Comparative Aspects on Constitutions

Theory and Practice

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Abstract

This paper will investigate for the influence of international legal developments on the drafting and implementation of constitutions, especially the impact of the European Union on the texts of the national constitutions of the EU Member States and its acceding countries.

We will look also at:

a. the influence of history (EU Enlargement) and tradition in the drafting and implementation of constitutions;

b. assessment (especially in the case of the Netherlands) of whether constitutional texts actually serve to achieve the practical implementation of expressed purposes.

Keywords: Constitutions, EU legal order, EU member states, EU enlargement.

A. Introduction

This paper will investigate for the influence of international legal developments on the drafting and implementation of constitutions, especially the impact of the European Union on the texts of the national constitutions of the EU Member States and its acceding countries.

We will look also at:

a. the influence of history (EU Enlargement) and tradition in the drafting and implementation of constitutions;

b. assessment (especially in the case of the Netherlands) of whether constitutional texts actually serve to achieve the practical implementation of expressed purposes.

For our study we must realize that the international legal order is interconnected with the EU and national legal orders. The international legal order has an impact on the EU legal order and the EU legal order and its enlargement have an impact on national constitutional texts and practice.

We will show some examples of this interconnection of legal orders. For example the Yusuf and Kadi cases, in which the Court of First Instance (CFI) not

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only addressed the vertical hierarchy between the national, EU and UN legal order, but also 'the constitutional architecture of the pillars'. The Court considered the coexistence of Union and Community as integrated and separate legal orders.[1]

B. The Impact of the EU Legal Order and its Enlargement on the Constitutions of the EU Member States

I. The European Union and National Constitutions

It is in the interest of an enlarged EU to increase the effectiveness of its legal order. Enlargement of the EU has as a consequence enlargement of its legal order. The EC and EU proved to be a success story since after their existence many new countries have applied for membership and acceded to the European Community, a community which is based on the rule of law. It was the rule of law as interpreted by the European Court of Justice, which supported further integration.

To achieve security, democracy and effectiveness of the rule of law, it is necessary to have an effective and transparent administration, an independent judiciary and an adequate system of legal protection at EU and national level.

National constitutions and the national courts interpreting these constitutions play an important role for the legal protection of the citizens of the European Union and the candidate countries. The national constitutional aspects are especially important in the pre-accession period as the national constitutions of the candidate countries determine the legal consequences of the rule of law in the national legal order: legal protection, direct applicability, direct effect and supremacy, primacy or priority of community law.

To reach a satisfactory system of legal protection not only the texts of the constitutions are decisive but also the interpretations given by the national courts when interpreting the constitutions and constitutional laws (*living constitutions*). These constitutional aspects as well as an adequate legal protection have to be adjusted and regulated as far as possible before accession.[2]

At the national level enlargement will contribute in many candidate countries most likely to the constitutional modernization of the country, as the EU Treaties have a constitutional character according to the European Court of Justice. The EU accession will give impetus to fundamental changes in this respect. This will concern especially the implications of their membership for the national constitutional provisions concerning the following topics:

1. The principle of the transfer of the exercise of certain state powers to the EU deriving from national state sovereignty.
2. Supremacy, primacy, priority, direct applicability and direct effect of community law.

1 Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* (2005) ECR II-3353, *in* R.A. Wessel, 'The Dynamics of the EU legal Order', *in European Constitutional Law Review* (2009) 5, pp. 117-142.

2 A.E. Kellermann, J.W. de Zwaan & J. Czuczai (Eds.), *EU Enlargement – The Constitutional Impact at EU and National Level*, T.M.C. Asser Press, The Hague 2001, p. LVIII and following,.

3. Specific provisions of the EU and EC Treaty (European citizenship, voting rights etc.).
4. Specific provisions in national constitutions which contradict the *acquis communautaire* such as acquisition of land and real-estate by non-residents, extradition of own nationals etc.

C. Impact on National Constitutions before EU Accession

The above-mentioned considerations have shown that there is a growing and continuous need before accession to adapt national constitutions and constitutional laws and practice.

Firstly, for some constitutions of applicant countries this adaptation is necessary in order to be competent to ratify the Treaty of the European Union. The constitutions of the candidate countries should not form an obstacle for accession of the candidate countries to an international organization, as the EU for example is considered. In some smaller candidate countries, who have regained their independence since 1991 there are, however, political and psychological objections against for example the transfer of sovereignty. If a provision as for example the transfer of exercise of certain state powers to an international organization is not included in the constitution, the candidate country risks afterwards receiving a constitutional complaint.

Secondly, the way in which some constitutional texts deal with the European integration process is rather poor from a political and a psychological viewpoint. In some national constitutions the way in which the texts deal with the European integration process is rather poor and not transparent ('European Deficit'). This happened even in an old EU Member State, like the Netherlands, where in the Constitution no reference at all is made to the EC or EU.

In order to guarantee a more or less uniform legal language and terminology concerning EU topics the applicant countries should, in our opinion, draft better proposals for constitutional texts in a multi-country context. An example of the constitutional drafting problems of terminology is the wording of transfer of sovereignty in the English text of Article 90 (1) of the Polish Constitution which speaks in the official government translation about *delegation* of the competence of the organs of a state authority to an international organization, whereas it should be formulated as *transfer* of the competence to an international organization.

The meaning of delegation in constitutional law is limited to transfer of powers to a *lower* institution or organization. The transfer of sovereign or state powers to the European institutions is according to community law, permanent and it is not possible to draw these powers back, as is suggested by the term of delegation. Although since the entry into force of the Treaty of Lisbon, this is now a question since Article 50 EU Treaty holds in Par.1 that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

Thirdly, there is a need to adapt national constitutions because many national constitutional provisions are contrary to (European Citizenship, voting rights) or are not complying with the *acquis communautaire* (extradition of own nationals, transfer of real estate).

Fourthly, the Copenhagen criteria for accession as mentioned in Agenda 2000 the stability of institutions guaranteeing respect for the rule of law, democracy, protection of minorities and human rights are topics which are generally laid down in the national constitutions or constitutional laws and practice. The European Commission assesses in its progress reports if the national constitutions and practice of legal protection comply with these Copenhagen criteria and make as a follow-up recommendations if necessary, for an eventual adaptation. The attitude of the European Commission is in my opinion schizophrenic, as they consider the drafting of national constitutions belonging to the people of each accession country, whereas on the other hand in the progress reports the European Commission is reporting and evaluating on the daily practice and assessment of the constitutional principles in that country with their compliance with the accession criteria.

D. Constitutional Problems with the Ratification of New EU Treaties

But also after EU accession the constitutional aspects play an important role. The constitutional courts in the EU Member States have denied in the beginning, explicitly or implicitly, the autonomous precedence of EU law by converting it into a legal effect of the constitutional provisions on the ratification of the European treaties.

For the ratification of new Treaties the Member States must follow their constitutional procedures for ratification. The Nice and Lisbon Treaties were concluded by the EU Member States by common accord, but ratification by Ireland was however not yet possible because of the negative results of the Irish referenda, which referenda were an Irish constitutional obligation. The question arises if Ireland should not amend its constitution in order to delete the obligation to hold referenda for the ratification of new treaties as this may form an obstacle for EU integration, whereas no other Member State has an identical obligation.[3]

Another example of ratification problems with EU texts is the rejection by the voters in France and the Netherlands of the Draft Constitutional Treaty text, which was agreed by the IGC 2004 and which text finally was adapted and entered into force on 1 December 2009 as the Treaty of Lisbon, after deletion of the word 'constitution'. This deletion was already suggested by Joseph Weiler in 2004 at a Asser conference 'The EU Constitution: the best way forward?',[4] in which he delivered a keynote lecture on the draft Constitutional Treaty text and stated that

3 A. Kellermann, 'The Irish Referendum on the Lisbon Treaty, Amicus Curiae', *Journal of the Society for Advanced Legal Studies*, London, 2008 Issue 75, pp. 30-34.

4 D. Curtin, A. Kellermann & S. Blockmans (Eds.), *The EU Constitution: The Best Way Forward?*, T.M.C. Asser Press, The Hague, 2005. J.H.H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography', *International Journal of Constitutional Law*, Vol. 3, Issue 2–3, pp. 173-190.

the text did not look like a constitution as it contains inclusive annexes 154,183 words while the American Constitution is about 5,800 words long and the Charter of the UN 8,890. Moreover it does not read like a constitution as the constitutional opening phrases are not referring to the 'People'.

Another more recent example of constitutional problems with ratification is explained in the judgment of the German Constitutional Court on 30 June 2009 that forbade Germany to ratify the Treaty of Lisbon until the Act extending and strengthening the rights of the Bundestag and the Bundesrat in European Union Matters was adapted according to German constitutional requirements.[5] Finally the Treaty of Lisbon was ratified by Germany and entered into force on 1 December 2009.

Finally the Czech Constitutional Court delivered on 3 November 2009 a second decision on the Lisbon Treaty where it rejected the complaints against the Lisbon Treaty and declared that ratification of the Lisbon Treaty is not in conflict with the Czech Constitution.[6] As the *acquis communautaire* is a moving target, national constitutions are also moving targets. This implies that adaptation of national constitutions is also after accession a continuing process.

E. For an Efficient and Effective Preparation of the Texts of National Constitutions the Following Suggestions Should be Considered

1) In order to improve the capacity to prepare and adapt national constitutions and constitutional practice taking into account the requirements of community law, the sharing of experiences with drafting and research project activities in other candidate countries and EU Member States in a multi-country context is suggested. See ANNEX I (Guidelines and questions for research of adaptation of national constitutions of EU Member States and (Pre) Candidate countries).[7]

Multi-country cooperation in adapting national constitutions is improving the quality of European constitutional law: in its comparative approach a multi-country cooperation could support the efforts of the applicant countries in order to guarantee a more or less uniform legal language concerning EU topics and would stimulate the applicant countries to draft better constitutional texts. Discussion on constitutional problems for accession would raise the awareness of politicians, judges, experts in the candidate countries and improve the practical and theoretical knowledge of the national judiciary in the concept of primacy, direct effect and direct applicability of community law.

The following advantages of multi-country cooperation may be added:

– It is useful to have an overview of possible adaptations of the constitutions and constitutional practice of the applicant countries.

5 D. Grimm, [article?]*European Constitutional Law Review*, 2009 Vol. 5, Issue 3 pp. 353-374.

6 J. Komarek, [article?] *European Constitutional Law Review*, 2009, Vol. 5, Issue 3 pp. 345-352.

7 A.E. Kellermann, J. Czuczai, S. Blockmans, A. Albi & W. Douma (Eds.), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre) Candidate Countries*, T.M.C. Asser Press – Cambridge University Press, 2006.

- The process could, however, also contribute after accession to proposals for an adaptation or revision of the national constitutional texts, in which national constitutional legislators will fully reflect the true importance of the European integration process.
- The development and use of a uniform European legal terminology in the national constitutions, concerning the relationship of community law and national law, could also contribute to the development of a European Constitution.
- Finally we have developed as an example for further research the following GUIDELINES for EU Member States for drafting national constitutions (ANNEX II).

These Guidelines could be discussed in a multi-country research group, which could be enlarged with many other countries in the world. Initiatives at this London conference organized by the Institute of Advanced Legal Studies on 'Comparative Aspects on Constitutions in Theory and Practice' could contribute to the development of these suggestions. In this multi-country research group proposals could be initiated for the development of some international and European models of constitutions. These models could focus especially on the relationship between the international legal order, the European Community legal order and the national and sub-national legal orders.

2) National courts interpreting the national constitutions play an important role in the final legal effects in practice of national constitutions. Therefore theory and practice with those principles which are relevant for the relationship between community law and national law should be increased and the awareness of national judiciary of their role as Community Courts should be promoted through workshops, briefings and training sessions.

Not only the texts of the national constitutions are relevant and important but especially the interpretation ('living constitutions') given by the national judiciary and prosecutors in the candidate countries in order to comply with the Copenhagen political criteria (democracy, the rule of law, fundamental rights, protection of minorities).

Conclusion adaptation of national constitutions of EU Member States is necessary before and after accession.

Before accession the Constitutional *acquis* should be added to the screening process. The aim of the screening process is to help the countries concerned to increase their understanding of the rules that underpin the EU and identify more clearly which issues they need to address as they adopt and implement the *acquis communautaire*. The relevant sectors are identified but not the constitutional *acquis*. A chapter on the constitutional *acquis* should be added and included. A post-screening meeting should be held for the candidate countries aimed at helping them to understand what the constitutional requirements of the accession process are about. After accession as the *acquis communautaire* is a moving target, the adaptation of national constitutions will also be a continuing process. The

Lisbon Treaty will also contribute to an adaptation of national constitutions and constitutional laws.

F. Impact of the International and EU Legal Order on the Netherlands Constitution and its Legal Effects in Practice

Since 1948 public debates have been going on in the Netherlands about whether appropriate provisions should be incorporated into the constitution so as to allow the direct effect of international law. The question was not whether the direct effect itself should be possible but whether the Constitution itself should state it. Internationalization became the order of the day in both politics and law. Unlike the intergovernmental organizations existing before, the supranational bodies started to emerge, with a right to create their own set of rules.

In 1950 a Constitutional Committee was appointed to prepare an amendment of the Dutch constitution to bring it in line with the post-war world. The Committee recommended new provisions into the Constitution concerning the relationship between the law originating from supranational sources and the Dutch legal system.[8]

The new order was initiated by the creation of new bodies like the European Defense Community and the Treaty on European Coal and Steel Community. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaties setting up European Community and Euratom soon followed. The prospects of more international and supranational bodies made the drafters of the Dutch Constitution state that legislative, executive and judicial powers could be conferred on international institutions by treaty and the provisions of law of supranational sources were to have direct effect providing they are binding on persons by virtue of their contents. No further action of the national authority was required.

The Netherlands constitution provided further that statutory regulations enforced within the Netherlands regardless when they were stated, would be inapplicable if they were not complying with the provisions of the treaties. The reasoning behind this was that since the Netherlands gave up part of its powers at the international level, it would not unilaterally take it back by having a legislation which is incompatible with the supranational rules. Therefore, the ECJ decision about the supremacy of community law over national law was no problem for the Netherlands.

Yet, another amendment was introduced in 1953 to help open up the Dutch constitutional system to the international law. Since then, the Dutch constitution states that any provisions of treaties which are in conflict with the Constitution may be ratified only with the consent of two thirds majority in favor in both Houses of Parliament. At first sight this might be seen as an additional obstacle. However, it is not the case. An amendment to the Dutch Constitution involves

8 *See* note 2. J. Peters, 'The Impact of the EU Acquis in the Netherlands'[is this a book title or an article in a book? If it is the former, please add publisher and place of publication. If it's the latter, please add full reference], pp. 57-64.

two readings. First, both houses must pass it by simple majority. Then, new elections are held and both houses of the newly elected parliament must pass it by a two thirds majority. Strange as it may seem, amending the constitution is more complicated than ratification of a treaty which is in conflict with the constitution.

The Dutch constitution denies further the judicial power to review the constitutionality of the Acts of Parliament or treaties. On the other hand, it orders to review if the Acts of Parliament and constitution are compatible with international law. This system is now under review in the Dutch State Commission.

I. Implementation of Community Law

Estimates of the volume of European legislation in the Netherlands vary. It includes approximately 70% of the legislation of this country. It is remarkable that in the Dutch constitution no reference at all is made to the EU or EC, although so much legislation is coming out of the EU or EC.

The prompt implementation of European legislation in the Netherlands might sometimes be a problem. The most notorious example in the Netherlands is one of the ECJ cases which reviewed that the Netherlands has been unaware of the notification directive under which Brussels should have been notified of all matters on the technical regulations before they could take effect.

The question arose from the 'Securitel' Judgment of the Court of Justice of 30 April 1996 concerning the question whether a breach of the obligation to notify according to Article 8 of Council Directive 83/189/EEC, as amended by Council Directive 94/10/EC constitutes a procedural defect in the adoption of the technical regulations concerned and renders such technical regulations inapplicable so that they may not be enforced against individuals.

Although this incident was relatively unimportant in itself, it had far reaching political implications. The Dutch government and parliament were in a state of confusion.[9]

Large scale operations had to be implemented by the Dutch government to remedy the omissions of the past.

Moreover, the Netherlands have problems with the speed of the implementation required by Brussels. Such speed is very difficult to keep up with due to the Dutch tradition of great care in drafting its own national legislation based on the consensus building model. This is a process involving the government and both houses of parliament, advisory bodies, and interest groups. The Dutch government devoted a lot of time to the process of implementation. The result is a number of organizational measures including monthly progress reports in the cabinet on the implementation of EU directives and frequent reports to parliament. The implementation can now take place via so-called Royal decrees and Ministerial orders rather than the time- consuming procedure of passing Acts of Parliament. To insure the continuation of the Dutch obligation to implement, the question of tacit parliamentary approval of the implementing legislation is being discussed.

9 A. Kellermann *et al.* (Eds.), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague, Boston, London 1998, p. XXIX.

However, this would require an amendment of the constitution. The Dutch government believes that fulfilling the obligation to the EU does not mean that the national parliaments are completely ignored.

The Dutch constitutional tradition is further one of autonomous municipalities and provinces. Municipal autonomy dates back to the town charters in the Middle Ages and continued during the times of the republic because the towns enjoyed so much economic power. This is the background to the debate about how far The Hague can go to oversee and even correct municipal and provincial authorities in their implementation of the legislation from Brussels. It is remarkable that in the Dutch constitution no reference at all is made to the EU or EC.

In 1983 the constitution was further nearly entirely rewritten. However in the constitution of 1983 no fundamental change was made in the provisions of the direct effect of international or supranational law. It seems the constitutional debate in 1953 has been brought to a successful conclusion without a need to reopen this question. The following group of articles of the 1983 Constitution pertains to international law and treaties and shows the impact of international law on the Dutch constitution.

Article 90 states that it is the duty of government to promote the development of the international rule of law. The Netherlands as a consequence is home to many International Courts and International Organizations that are established in The Hague. The study of international law always merits special notice in the Netherlands, the country of Hugo Grotius.[10]

Article 91 states that the Kingdom shall not be bound by treaty without prior approval of the States-General, except for those cases where law determines no such approval is necessary. Such approval may be tacit (sub Art. 2). Sub Article 3 determines that if a treaty conflicts with the Constitution, it has to be approved by a two-thirds majority of both Houses. A special implementation by law in the Act on the approval of the 1992 Treaty of Maastricht determines that certain European Community decisions having force of treaty have to be approved by parliament prior to even the conclusion itself.

Article 92 holds that by treaty legislative, administrative and judicial powers may be conferred on organizations established under international law. This has been done on many occasions e.g. on the Benelux, the European Community and the United Nations, the Council of Europe and NATO.

According to the present doctrine of 'treaty monism', treaties in the Dutch legal system are in principle self-executing: no special transformation is needed by implementing a special law, as in countries with a 'dualistic' system (as in the United Kingdom). The 'limited monists' held that only published treaties are self-executing and that thus Article 93 is the basis for all treaty monism. The government stated that this article should in any case be read as also covering the treaties conferring rights on the citizen and imposing duties upon the government.

10 *See* 2. A. Kellermann, 'International Law in the Netherlands', pp. XXXIV-XXXVI[is this a book title or an article in a book? If it is the former, please add publisher and place of publication. If it's the latter, please add full reference.

We have included below the original Dutch version of these Articles 93 and 94 as well as an English translation (in square brackets).

> Artikel 93
>
> *Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud een ieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekend gemaakt.*
>
> [Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.]

> Artikel 94
>
> *Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties.*
>
> [Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.]

A report written on request of the Dutch Ministry of Internal Affairs by Prof. dr L.F.M. Besselink and Prof. dr. R.A.A. Wessel comes with a number of policy options:[11]

1. Treaties that contain 'binding on all' provisions or decisions of international organizations with 'binding on all' character, must obtain parliamentary approval before the Kingdom is obliged to observe them.
2. International standards and decisions that are in conflict with the essential constitutional principles of democratic rule in the Kingdom will have no validity in the Dutch legal system.
3. There is only priority of international provisions on national constitutional provisions granted if these constitutional provisions are approved by a two thirds majority of the votes by the States General.
4. 'Customary ius cogens' has priority on procedural law and official regulations.

The last policy option should be applicable for UN sanctions implemented by EU decisions conflicting with national legislation as mentioned in the Kadi case of the Court of First Instance and the Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P in *Kadi and Al Barakaat International Foundation v. Council and Commission*. The Court annuls the Council Regulation freezing Mr Kadi and Al Barakaat's funds; the rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, were not respected. The Court further concludes that the freezing of funds constitutes an unjustified restriction of Mr Kadi's right to property.

11 *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht. Een neo-monistische benadering*, Kluwer 2009, Report written under the authority of the Dutch Ministry of Internal Affairs.

The *Kadi* case shows the influence of the development of the legal effect of resolutions of international organizations on the EU legal order and as a consequence also on the national legal order. In the 2009 report on the influence of developments in the international legal order on the effect of Netherlands constitutional law according to 'neo-monism', the priority of international decisions in the Netherlands will be limited by the fundamental principles of the Dutch constitution. Bogdandy is referred to as follows:[12]

> [...] sometimes debatable legitimacy of international legal acts... There should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law [...]

The government of the Netherlands indicated that many developments in the international legal order have occurred the last twenty five years since the revision of the constitution in 1983. What are the consequences of these developments for the democratic legitimacy and individual legal protection? In other words are Articles 93 and 94 of the Dutch Constitution still satisfactory to guarantee democratic legitimacy and legal protection and complying with the developments in international law and in how far adaptation will be necessary? Taking into consideration these developments there was in the Netherlands a constitutional debate about monism or dualism.

The effect of international law in the national legal order as described in doctrine is nowadays more or less outdated as written by Nijman and Nollkaemper:[13]

> The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new non-legal developments, different from those that inspired traditional monism and dualism, calls for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law.
>
> While protection of sovereignty, individual freedom, and rule of law remain relevant factors, they are now part of more complex processes and interests. Above all, they have been redefined and submerged by the process of globalization. Increasing cross-border flow of services, goods and capital, mobility and communication have undermined any stable notion of what is national and what is international.

In the Netherlands limitation of the effects of 'monism' is nowadays more or less accepted in line with the German lawyer von Bogdandy: "Monism and dualism

12 Kellermann, Czuczai, Blockmans, Albi & Douma (2006), p. 109 *et. seq*.

13 J. Nijman & A. Nollkaemper [please add title of article of chapter], *in New Perspectives on the Divide between National & International Law*, Oxford University Press, Oxford 2007, p.10.

should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law…"[14] The new draft could be indicated as 'new monism', which is supported by most Dutch lawyers since this term recognizes priority of the essential and fundamental legal principles and 'customary ius cogens' above all international treaties and decisions of international organizations.

G. Assessment of Whether Dutch Constitutional Texts Actually Serve to Achieve the Practical Implementation of Expressed Constitutional Purposes

An evaluation of the importance of the Dutch constitution legally, socially, politically as framework for the regulation of relations between government and citizens has been made on request of the government. The research was published by Kluwer in 2009 by a Leiden university research group.[15] The research has focused on questions like the social status and role of the constitution as well as the legal and juridical role of the constitution. The discussion has concentrated mainly on the legal and juridical role and function of the constitution. The social function of the constitution is considered for the moment small, however it is important to look for possibilities to strengthen that role. The legal role and function is under pressure for several reasons.

An internal factor is for example the diminishing authority of the text of the constitution, and lack of knowledge about the content. External factors are the development of international human rights protection, the politicizing of the debate in the parliament and the prohibition for a comparative test and check of the national laws with the constitution. As a result of these developments the constitution receives less attention in the courts and parliament.

The protection of human rights since the European Convention for the Protection of Human Rights has increased more than foreseen in 1983 by the legislator. Especially the role of the constitutional rights in the Dutch constitution has diminished in the Dutch courts in favor of the European Court of Justice after the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights and the Strasbourg court since the conclusion of many international human rights protection treaties.

The results from the interviews implemented under members of parliament, government, judiciary and civil service, universities, free professions, business etc. show the following.

14 A. von Bogdandy [please add article title], *International Journal of Constitutional Law*, 2008, nos. 3 & 4, p. 400.

15 The Research group consisted of prof. mr. T. Barkhuysen, mr. dr. M.L. Van Emmerik, prof. dr. W.J.M. Voermans and others. The final report was presented on 15 October 2009 to the chairman of the State Commission for the revision of the Grondwet (constitution), Prof. W. Thomassen and was published by Kluwer in 2009 under the title: 'De Nederlandse Grondwet geëvalueerd'.

The juridical and society functions of the constitution are weak and become weaker. On the one hand because European and international human rights protection have priority and on the other hand because the examination and review of Dutch laws against the constitution is unconstitutional in the Netherlands.

Finally the text of the constitution is not familiar and not well-known by the interviewed persons. The weak effect of the constitution is however appreciated by the respondents. The general conclusion of the respondents was that there is no need for a general revision of the 1983 Constitution, although some respondents prefer partial improvements.

ANNEX I

Draft Guidelines and Questions for Research on Adaptation of National Constitutions for EU Member States and Acceding Countries

- *National Constitution*

1) Do you classify your legal system as monistic or a dualistic? How is international law implemented in the national legal order?
2) Does your constitution allow the transfer of legislative powers to international organizations with or without limits? What is the legal situation in case of a conflict of your constitution with the Treaty (primary law) or community secondary law, and a conflict of a prior or later national law with the Treaty on EU and EC Treaty? Do the relevant constitutional provisions for supremacy of international law guarantee supremacy or direct effect of European law?
3) Would your constitution require amendment for the ratification of the EU Treaty, EC Treaty, Euratom Treaty? If yes, how and which procedures for amendment are to be used?
4) If your constitution has to be amended for accession to the EU, what are the problems in practice? Which procedures for amendment are to be followed?

- *Role of Courts*

1) Do the courts in your country accept the principle of direct effect and supremacy of international law obligations like for example community law and do the courts accept a different attitude for primary or secondary community law and on which principles they base their reasoning (community law, constitutional law or international law)?
2) Do your courts recognize a rule of interpretation whereby national law must be interpreted in conformity with international obligations (principle of indirect effect)?
3) Could you mention and comment on some interesting cases of your Supreme Court and/or Constitutional Court dealing with such problems?
4) If a community measure is inconsistent with prior international commitments of the Member States, do your national courts give priority to the prior international commitments?

- *Role of the Executive*

1) To what extent do the central government and the administration implement and/or apply the Europe Agreement or Stabilization and Association Agreement (SAA)?
2) Which administrative and/or legal measures have already been initiated by your government to comply with the political criteria of Copenhagen?
3) What coordination mechanisms have been envisaged for the preparation and implementation of EC/EU law?
4) What impact do you expect EU accession to have on the organization and practice of
   (a) central government and administration and (b) the decentralized authorities?

- *Role of the National Parliament*

1) Is the national parliament prepared for the legal approximation of national (constitutional) legislation with EC/EU law? Are there special instructions or committees for implementation of EC/EU law? Please elaborate.
2) To what extent will national parliament keep control over decisions taken by Ministers in the Council of the European Union? What views exist on this matter in your country?

ANNEX II

Draft Guidelines Improving the Quality of Drafting National Constitutions in the EU Member States and Candidate Countries

(1) Clear, simple and precise drafting of constitutional texts is essential if they are to be transparent and readily understandable by the public and economic operators. It is also a prerequisite for the proper implementation and uniform application of community legislation in the Member States.

(2) According to the case-law of the Court of Justice, the principle of legal certainty, which is part of the community legal order, requires that community legislation must be clear and precise and its application foreseeable by individuals. That requirement must also be observed for national constitutional texts.

(3) National constitutional texts should respect the principle of the transfer of the exercise of state powers to the EU deriving from national sovereignty according the case law of the Court of Justice (*Van Gend & Loos*).

(4) National constitutional texts should respect the relationship between community law and national law (supremacy, primacy, direct applicability and direct effect in the national legal order) as developed in the case law of the European Court of Justice (*Costa v. ENEL*).

(5) The guidelines on the quality of drafting of national constitutions should therefore be adopted in the Council by common accord. These guidelines are

intended as a guide for the national parliaments when they adopt constitutional texts, which have to comply with the *acquis communautaire*.

(6) Provisions of national constitutions shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.

(7) Throughout the process leading to their adoption, draft constitutional texts shall be framed in terms and sentence structures, which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care.

The terminology used in a given text shall be consistent both internally and with texts already in force, especially in the same field.

(8) All constitutional texts shall be drafted according to a standard structure (title preamble enacting terms annexes, where necessary). As far as possible, the enacting terms shall have a standard structure (subject matter and scope definitions rights and obligations provisions conferring implementing powers procedural provisions implementing measures transitional and final provisions).

(9) References to other acts should be kept to a minimum. References shall indicate precisely the act or provision to which they refer. Circular references (references to an act or an article which itself refers back to the initial provision) and serial references (references to a provision which itself refers to another provision) shall also be avoided.

(10) Amendments should be possible by the absolute majority in the national parliaments in one lecture, in order to prohibit the rigidity of the amendment procedure, which might be an obstacle for a dynamic European integration. Every amendment of a constitution shall be clearly expressed. Amendments shall take the form of a text to be inserted in the act to be amended. Preference shall be given to replacing whole provisions (articles or subdivisions of articles) rather than inserting or deleting individual sentences, phrases or words. An amending act shall not contain autonomous substantive provisions, which are not inserted in the act to be amended.

(11) An act not primarily intended to amend another act may set out, at the end, amendments of other acts, which are a consequence of changes which it introduces. Where the consequential amendments are substantial, a separate amending act should be adopted.

(12) Obsolete provisions shall be expressly repealed. The adoption of a new provision should result in the express repeal of any provision rendered inapplicable or redundant by virtue of the new provision.

These guidelines could be regarded as instruments for internal use by the national parliamentary institutions. They are not legally binding.