an Act of Parliament, the lower chamber is dissolved and an intervening election held before the amendment is approved. This procedure makes constitutional amendment a risky endeavour for the lower chamber because a proposal may lead to electoral loss. In practice, the procedure is less risky than it seems because proposals are timed so that the required intervening elections are simply the same as ordinary elections, and in most cases, constitutional amendments are not politically controversial.<sup>7</sup>

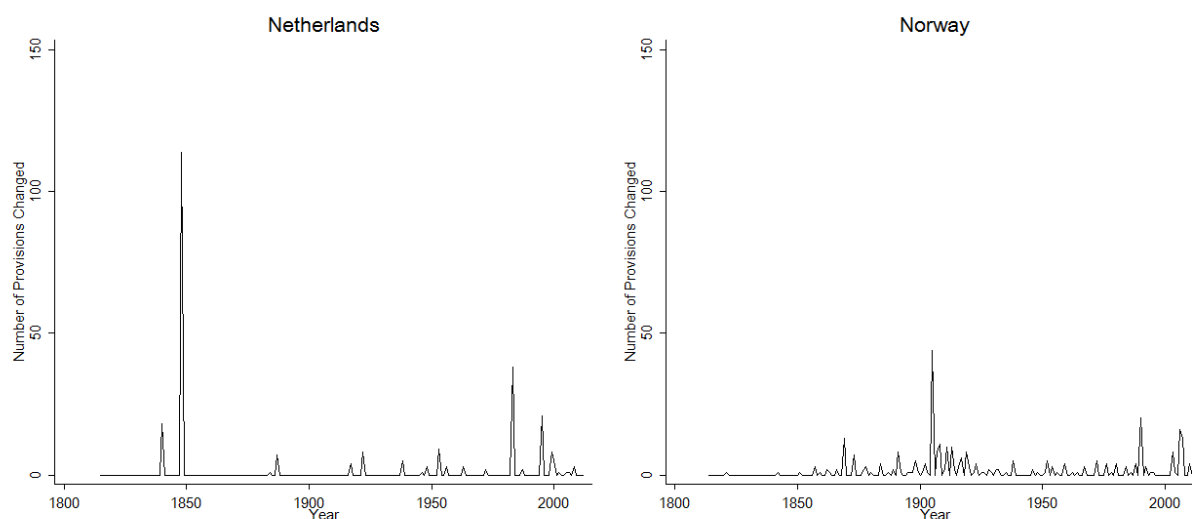
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<sup>7</sup> Amendments concerning the Kingdom require a special procedure.



Figure 1 compares the use of constitutional amendments in the Netherlands to their use in Norway, another country with constitution dating from the early 19<sup>th</sup> century. The line in each plot represents the number of provisions changed in the constitution in a given year. Notice that both constitutions have been amended a number of times. However, as is clear in the figure, the Norwegian constitution has been amended more frequently. The Dutch constitution has been amended in 23 years since it was promulgated, while the Norwegian constitution has been amended in 77 years. That said, when the Dutch constitution is amended, the changes made are more substantial. Notice the large spikes in Figure 1 for the Netherlands, when 114 provisions were changed in 1848 and 38 provisions were changed in 1983. The Norwegians changed 44 provisions in their constitution when the country gained independence from Sweden in 1905, but such a large amount of change is unusual in Norway. On average, amendments in Norway change only about 4 provisions, while the average amendment in the Netherlands changes about 12 provisions.

**Figure 1: Constitutional Amendments in the Netherlands and Norway**



One could say that evolution of the Dutch constitution is characterized by long periods of stability followed by abrupt and major shifts, and the Norwegian constitution is characterized by small continual changes. These differing patterns of constitutional change are most likely the result of different amendment procedures. Norway has a

unicameral legislature, so there is one less actor required to approve constitutional amendments in Norway than in the Netherlands, which has a bicameral legislature. Furthermore, even though an intervening election is also required in Norway, the Act proposing a constitutional amendment does not lead to dissolution of parliament like it does in the Netherlands. Given the increased difficulty of amendment in the Netherlands, it is no surprise that Dutch constitutional amendments are rarer and more consequential, pursued only after an inclusive process of developing consensus.

A relatively difficult amendment process in the Netherlands also increases the importance of informal amendment of the constitution. The provisions on the powers of the government have facilitated the transformation of the monarchy from a real source of power to a constitutional figurehead. There have been de facto changes introduced by the parliament, government and courts without formal constitutional amendment.

The Dutch Constitution is unusual in that explicitly denies the power of judicial review, whose global spread has been one of the great constitutional developments in recent decades. The Netherlands remains one of the few countries in Europe without a designated constitutional court. [Article 120](#) makes clear that the courts do not have the power to review treaties or laws for constitutionality. In this sense, the Netherlands subscribes to a theory of parliamentary sovereignty, although the principle is not explicitly laid out in the text. The courts do become involved in reviewing lower legislative ordinances and provincial governments, and can review laws for compliance with international treaties such as the European Human Rights Act, but have not been major players in constitutional development.

The Dutch constitution is also an example of “deciding not to decide.”<sup>8</sup> This refers to constitutional provisions that designate an issue for regulation but do not actually stipulate how the issue is to be resolved, instead leaving it to future political processes. In some sense it is a particular kind of specificity that does not tie the hands of parliament but empowers it. In the Netherlands, 148 constitutional articles delegate decisions to ordinary laws passed by the parliament, usually with an ordinary majority,

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<sup>8</sup> Rosalind Dixon and Tom Ginsburg, “Deciding Not to Decide”, *International Journal of Constitutional Law*, 2011.

although in some cases by a 2/3 vote. This is significantly more than the average constitution; in a study of a subset of such decisions, Dixon and Ginsburg report there was an average of 3.88 such clauses among 579 constitutions that used this technique.<sup>9</sup> This willingness to delegate policy decisions to the parliament, combined with the lack of judicial review, reflects a kind of trust of the political system that is not found in many other countries.

The Dutch state has been very resilient, surviving a series of invasions from Germany and France, and two major losses of territory (with Belgian secession in 1830 and the dismantling of the colonial empire after World War II.) For the most part, with the exception of the Indonesian war of independence 1945-1949, these have been easily accommodated into the constitutional structure of the Kingdom, which formally includes the Netherlands, Aruba, Curacao and St. Maarten.

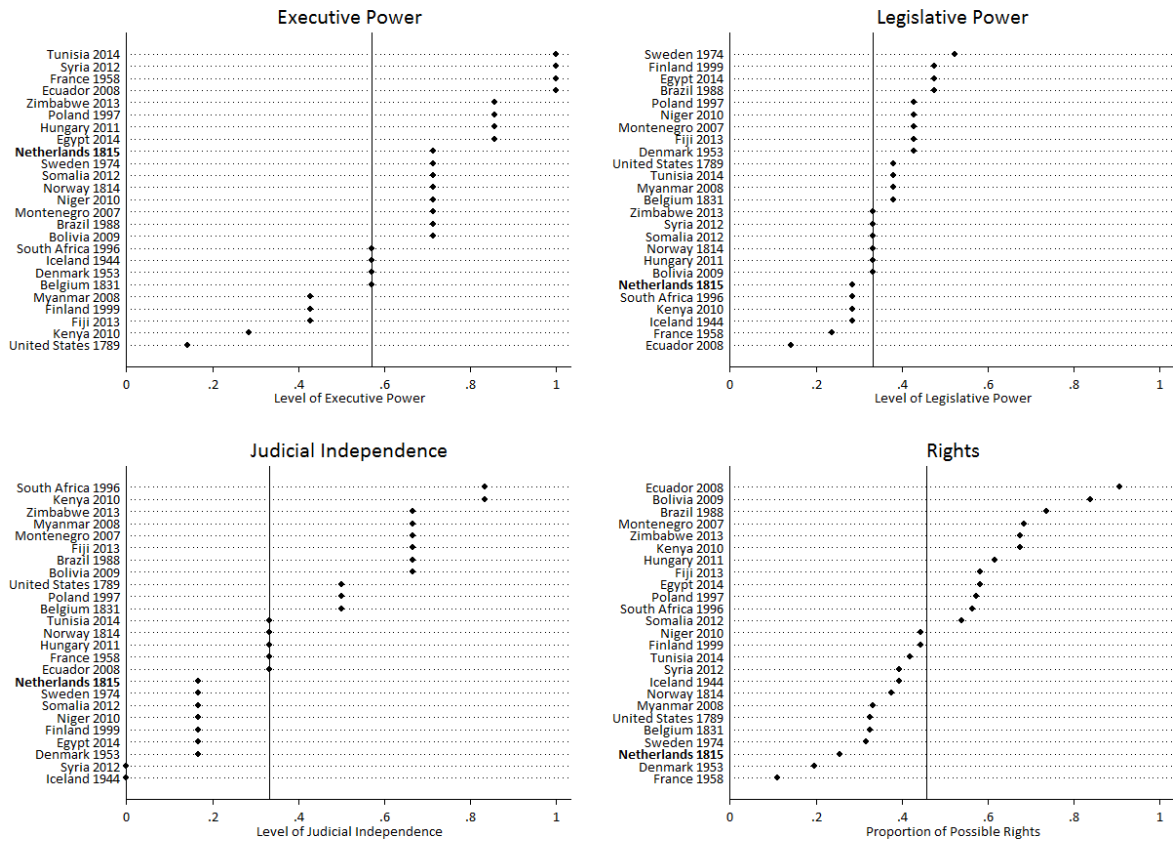
## 4 Content

One broad question has to do with how we might characterize the Netherland's Constitution with respect to some of the basic dimensions that scholars typically use to compare constitutions. Figure 2 does just this along four dimensions, each described below. In each panel of Figure 2, the Dutch Constitution is compared to a select set of constitutions, drawn from those currently in force in neighboring European countries, as well as those most recently adopted in any region. The vertical line indicates the mean for the given dimension across *all* constitutions currently in force.

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<sup>9</sup> Id.

**Figure 2: Four Elements of the Dutch Constitution in Comparative Perspective**



Note that our focus in Figure 2 is on the written, or de jure, constitution. We rank the countries according to how each attribute is mentioned in the constitution, which may or may not conform to practice. Take, for example, the level of de jure executive power illustrated in Figure 2. In practice, executives may have significantly more power than the constitution allots them. This could be granted to them through norms and conventions, or result from the fact that the head of state's party dominates the legislature. The United States is a good example of the difference between de jure and de facto power because the President of the United States is typically thought to be relatively strong, especially when his party controls both houses of Congress. However, according to our measure of formal executive power, it is constitutionally one of the weakest executives in the world.

### *A. Executive Power*

Executive power is an additive index drawn from Elkins, Ginsburg and Melton (2014). The index ranges from 0 to 7 and captures the presence or absence of seven important aspects of executive lawmaking: (1) the power to initiate legislation; (2) the power to issue decrees; (3) the power to initiate constitutional amendments; (4) the power to declare states of emergency; (5) veto power; (6) the power to challenge the constitutionality of legislation; and (7) the power to dissolve the legislature. The index score indicates the proportion of these seven powers given to any national executive (president, prime minister, or assigned to the government as a whole).

The Dutch constitution provides the executive significant power, at least compared to its European counterparts. The only European countries with a higher level of executive power are France, Poland, and Hungary, all of which have Presidential or Semi-Presidential systems of government. Most parliamentary systems in Europe have a relatively low level of executive power. Examples include Belgium, Denmark, Iceland, and Finland. The parliamentary systems with higher levels of executive power tend to have a longer constitutional history and a monarch, such as Norway and Sweden. The Netherlands definitely satisfies these criteria, which possibly explains why its executive has more power than the executive described in the average constitution.

### *B. Legislative Power*

Legislative power is an aggregate measure composed of 32 items that track the authority and autonomy of the legislature (Elkins, Ginsburg and Melton 2009). Scores closer to 1 indicate higher levels of legislative power. The Dutch constitution receives a low score on legislative power. This is a little surprising because many parliamentary systems provide for very strong legislatures in their constitutions, and the legislatures in Northern Europe are particularly strong. For instance, Sweden and Finland have the strongest legislatures in the sample of countries provided in Figure 2. The low level of legislative power in the Netherlands might reflect the age of the Dutch constitution. Recall that the cabinet did not become responsible to parliament until 1868, more than 50 years after the constitution was adopted. Also, the Norwegian constitution, which is

about the same age as the Dutch constitution, also provides for a relatively low level of legislative power.

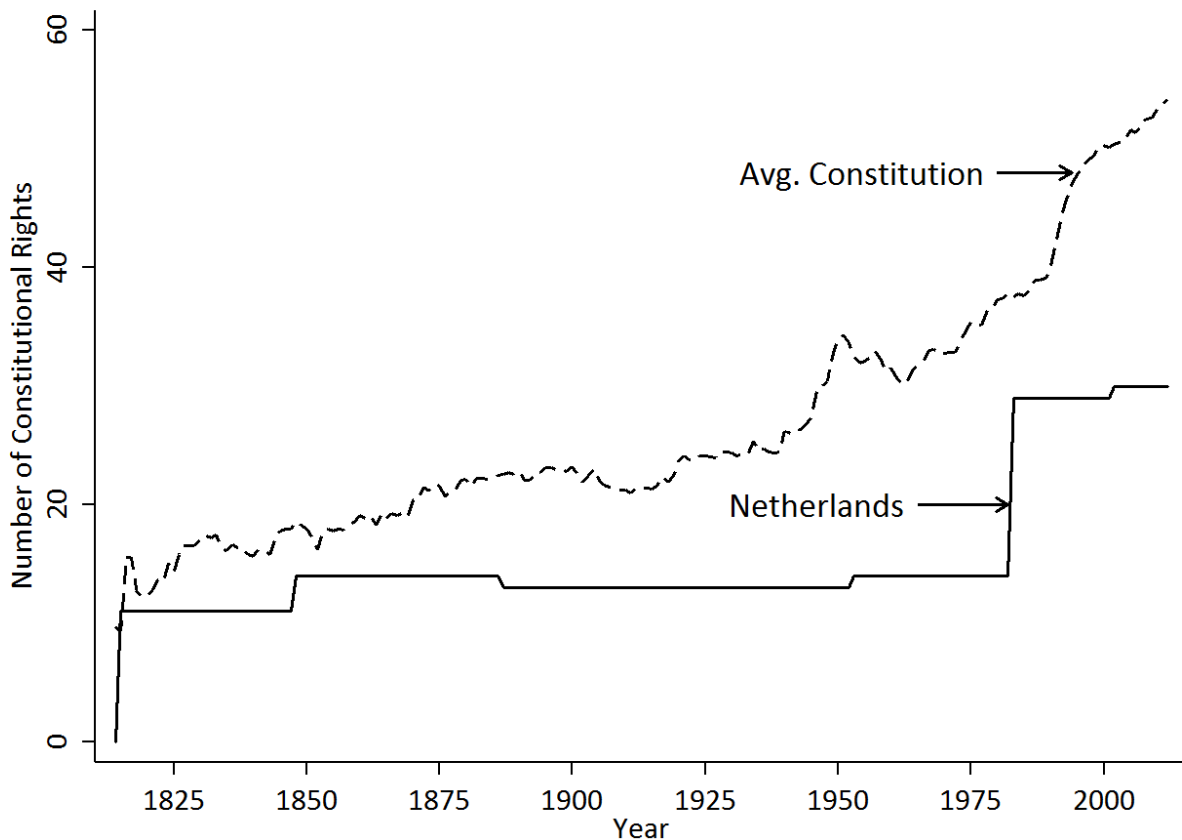
### *C. Judicial Independence*

Melton and Ginsburg (2014) identify six features of constitutions that can enhance the independence of the judiciary: (1) an explicit statement that the judiciary is independent; (2) selection procedures that enhance independence; (3) removal procedures that enhance independence; (4) requirement that judges can only be removed for grave offences; (5) protection of judicial salaries; and (6) life terms for judges. The index of judicial independence in Figure 2 reports the proportion of these guarantees in a country's constitutional text. The Dutch constitution provides little protection of the judiciary's independence. Of the 6 features that could be included, the Dutch constitution provides only one: selection procedures that enhance independence. For most of the other criteria, the constitution is silent. The treatment of the judiciary in the Dutch constitution is not uncommon. Even in relatively recently written constitutions, the section on the judiciary is one of the shortest and often provides few provisions that enhance judicial independence. Notice that the average constitution in force, represented by the solid line, only includes 2 of the 6 features that we think enhance judicial independence.

### *D. Rights*

This is a measure of the number of rights in a constitution, measured as the proportion of rights included in the constitution across 116 distinct rights that have been specified in constitutions since 1789. There are few rights in the Netherland's constitution. In fact, only two countries included in Figure 2 include fewer rights: Denmark and France. France's low score is not entirely fair because the French constitution directly incorporates the French Declaration of the Rights of Man in its constitution. The countries that score the highest on our rights scale are those that have written constitutions relatively recently, like Bolivia and Ecuador.

**Figure 3: Constitutional Rights in the Netherlands and Abroad**



The fact that recently written constitutions have high numbers of rights suggests that one reason the Dutch constitution has such a low level of constitutional rights is its age. This is illustrated in Figure 3, which shows the number of rights in the Dutch constitution (the solid line) versus the average in force constitution (the dashed line) from 1814 to 2012. As indicated by the dashed line, the number of rights included in national constitutions has increased steadily over the years. Early in the modern constitutional era, constitutions had, on average, only 10 rights, and this number is skewed upward by Latin American constitutions. Most European constitutions of the day included very few rights. Since 1789, there has been a fivefold increase in the number of rights in constitutions, so today, the average constitution includes upward of 50 distinct rights.

When it was drafted, the Dutch constitution had about as many constitutional rights as its contemporaries. It even managed to keep up with the number of rights in other 19<sup>th</sup>

century constitutions through a large amendment promulgated during the springtime of nations in 1848. However, after 1848, there was a long period constitutional stability in the Netherlands, during which the number of rights in the Dutch constitution remained constant, while the number of rights in other countries' constitutions increased dramatically. More rights were added to the Dutch constitution in 1983, including a number of socioeconomic rights which did not become popular until long after the Dutch constitution was written, but even after this modernization effort, it still has far fewer rights than most in force constitutions.

Of course, the Netherlands is a part of a broader European legal order that has extensive rights guarantees, both through the Council of Europe and the European Union. There is surely less of a need for constitutionalizing rights that are already, in some sense, incorporated into the constitutional order because of the supremacy of treaties, discussed in the next section.

## 5 International Engagement

The role of international law in the Netherlands bears particular mention. Beginning with the revision of 1953, which added a new article 60, the Dutch constitution contained very specific provisions on the relationship between international and domestic law. These provisions still exist today, albeit with different article numbers. [Article 94](#) provides for the supremacy of treaty obligations over domestic statutory law by stating that they are binding on all persons. This has been interpreted liberally by the Dutch courts. Treaties that are incompatible with the constitution require approval by a 2/3 majority of parliament to adopt, which is the same majority required to amend the constitution. [Article 92](#) explicitly allows the delegation of legislative, executive and judicial authority to international bodies. And [Article 90](#) instructs the government to “promote the development of the international legal order.” In this sense the Netherlands is remarkable in its explicit engagement with international law.

It may be that the famous Dutch pragmatism facilitated this integration with international law. Because the Constitution is silent on sovereignty, it may have been more palatable



toward the innovative treatment of international law, trumping domestic statutes. In a different context, such a provision would have to confront claims about the displacement of sovereignty. But without sovereignty being defined, such critiques would have less force.

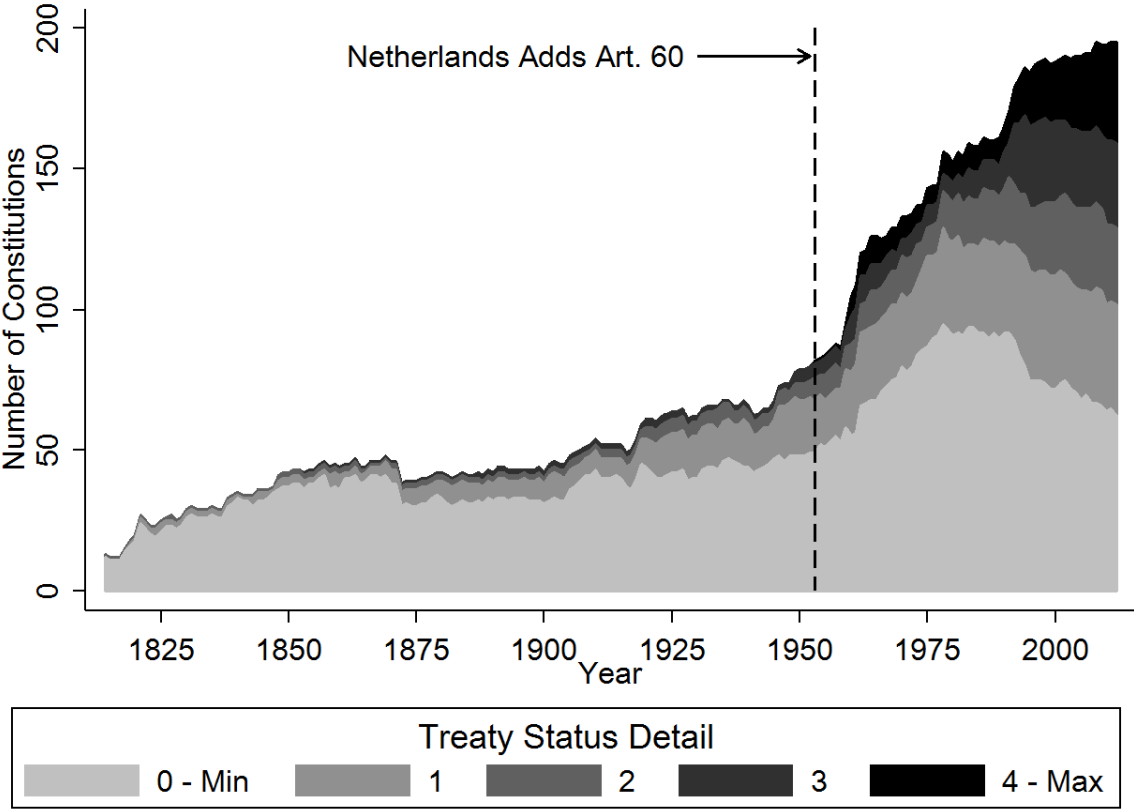
The engagement with international law provides a set of limits on political power. While the constitution lacks a scheme of constitutional review, international law is and has been used to accomplish much of the same ends, on the basis not of the constitution but the supranational regimes of the European Union, the European Convention of Human Rights, and other international treaty norms.<sup>10</sup> Making these rules directly enforceable has helped to reinforce the domestic political commitments to rights protection; it has also, importantly, strengthened these supranational regimes, providing a positive reinforcement for other European countries.

Figure 4 plots the amount of detail on the relationship between international and domestic law in national constitutions from 1814 to 2012. The index illustrated in Figure 4 captures four aspects of this relationship: (1) whether the relationship between the constitution and international law is specified, (2) whether the relationship between the constitution and ordinary legislation is specified, (3) whether it is specified how treaties are incorporated into domestic law or not, and (4) whether it is specified if treaties are reviewable for their constitutionality or not. In the figure, the darker the region the more of these features are specified in the constitution. The region is black if all four aspects are specified.

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<sup>10</sup> Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 19 Michigan Journal of International Law 266 (1989).

**Figure 4: Details on the Position of International Law Vis-à-vis Domestic Law**



It is perhaps unsurprising that constitutions tend to be silent about the relationship between domestic and international law. Until World War II, most constitutions specified either zero or one of the attributes describing the relationship between domestic and international law, and no countries specified all four of these attributes. It was not until 1953, indicated by the reference line, when the Dutch added Article 60 to their constitution, that a country specified all four attributes.

The open-ness to international law has been a trend among constitutional drafters, particularly in new democracies, which seek to commit the hands of their leaders to human rights treaties. Few countries, however, have gone as far as the Netherlands. In 2014, only 36 (18.6%) constitutions scored a four on the index illustrated in Figure 4, and most constitutions still specify either zero or one of the aforementioned attributes. Again, this is a feature which developing country drafters should be aware of, and carefully consider in their own efforts to establish constitutional order.

## 6 Pragmatism

Another theme in Dutch constitutional history is a certain procedural pragmatism with regard to the adoption of constitutional reforms. The original bill for the 1815 Constitution was approved unanimously by the States General, but required some creative accounting since a majority of the Belgian representatives to the constituent body voted against the constitution.<sup>11</sup> After the Belgian secession of 1830, the Constitution was not amended for ten years because of the unwillingness of King William I to accept it. This meant the parliament had only half its members, but it continued to operate. Finally, in 1840, the size of the legislature was reduced by around half. Another sign of pragmatism is the way the political order has taken what is a relatively rigid amendment rule and transformed it into a simpler one, essentially eliminating the requirement of an intervening parliamentary election. The famous Dutch pragmatism extends, it seems, to constitutional implementation.

One sign of this pragmatism is that the Constitution is silent on its ultimate foundation. The Dutch constitution lacks a preamble, a feature it shares with the constitutions of Luxembourg, Belgium and Norway among long-lasting constitutions. In this sense, it is an “incompletely theorized” document, to borrow from Professor Sunstein’s terminology.<sup>12</sup> There is no ideological statement of where sovereignty lies, or in whose name the constitution is promulgated. Avoiding this symbolic function turns out to have been a device for flexibility, as it has accommodated great social changes over the course of two centuries. For example, the lack of a commitment to a particular vision of the state allowed the country to be able to resolve the schools struggle through ordinary political mechanisms, reflecting the particular views of the time rather than locking in a single system for eternity. In some sense, one might see the Dutch decision to avoid the “sovereignty question” as prescient, as we live in an era in which sovereignty is seen to be in decline. The reasons for this decision are not clear, but we can speculate that it results from the unusual situation of re-establishing a monarchy with a new line after

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<sup>11</sup> Kraan at 595

<sup>12</sup> Cass R. Sunstein, “Incompletely Theorized Agreements,” *Harvard Law Review* 108, no. 7 (1995): 1733-1772.

some centuries. Furthermore, the previous sovereigns, the seven United Provinces, had lost their sovereignty during Napoleonic occupation. The turmoil preceding 1814 was such that resolving this question may not have been seen as important. And in contrast with its contemporary in Norway, the Dutch constitution was not adopted as a result of a popular movement. Nor was the independence of the state something that was a matter of local control, instead being a simple by-product of the defeat of Napoleon. There was thus little need to use a preamble to develop a long narrative of national history.

Constitutional drafting in many developing countries often spends an inordinate amount of time on symbolic issues in the preamble. Many recent accounts of constitutional design include mention of great controversies about the nature of the state, the role of Islam, the relevant historical events to reference, and the assignment of ultimate sovereignty. There may be something in the pragmatic Dutch approach in which the Constitution is silent on its ultimate foundations. While unconventional, the fact that a country as stable as the Netherlands has been able to succeed without a constitutional preamble might persuade some drafters to adopt this unconventional approach.

## **7 Conclusion**

As a small state in the heart of Europe, the Netherlands has faced its share of challenges, including war, loss of territory, and major political cleavages. Yet the country and the constitution have survived and thrived. While the political circumstances faced by many of today's constitutional drafters may seem quite different, they in fact have a good deal in common with some of the early challenges faced by the Netherlands.

Dutch constitutionalism is unusual in that it relies heavily on political responsibility, more than judicial checks on the state, to ensure good policy. This largely reflects the inclusive, consociational basis of the state, and encourages groups to become involved in policy formation rather than to attack policies in the courts after adoption. However, the Netherlands has also utilized international law as an independent source of

constraint, which helps to prevent majoritarian domination, and protects rights. For developing countries, this last feature may be the most transferable of the Dutch model, as consociational political institutions rely heavily on a willingness to cooperate that is not always found.

Finally, the drafters of the Netherlands Constitution declined to include a preamble, leaving the ultimate political basis of the state unarticulated. Since many a constitution-making exercise has failed over the question of sovereignty, this decision “not to decide” may have been a very wise one that today’s drafters could learn from.

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