# Constitutional Reform in the Postwar Netherlands: Law in History

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## Introduction

What is the authority of a constitution when it comes to defining the system of government? In 1948, the Dutch constitutional law professor André Donner compared the state of his discipline to that of 1848, the year of the famous constitutional reform led by law professor and politician Johan Rudolph Thorbecke. Donner observed that times had irrevocably changed since then, because "the unlimited respect for the written constitution is missing, and one hears justified complaints about the respect for constitutional law and its scholarship, complaints also, no less justified, about the unreality of this scholarship itself" (Donner, 1948, pp. 361–2). Notwithstanding these rather pessimistic observations, Donner would, in the next decades, actively contribute to constitutional reforms as a member and chair of consecutive constitutional committees.

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Moreover, as I have concluded from studying the political history of these reforms, Donner's prominent role relied significantly on the constitutional legal arguments he was able to bring to the debate—despite the decreased respect for this discipline he had observed earlier (Van Leeuwen, 2013).

In the initial stages of my research into the history of constitutional reform in the postwar Netherlands, legal writings such as Donner's did not figure prominently. Interested in constitutional politics as a process regarding the content of the constitution, my project primarily focused on the many initiatives attempting to reform the key document "establishing a system of government, defining the power and functions of its institutions, providing substantive limits on its operation, and regulating relations between institutions and the people" (Galligan & Versteeg, 2013, p. 6). As is typical for political history as well as related disciplines interested in the political, law in my project merely featured as the outcome of the process or, more precisely, the result of often difficult negotiations between parties and the ideas, interests, and power they bring into play. By following the paths of various Dutch reform plans—regarding, for example, the electoral system, direct democracy, and demonstration rights—through public opinion, political backrooms, and parliamentary debates, I expected to refine existing explanations for the (lack of) success of these and other reforms, explanations that so far had mostly focused on political calculations and institutional constraints (e.g., Andeweg, 1989).

Soon after, however, I was motivated to delve further into the object of the reforms itself: the constitution. This curiosity was sparked by my systematic analysis of the archives of what we called constitutional committees: temporary committees in which usually politicians as well as legal experts drafted the reforms (Van Faassen et al., 2010). In spite of Donner's observations about the constitution's declining normative value, the debates in these committees suggested that the constitution figured as more than just a blank sheet to be filled as political majorities desired. Rather, as a system of norms and practices, the constitution also appeared to shape the political process by enabling and constraining possible paths for constitutional reform.

Moreover, in this process, the exact meaning of the constitution seemed by no means fixed: various interpretations competed for prominence, in

an often-implicit debate underlying the discussions about actual reforms. The Babylonian confusion in which these implicit debates incidentally resulted intrigued me but also left me without the appropriate words to describe them properly—or at least, I had trouble finding them in my own discipline.

In this chapter, I show how my aim to better integrate these legal aspects of constitutional politics inspired me to cross disciplinary boundaries and look for a way to integrate law into political history. In particular, I focus on the concept of (constitutional) tradition(s) that I used to synthesize the various interpretations of the constitution and their normative claims. As I show in the first section, this concept was originally borrowed from constructivist, interpretative political science, but it also tunes into recent innovations in the discipline of legal history within the broader legal domain. The second section then illustrates how discerning three constitutional traditions allowed me to include the legal dimension in my historical narrative of Dutch constitutional reform. Finally, by positioning this example of law-in-history in the expanding interdisciplinary field, the conclusion considers how the concept of tradition might benefit a further integration of law and (political) history.

## Conceptual Explorations: Constitutional "Tradition(s)"

Interdisciplinary research into the politics of constitutional law, or the politics of law in general, has recently generated a significant amount of scholarship (e.g., Versteeg & Galligan, 2013), which this section does not even attempt to summarize. Instead, weaving recent insights through my original explorations, I focus on the concept of tradition and how it aims to cross disciplinary boundaries.

Despite recent moves toward interdisciplinarity, legal scholarship and social scientific approaches to law are still markedly divided by the boundaries described by the French political sociologist Pierre Bourdieu in his seminal work on "the force of law" (1987). As Bourdieu observed, legal studies are typically split into a formalist approach, "which asserts

the absolute autonomy of the juridical form in relation to the social world," and an instrumentalist approach, "which conceives of the law as a reflection, or a tool in the service of dominant groups" (1987, p. 814). The former still dominates legal scholarship, serving to construct a coherent body of doctrine. In contrast, the latter approach, which is found both in critical legal studies and in adjacent social science disciplines, seems scarcely interested in the law, which it regards mostly as a cover-up for ideological aims—recent qualifications include "a smokescreen for ideology" (Roux, 2019) or "politics by other means" (Hirschl, 2013).

Bourdieu's legal sociology is only one of many attempts to overcome this hard split. By studying law and its practitioners, to which he referred as the legal field, Bourdieu continued to critically reflect on the social implications of the competition over the right to determine what the law is, as he observed in the more critical approaches. At the same time, he took the relative autonomy of the law seriously, at least as a body of knowledge that provided lawyers with their social capital. A more rigid approach that also focuses on the autonomy of the law—or the self-referential reproduction of legal communication—can be found in Niklas Luhmann's theory of the legal system (*Das Recht der Gesellschaft*, 1993).

Both Bourdieu's strict separation between fields and Luhmann's closed system seemed a rather ill fit for the empirical reality of Dutch constitutional legal debate I aimed to explore. Not only was it nearly impossible to tell where politics ended and law began, constitutional lawyers themselves also questioned the legal character of their discipline, as I will elaborate below. What I did appreciate in these sociological approaches, however, was their genuine interest in the role of legal knowledge and language, as well as cultural capital, in distinguishing lawyers from non-lawyers. A more anthropological interpretation regarded the legal discipline as a distinct culture with a unique manner of making sense of the world (Etxabe, 2020, p. 25; Geertz, 1983). As a political historian formed during a wave of cultural–anthropological approaches to politics (e.g., Te Velde, 1997), I could easily integrate these interpretations in my work.

While sociologists and anthropologists inspired my views on the legal discipline, interpretative work by political scientists offered the key

concept that I would use to connect lawyers and their knowledge to their actual contributions to constitutional reform: the concept of tradition. Defined as "a set of connected beliefs and habits that intentionally or unintentionally passed from generation to generation at some time in the past" (Bevir & Rhodes, 2003, p. 34), this concept offered a contingent approach to what other political scientists described as paths or institutions. Rather than looking at formal constraints (such as legal frameworks) as stable, unchanging entities, it regarded these as "sedimented products of contingent beliefs and preferences" (p. 41). Translated to my research, this meant that the paths or institutions limiting the possibilities for constitutional reform were not so much found in, for example, the constitutional clauses formally overseeing that procedure but, rather, in the connected beliefs and habits in which this procedure and the constitution itself was embedded, intentionally or unintentionally. It was to be expected that constitutional lawyers would take an authoritative role in explaining what these beliefs and habits—in other words, traditions—were, even when their competition for interpretative sovereignty could not be fully separated from the political environment in which their discussions were inevitably embedded.

As the next section will explore in greater detail, this somewhat eclectic and loosely built analytical framework—not unusual for a historian—allowed me to better integrate the law into my political history narrative. At the same time, I was not fully aware that the term tradition in particular had led me into a conceptual minefield when it came to the legal discipline itself, specifically legal history. Operating very much in the service of classical legal scholarship in favor of a closed and coherent body of doctrine, traditional legal historians have primarily used the term tradition in the singular to describe a "set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected and taught" (Merryman & Pérez-Perdomo, 2007, as cited in Duve, 2018, p. 21). Typically, tradition is used here for rather large spatial realms: the common law tradition of the Anglo-Saxon world, the civil law tradition on the European continent, and so on. More recently, however, legal historians, inspired by insights and methods from

the humanities, have started to move away from such essentialist approaches. This has resulted in more contingent and practice-oriented understandings of legal tradition, defining tradition, for example, as "normative information that is produced, captured and adapted by communities of practice" (Duve, 2018, p. 30). Although the analysis described in the next section was not informed by these influences, the turn made by legal historians clearly opens roads for an even better integration of disciplines. The conclusion will return to this issue.

In my empirical analysis, however, tradition served in the first place as an instrument to describe the normative dimension of constitutional legal knowledge and beliefs, whether expressed in ideas, habits, or practices. Moreover, having learned that coherence of the law is essential in formalist legal argumentation, I assumed that what was imagined to be constitutional tradition, consequently, also influenced constitutional reforms, as the lawyers helping to shape these reforms would be inclined to prefer proposals that were consistent with tradition over those that were not. To trace Dutch constitutional tradition, I reread the committee reports, legislative proposals, and constitutional legal writings, which I had initially studied for their actual reform plans. This time, I searched for a deeper layer of beliefs, habits, and narratives about what ("good") constitutional law was or should be. Eventually, I identified three concurring traditions connecting a particular view of the past to the shape of future reforms.

## Constitutional Reform in the Postwar Netherlands

Before looking at these traditions in more detail, a few words on the empirical case of the Netherlands that provided the context for this conceptual exploration are necessary. As I will briefly explain, the case of the Netherlands is somewhat exceptional, necessitating the rather broad manner of defining tradition in the section above. As was already highlighted in Donner's 1948 observations, the postwar Netherlands did not particularly feature as the heyday of the authority of written

constitutions and constitutional legal scholarship. Ever since, Dutch constitutional lawyers have continued to question the normativity of Dutch constitutional law (Voermans, 2019), while doctrinal debates are observed to be lacking (Zoethout, 1997). This is partly a matter of comparison: Where globally constitutional politics is observed to be firmly on the rise (Hirschl, 2004), the Dutch constitutional system lacks one of the features through which such politics often takes place—a constitutional court. Notwithstanding recent reform attempts, the Dutch constitution thus far has left the last say on the constitutionality of legislation in the hands of the legislator itself. This means that not only the formal reform of the constitution but also its eventual (re)interpretation is decided "in the Hague," notably in the Senate, where legal argumentation tends to blend with more political considerations.

Political considerations also provided the impetus for the debate about constitutional reform that began during the early postwar years. Unlike many neighboring states, the Netherlands had no urgent need to introduce a completely new constitution. Yet, the return to the 1814 constitution, which had undergone major reforms in 1848 and 1917, was accompanied by numerous proposals for fundamental reform of the political system. Once the most urgent reforms—including the decolonization of Indonesia—had been dealt with in the late 1940s, the next decade saw the establishment of a heavyweight committee of political leaders and constitutional experts to prepare an overall modernization of the constitution. Soon, however, the condition that proposals could garner the approval of a broad political majority—the Dutch constitution requires not just two legislative rounds but also a two-third majority in both chambers of parliament for any constitutional reform to be approved—proved insurmountable. The broad political compromises that enabled the development of the Dutch welfare state during those years did not extend to the very foundations of the political system, as many reformers had hoped.

Eventually, modernization of the constitution only took place in 1983, following a legislative operation that stretched out over almost a decade. Two phases separated 1983 from the failed 1950 committee. First, the publication of the *Proeve van een nieuwe grondwet* (1966), a draft constitution prepared by civil servants in dialogue with legal scholars,

explored the possibilities and political salience of reducing the constitution to "the very minimum": a technical document that, released from its historical shape and language, contained only the most essential norms regulating the system of government and its limits. Second, another heavyweight constitutional committee of (former) politicians and constitutional experts was established in the late 1960s under the leadership of Jo Cals and André Donner in order to condense the over 60 societal responses provoked by the *Proeve*, together with the new radical plans for political reform debated at the 1967 elections, into coherent and convincing legislative proposals for constitutional revision (Van Leeuwen, 2013).

My reading of the endless minutes of that Cals-Donner committee, which convened seasoned politicians and law professors with a new generation of political scientists in elaborately decorated *Binnenhof* backrooms, provoked me to look beyond the mere arguments the committee members exchanged and to try to understand them not only in a political context but also as part of ideas and narratives inspired by diverging disciplinary traditions (Fig. 1). At times, it seemed as if the members of the committee spoke different languages. This Babylonian confusion most prominently featured in the often-heated debates regarding the radical reform plans tabled at the 1967 elections that addressed the electoral system and the procedure for government formation, among other things. While some constitutional lawyers proposed tackling these issues by removing its regulation from the constitution—very much in line with the minimal constitution proposed in the *Proeve*—political scientists continued pleading to introduce a range of new provisions based on a systematic analysis of the flaws of the reigning conventions (Van Leeuwen et al., 2020, pp. 447–55). The latter's implicit and explicit references to Thorbecke, whose 1848 constitutional reform had actively transformed the 1813 Kingdom of the Netherlands into a constitutional monarchy, hinted at underlying disagreements about what the constitution was meant to do.

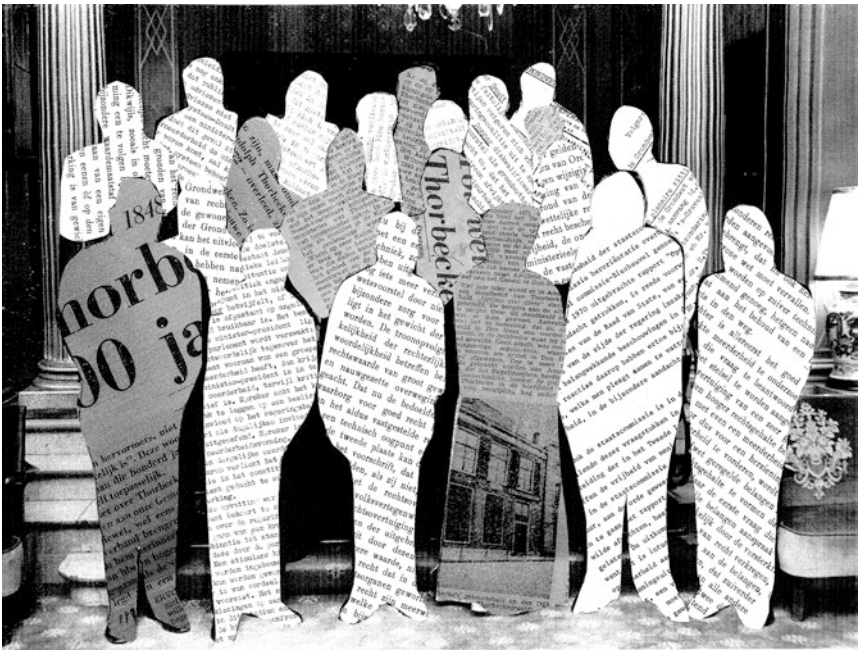

**Fig. 1** Diverging ideas and narratives in the 1967–1971 Cals-Donner committee; collage based on a group portrait made by Stokvis to mark the official farewell of the committee March 29, 1971 © Van Leeuwen

## Three Constitutional Traditions

The ideas embodied both in the *Proeve* and by (interpretations of) Thorbecke provided the starting points for two of the three "traditions" I eventually distilled from Dutch constitutional thought and practice. These traditions roughly succeeded each other chronologically in terms of dominance: As new paths worn into soft soil, the latter two steered Dutch constitution-making in the twentieth century "away from Thorbecke's tracks." At the same time, as the debates in the Cals-Donner committee demonstrated, older traditions continued to exist as sets of beliefs and habits influencing what constitutional reforms should look like and how they should be organized. Eventually, the 1983 constitutional reform at best resembled an amalgamate of all three traditions, with different traditions inspiring different parts of the legislative operation, as a closer look at these traditions will illustrate (Van Leeuwen, 2014).

The first of the three traditions influencing twentieth-century constitutional debate referred back to its nineteenth-century origins, more specifically the 1848 constitutional reform. In this Thorbeckean tradition, the constitution featured as an instrument of change (Elzinga, 1998). In 1848, the constitutional reform was meant to pave the way for new political and societal structures, such as the uniform system of local and regional government or a more active education policy. It did so by including the basis for these new legislations in the constitution: After decades of government by royal decree, the new constitutional framework meant to introduce a firm rule of law (*heerschappij der wet*). Hence the belief central as well in later manifestations of this tradition that constitutional revision was foremost an instrument heeding systemic reform—whether it be Thorbecke's ministerial responsibility in 1848, the introduction of general suffrage in 1917, or the new procedure for government formation proposed in the 1960s.

Where the Thorbeckean tradition leaves no other way to such reform than through constitutional revision, the early twentieth century witnessed the emergence of alternative views of the constitution and its ability to accommodate reforms. In this period of growing democratization, the constitutional framework was increasingly experienced as galling bonds (Verkouteren, 1912). In a political landscape of minorities, the formal reform procedure with its demand of a two-third parliamentary majority blocked developments that were widely demanded in political debate or, as legal scholars recounted, were considered legitimate in national legal consciousness. Some issues, such as the pressing political issue of private (in the Dutch context, confessional) schools, were eventually accommodated by parliamentary majorities reinterpreting the relevant constitutional clauses. Constitutional lawyers encouraged this more flexible interpretation as a necessary step toward the demands of an expanding electorate. At the same time, they warned that the constitution was losing credibility and carried the risk of encouraging revolution (Krabbe, 1906).

Therefore, they discussed a new approach to the constitution that left more room to democratic politics by moving away from the "typical, legal interpretation applied by solicitors to a contract, or by judges to a statute" (Van Hamel in Handelingen N.J.V., 1914, p. 166). Instead, the

constitution, in the words of constitutional law professor A. A. H. (Teun) Struycken, should be interpreted as a historical national document and a guiding principle for national policy (Struycken, 1914). According to this Struyckean tradition, reform no longer needed to be preceded by constitutional revision: As long as it fit the broader constitutional framework of legitimate decision-making, some stretching of constitutional limits was allowed. Eventually, a formal revision would then follow to again incorporate the main achievements of those democratic reforms in the constitution—if only to make sure that the constitution continued to reflect national legal consciousness and thus guarantee the authority of the constitutional framework. From its Thorbeckean role as pathfinder, the constitution assumed a more passive role. This Struyckean view of the constitution as a primarily symbolic historical document guided many debates over constitutional reform well into the 1950s (and beyond).

A third tradition emerged in the 1960s from the same desire to withdraw the constitution from everyday politics. Yet the constitutional model represented by the *Proeve* at the same time rejected the focus on the symbolic value of the constitution, while reemphasizing its normative, legal value. The *Proeve* proposed a short constitution that would not stand in the way of everyday politics unless fundamental principles were concerned. At the same time, by expanding the catalogue of basic rights, it strengthened the normative safeguards against a still increasing state intervention. Its shortened and modernized text cut the ties with the past, thus seeming to embrace the later often-heard complaint that it was mainly of interest to legal professionals.

## The 1983 Constitutional Revision: Paths Toward (Non-)Reform

When in 1983 the modernization of the Dutch constitution took its final shape, politicians as well as citizens seemed to have long lost interest. The formal announcement of the revision, scheduled on a cold February day, barely made headlines. As the media reported, radical reform plans, such as those proposing a new electoral system or a reform of the procedure of

government formation, had already been taken off the agenda in the mid-1970s. Beyond some minor reforms, for example, the introduction of an ombudsman as well as a clause on transparency, lawyers described the 1983 revision as a facelift of the old lady (Heringa & Zwart, 1983): a mostly textual, technical operation that strengthened the catalogue of basic rights, modernized language, and cleared out many provisions considered either outdated or too detailed.

To explain why some reform attempts were successful while others failed, it is important to examine the interests of the dominant political parties. At the same time, I have found that differing beliefs about the constitution also influenced the success of these attempts—beliefs that could be mapped through the various constitutional traditions. Often, the two explanations were narrowly intertwined. For example, as chairs of the constitutional committee dealing with the radical reform plans in the late 1960s, Cals and Donner were, not coincidentally, also members of the confessional parties represented in the confessional-liberal governing majority that did not support these reforms. Yet reformists did not help their case by proposing to radically diverge from what many committee members believed to be the constitutional framework (Van Leeuwen, 2013).

More precisely, the reformists—many of them leftist political scientists arguing from theoretical models about the "ideal" system—proposed introducing pathbreaking changes to the electoral system, among other things. Using the constitution as an instrument of change in a Thorbeckean manner, they argued that "in no other way could practices in government formation be changed" (Glastra van Loon, 1966, p. 135). Meanwhile, many constitutional lawyers instead favored a *Proeve* approach: removing obstacles and, thus, enabling reforms to take shape outside the constitutional framework. In their view, the constitution was "no place for experiments" (Simons in Van Leeuwen et al., 2020, pp. 131–3), and reflecting the Struyckean tradition, they wondered whether the matter had sufficiently "ripened" enough to be integrated into the constitution and were opposed to "declaring politicological conclusions normative and consolidating them in the constitution" (De Pous, respectively Jeukens, as cited in Van Faassen et al., 2010, November 24, 1967). The deep cleavages between the approaches of the two sides even regarded the

working order of the committee: Should the committee begin with an open debate about problems and solutions of the political system or with Article 1? With reform plans so clearly diverging from the dominant paths of constitutional revision, it proved impossible to find a satisfactory compromise—both in the committee and in consecutive parliamentary debates.

The constitution eventually promulgated in 1983 did, in fact, mostly follow the *Proeve* path, albeit with some traces of Struyckean thinking. As the lawyers drafting the *Proeve* had suggested, the new constitution drastically reduced the number of provisions and put greater emphasis than before on rule of law elements, for example, with its prominent new chapter on basic rights. Except for some controversial clauses, the text was modernized and shortened. Legal consistency did not prevail in all cases, however. A proposal to subject the newly introduced basic rights chapter to judiciary review was rejected as was an attempt to remove the procedure for appointing local mayors from the constitution (to open that procedure for elections). Moreover, elements such as the new catalogue of social rights, which were explicitly described as having no legal effect other than providing "guiding principles," were reminiscent of the merely symbolic approach to the constitution that dominated the Struyckean tradition.

While these three traditions help to bring out the role of legal thinking and beliefs in the constitutional reform, a better understanding of this legal dimension also enables us to comprehend that the new 1983 constitution, despite a widely felt experience of failure, marked an important transformation after all. This is because the traditions that helped shape the reform also shaped the *use* of the constitution in subsequent years. As one of its drafters soon observed, the new emphasis on the catalogue of rights steered that use in the direction of an increasing focus on its role as safeguarding individual freedoms (Van der Hoeven, 1988). This more normative use of the constitution found its parallel in the emerging jurisprudence based on international human rights treaties that in the Dutch legal system had already been granted direct effect in the 1950s (Van Leeuwen, 2012). Together, these developments suggest that despite the absence of a judicial review of constitutional law, the

trend toward constitutionalization with its greater emphasis on rule of law elements and the judiciary also took root in the Netherlands.

## Concluding Remarks

In recent years, research crossing the disciplinary boundaries between law and history has experienced a major upswing. While historians are increasingly aware of the legal elephant in the room when analyzing constitutional, European, or international politics (Patel & Röhl, 2020), lawyers from their side are moving toward more contextual approaches (e.g., Taekema et al., 2020), allowing for a more contingent understanding of the law (Venzke & Heller, 2021). In some legal subfields, that exchange has already produced important conceptual and methodological reflections, such as in the history of international law (Orford, 2021), or in the history of European law (Davies & Rasmussen, 2012). As a concept not limited to the constitutional subfield for which it was developed, the concept of tradition explored in this chapter might help to further this interdisciplinary dialogue.

From a historical, contextual point of view, the concept invites the researcher to approach the law not just as written law, or as the outcome of a political process, but as part of a larger normative framework of ideas, beliefs, and habits usually driven by the aim for consistency—hence precluding radical change. Lawyers may claim an authoritative role in making and explaining the law along the lines of internal coherence. Yet that does not rule out that they compete for interpretative sovereignty among themselves, as well as in dialogue with broader politics or society. In this chapter, the concept of tradition is used to describe those diverging and competing narratives carrying normative information about how constitutional law should be. Elsewhere, I have also tentatively used the concept to analyze a particular trend in Dutch constitutional thinking about and practice vis-à-vis the international legal order (Van Leeuwen, 2012). Here too, the concept helped to highlight how next to other political considerations, contested beliefs about a consistent normative practice informed political decision-making.

At the same time, from a legal perspective, the emphasis this chapter places on tradition in plural form implies that normativity is rendered contingent and subjected to a competition between various narratives. While this loss of coherence may seem to threaten the law's authority, it also opens ways to new coherences. In fact, better appreciating the historical context in which earlier traditions emerged and acquired meaning may inspire us to leave outdated paths and make space to begin imagining new ones.

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