Chapter 4
Constitutional Advice and Signals in the Netherlands: Actors and Impact

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Abstract  Many issues do raise fundamental questions about the constitutionality of (non)-intervention from the executive and the legislator. In most cases, it is the government who is primarily responsible and best equipped for addressing these
issues in first instance, including the compatibility review, assisted by many internal and external advisory bodies or agencies. For many different reasons, additional scientific research or external constitutional advice on a regular basis is often needed. High Councils of State, advisory councils, commissions and committees or international bodies will then be requested to give advice. Special ad hoc commissions or committees are frequently established in order to give such advice equally. Recent political crises and judicial decisions do raise the question whether or not all this constitutional advice does finally make sense, and if not, why continuing or what can be done better? In order to contribute to answering these questions, this chapter will present an overview and categorization of different kinds and ways of constitutional advice and finally makes remarks about its effectiveness. It will conclude, among other things, that (meta) evaluations on the effectiveness and impact of advice should be strengthened. Besides, maintaining the constitution and thus the rule of law is not only about institutions and formal legal safeguards, but also about maintaining an enabling environment for the constitution and rule of law through the political culture. Self-restraint in the use of powers might be one of the keys to constitutional success.

**Keywords** Actors · advisory bodies · constitution · constitutional advice · culture · evaluation · fundamental rights · High Councils of State · human rights · impact · legislation · rule of law

### 4.1 Introduction

How to deal with the foreign funding of communities based on religion or belief when this funding comes from so called illiberal and unfree countries? How to reconcile public health measures concerning covid-19 and fundamental rights? And how to strengthen the national democracy based on the rule of law and the balance between state powers in the light of internal and external threats as well as of approved deficiencies? These and many other issues do raise fundamental questions about the constitutionality of (non-)intervention from the executive and/or the legislator, actors that are partly the same in the Netherlands.\(^1\) In most cases it is the government who is primarily responsible and best equipped for addressing these issues in first instance, including the compatibility review, assisted by many internal and external advisory bodies, councils or agencies. For many different reasons—political, legal, economic or otherwise—there is a need for additional scientific research or external constitutional advice on a regular basis. Special ad hoc commissions or committees will then be established or international bodies will be requested to give advice. Recent political crises and judicial decisions do make an old research question actual as it has not been for a long time. This question is: does all this constitutional advice finally

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\(^1\) In the Netherlands the legislator is composed by the government and the parliament together (the States General), see Section 81, Constitution: ‘Acts of Parliament shall be enacted jointly by the Government and the States General.’
make sense, and if not, why continuing or what can be done better? This question cannot be totally addressed in one chapter. For doing so, at least a meta-evaluation of the evaluations of the functioning of most constitutional advisors—when apparent—would be required. Instead, I will present an overview and categorization of different kinds and ways of constitutional advice, present considerations of the government and parliament in seeking for advice and finally will make some observations about effectiveness. In order to do so, I will first make clear the emerging attention of constitutional advice (Sect. 4.2) and then deal with the object and rationale of constitutional advice and define advice in relation to constitutional review (ex post and ex ante) (Sect. 4.3). Subsequently I will elaborate on the national and international actors (who?) (Sects. 4.4 and 4.5) and then focus on two concrete topics in order to illustrate the functioning and practical use of the procedural mechanisms on constitutional advice mentioned before (constitutional advice regarding undesirable foreign funding of organisations and, second, rule of law) (Sect. 4.6). Next to this I will look to the impact of advice (Sect. 4.7) and finally I will end with a conclusion (Sect. 4.8).

4.2 Political and International Attention and the Need for Constitutional Advice

In the Netherlands the practise of constitutional advice has been developed by building and reorganising institutions and advisory bodies over decades. The appearance of constitutional advice sometimes has adequate political attention, sometimes more, sometimes less. The degree of attention and the political and governmental responsiveness thereto depend on manifold reasons, like the political view on the functioning of a state and on national and international developments in societies and the environment. Nowadays constitutional advice seems to be in the heart of the political and policymaking domain. In recent years there have been different parliamentary commissions who held enquiries in the constitutional domain, like the Pocob\(^2\) and the POK.\(^3\) Their reports caused much media-attention and extensive political debates. Reflections on the proper functioning of the system of checks and balances are still taking place following the Parliamentary investigation report of the POK finding that principles of the rule of law had not been respected and which led to the dismissal of the cabinet (Rutte III) which agreed to the conclusions. Follow-up measures and inquiries are currently envisaged or ongoing. Besides, the Netherlands, like all other countries in the world, faced the Covid-19 pandemic, which led to internal and external constitutional advice and intensive debates in parliament on

\(^2\) The House of Representatives’ parliamentary committee of inquiry on the undesirable influence of unfree countries (abbreviated in Dutch to ‘Pocob’).

\(^3\) The House of Representatives’ parliamentary committee of inquiry on the implementation of the childcare allowances system (abbreviated in Dutch to ‘POK’); 2020 Report of the Childcare Allowance Parliamentary Inquiry Committee entitled ‘Unprecedented injustice’ (Ongekend onrecht).
concrete measures which aim to protect and promote public health while respecting and ensuring other fundamental rights (liberty, political and social economic rights). In particular debates were going on about a law adopted to provide a more solid legal basis for Covid-19 measures and high-profile Covid-19 measures were challenged in court. All societies do need a multi-annual thoroughly (not at least: constitutional and ethical) reflection about living together, as a result of the pandemic, but also in a context which dominated public and political discourse the last twenty years: the multicultural and religious transformed societies. Furthermore climate-issues are high on the political and legal agenda, partly because of the constitutional rights-based arguments of some landmark cases like Urgenda and Shell. ⁴ Finally, but not at least and not limited to the next topics, digital technology and (il)liberal democracy continue to be objects of debate, research, policy, legislation and constitutional advice.

Dealing with these high-sensitive and complex issues, independent authorities, including the High Councils of State, the National Human Rights Institute (NHRI) and (other) advisory bodies, as well as the free media and legal units within ministries do play an important role in the system of checks and balances, including for safeguarding fundamental rights. ⁵ Besides, civil society itself plays an important role. It continues to be open, although questions have been raised regarding new draft legislation on transparency and legislation expanding the possibilities to prohibit so-called ‘radical organisations’ and of the prohibition of foreign funding of these radical organisations which ‘undermine the democracy based on the rule of law’. In the meantime, the proliferation of legal norms and oversight mechanisms continues, like the so-called ‘rule of law mechanism’ in the EU. Next to this, international actors continue to call the national executive, who is urged to reconcile all interests in the complex frontline right at the moment, to account and to explain directly what measures are taken and for what reason.

Against this background, there seems to be an urgent need for the continuation or even strengthening of robust constitutional advice. At the same time, the absorption capacity of the executive sometimes—especially in times of crisis—seems to be exaggerated. Therefore, constitutional advisory bodies should take care of their effectiveness for having impact, while the executive should be responsive and make full use of the know-how of advisory bodies, where possible. This last clause is not only a question of time, but also of content; advice is namely not always right. Although listening to such advice might still be appreciated positively, taking over unconstitutional advice is obviously not. ⁶

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⁵ The recent murder of crime journalist Peter R. de Vries and the persistent threat to the regular press such as the NOS had led to debate on the degree of freedom of the press in the Netherlands.
⁶ For example the Council for the Judiciary (Raad voor de Rechtspraak) once advised to take out reasonable hardship clauses from certain social welfare bills, for reasons of legal certainty and workload of the judiciary. The absence of such clauses was one of the causes of the childcare allowance issue.
4.3 Object and Rationale of Constitutional Advice and Scrutiny Test

Insight into the practice of constitutional advice supposes at least some clarity about the constitution as the object of advice as well as of the task of advice. In this chapter, I use a material or broad definition of the concept of constitution instead of a formal and limited meaning thereof. In the material meaning the constitution includes—limited to the Dutch context—the Dutch Constitution, both its fundamental rights and other provisions, unwritten constitutional law, the Statute of the Kingdom of the Netherlands, general constitutional principles, (human rights) treaties, including especially the European convention on human right and fundamental freedoms (ECHR) and the constitutional law of the EU, especially the EU Charter on Fundamental Rights. Both the government as co-legislator and the Department of Advising of the Council of State use the concept of constitution in this broad material sense when advising or reviewing bills. Thus, they advise on and/or test to a complex of fundamental norms laid down or derived from different legal sources. The necessity and relevance from constitutional advice and testing is the existing hierarchy of legal norms as well as the principle of legality as one of the characteristics of a democracy based on the rule of law. That principle not only implies that governmental acts are based on a legal basis, but also that that basis respects higher legal norms. That follows from the system of legislation and is necessary for the functioning of a legal order that aims to be an ordered system of higher and lower norms.

Although constitutional norms belong to these highest norms, there exists an internal hierarchy between them. The norms laid down in the Dutch constitution are inferior to the Statute and both of them are inferior to treaty law and EU law. To avoid possible tensions with higher norms, the Constitution can—to a certain degree—be interpreted conform the treaty. This situation will especially be the case when constitutional fundamental rights do have a lower protection degree than the higher norms. The higher protection degree of national norms is explicitly provided for in international law (see e.g. Article 53 ECHR and Article 53 EU Charter). This internal hierarchy of constitutional norms underlines once more the necessity to interpret the constitutional test and advice in the material or broad sense.

Besides this principal character of respecting the rule of law, constitutional review and advice is also of a very practical significance. This is due to the prevention of spending senseless energy to capacities of civil servants, politicians and finances to the preparation of policies and legislation of which the constitutional incompatibility

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7 These and other classifications in categories of the concept of the constitution are discussed at length in, e.g., Van der Tang 1998, pp. 30–64.
8 Concerning the government, see, e.g., Parliamentary documents II 2015/16, 34400 VII, 62 (reaction to motion Klein). The Advisory Division of the Council of State also uses a broad definition of the constitution dealing with constitutional review, see Vermeulen and Van Roosmalen 2012.
9 See (e.g.) Kortmann 2021, p. 373.
10 See however the clauses set out in the case EU Court of Justice 26 February 2013, C-399/11 (Melloni).
can reasonably be foreseen. Such an incompatibility could have as a consequence that during the legislative process a bill still has to be amended or even will not be prompted into the parliament because of a negative advice of the Advisement Department of the Council of State.\textsuperscript{11} In the parliamentary phase of the legislative process the constitutional incompatibility of a bill could lead to amendment or voting down the bill. Even after the adoption of a bill by the House of Representatives and the Senate and before its entering into force, the (supposed) constitutional incompatibility of the (adopted) bill might be tested and debated again, when a binding corrective referendum will be introduced.\textsuperscript{12} Last but not least the judge is able to test the compatibility of governmental acts and legislation, once entered into force, to the Constitution, (human rights) treaties and EU Law, except the possibility of testing formal legislation to the Constitution (Article 120 of the Constitution), and attaches consequences thereto. After all, when the application of statutory regulations in force within the Kingdom is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons, the regulations are not applicable (Article 93 in connection with Article 94 of the Constitution). In a concrete case the judge will find such rulings non-applicable in that case but can even declare the regulation as being non-binding. Moreover, to enact and enforce a law that is in conflict with higher law is illegal and implicates a wrongful act (Article 6:162 Civil Code). In practice however, the judge will regularly try to avoid these consequences by neutralizing tensions with higher law by means of a treaty or union law conform interpretation. Of course, judicial review of acts not only takes place at the national level but also by the European Courts.

To be clear, firstly, not all advice from the High Councils of State is constitutional by their nature, notwithstanding their institutional positions are embedded in the Constitution. In other words, not the legal nature of the advisory body is decisive, but the nature of the object of the advice. Secondly, (constitutional) advice on policy and legislation or on other issues can be considered as being different from accountability. For example, the new European Union rule of law mechanism, which acts as a preventive tool, deepening multilateral dialogue and joint awareness of rule of law

\textsuperscript{11}The realization or development of Dutch law can be differentiated by four phases: the preparing phase, the phase of administrative enactment, the phase of parliamentary considerations and the phase of feedback. Already from this scheme it appears that not only the government, but also other actors in the legislative process do bear the (co-)responsibility for constitutional review. These are especially the States-General as co-legislator (Article 81 Constitution) and the Council of State as the independent advisor on draft legislation (Article 73, Section 1, Constitution). The Council of State uses an assessment model developed by itself. Furthermore, depending on the topics covered by the draft legislation, bodies like the Data Protection Supervisor and the Netherlands Human Rights Institute respectively must be and can be consulted or they can deliver advice on their own initiatives. Each of these actors is responsible for the quality of the law.

\textsuperscript{12}A binding (corrective) referendum about legislation must be based on a law and such a law is only allowed after an amendment to the Constitution on this topic. A proposal for this amendment from MP Van Raak (SP) has been adopted in the first of two readings in 2021 (Parliamentary file 35129; Stb. 2021, 58). A law advising referendum, which entered into force in 2015, was withdrawn in 2018. This law made possible the (non-binding) referenda on the bill of approval of the Ukraine Treaty in 2016 and on the bill on national security services (Wiv 2017) in 2018.
issues, should be considered more as an instrument for accountability than for advice. The same holds, for example, for oversight mechanisms from the United Nations and the Council of Europe. Thirdly, advice should be considered being different from a review/scrutiny test, although the differences can be fluid. Some further information on this third issue might be helpful, because constitutional review is frequently and predominantly associated with the (prohibited) judicial review of formal legislation.

4.3.1 Advice and Review: Constitutional Review in the Netherlands in Short

A mentioned before, Dutch judges can test lower rules against higher rules. This has one notable exception. Article 120 of the Constitution does not allow judges to review the constitutionality of Acts enacted jointly by the Government and Parliament (so-called formal legislation or ‘formele wetgeving’ ex Article 81 of the Constitution) with regard to either the Charter for the Kingdom of the Netherlands, the Constitution, or unwritten principles of law. Because of this prohibition of judicial constitutional review, the Netherlands also has no Constitutional Court. The central thought behind this judicial prohibition on constitutional review, which dates back to 1848, is to protect the interpretation of the Constitution from influence by the executive and the judiciary by reserving questions of constitutionality to the legislator, who also drafts and amends the Constitution. The decision whether legislation is compatible with the Constitution is therefore made by the legislator ex ante. To this end a check on constitutionality is performed during the legislative process. The explanatory note attached to legislative proposals explicitly deals with this in a separate paragraph and constitutional matters are discussed in Parliamentary debates. In order to aid civil servants in composing the constitutional paragraph in the explanatory note manuals have been compiled. Different proposals and advice to amend provision 120 of the Constitution were rejected in the last decades, like a bill aiming to amend the provision, the proposal of the state commission Thomassen on the Constitution as well the advice of the state commission Remkes on the parliamentary system. In its reaction to this last advice, the cabinet finally decided not to make any proposal changing

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14 For a good example on the relationship between constitutional interpretation by the Supreme Court and the legislator, see, e.g., Van Sasse van Ysselt 2013, pp. 224–233.
15 Furthermore, the Department for Constitutional Affairs and Legislation of the Ministry of Internal Affairs and Kingdom Relations can be consulted for advice on constitutional matters.
16 Parliamentary documents 28331 and 32334. For an overview of the background of the legislative process concerning this bill and for an analysis of its expiration, see Van Sasse van Ysselt 2019, pp. 452–461.
Article 120. Instead, the cabinet gave a follow-up to the request of the Senate (especially the CU-fraction) to let carry out a special comparative legal research. This research covered Belgium, Germany, France, the United Kingdom, Saint Martin (a country within the Kingdom of the Netherlands) and the Scandinavian countries. Quite a few political parties now strive for amending Article 120 of the Constitution or even for deleting it, having regard to their programs. Furthermore, a motion aiming to amend the Article 120 was adopted by a large majority of the House of Representatives. A party like the SGP seems to be in favour of more efforts taken by the government and parliament themselves concerning their role in the constitutional review in the legislative process (review ex ante). This connects to the wish of the political party PvdA to educate especially MPs and civil servants in fundamental rights. That leads to the domain which is the main topic of this article: constitutional advice (and review ex ante) and its main actors.

4.4 Actors on Constitutional Advice and the Different Nature of Advice

Many national and international actors or institutes have the task of giving constitutional advice to the Dutch government as executive and/or as co-legislator as well as to the parliament. It is especially the Council of State, one of the so-called High Councils of State, who is the general (legal) advisor and has a broad mandate with regard to advice on constitutional issues, including fundamental rights issues. Besides, the National Ombudsman as High Council of State as well, plays an important role in safeguarding the constitution and especially human rights. Concerning fundamental rights, the Netherlands Human Rights Institute (NHRI) has a wide range of tasks and a broad mandate. Other bodies have a more specialised mandate, related to one fundamental right, like the Authority on Data Protection (ADP) and the Election Council. All actors are allowed to provide advice both solicited and non-solicited. The government is frequently legally obliged to consult these institutions, except e.g. the NHRI and the Ombudsman. Furthermore, there are different permanent advisory bodies of the government and parliament which are independent, established by law and whose functioning is evaluated each four years, like the Advisory Council on International Affairs (ACIA; AIV), Netherlands Scientific Council for Government

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19 Parliamentary documents II 2018/19, 34430, nr. 10.
21 The researchers described and analysed the way constitutional review works (scope, competences and organization) and how this kind of review is embedded in the whole system of state powers and the influence thereof on the mutual constitutional relationships.
22 Parliamentary documents II 2021/21, 28362, nr. 47 (Motion Kuik c.s.). De motion was adopted by raising hands: in favour 88, against 72. The MPs who voted in favour are from the fractions SP, GroenLinks, BIJ1, Volt, DENK, de PvdA, de PvdD, 50PLUS, D66, de ChristenUnie, het CDA, JA21 en BBB, against: VVD, PVV, FvD en SGP. https://www.tweedekamer.nl/Parliamentarydocuments/moties/detail?id=2021Z07215&did=2021D15957.
Policy (SCGP; WRR), Council for Public Administration (CPA; ROB) and the Health Council (Gezondheidsraad). Besides, there are different kind of commissions established by the government or by the national parliament (inquiries and mini-inquiries). When these permanent, temporarily or ad hoc bodies or commissions advise on policy and/or legislation, they are (partly) governed by the Framework Act on Advisory bodies (Kaderwet Adviescolleges),\(^\text{23}\) except e.g.—for different reasons—the Council of State and the National Ombudsman.\(^\text{24}\) Last but not least there are many international and European advisory bodies, such as the Venice Commission of the Council of Europe and the EU Fundamental Rights Agency.

Not all of the advisory opinions of these national and international bodies and institutes are equally relevant from the constitutional perspective, although many of them concern at least some constitutional aspects. Besides, the opinions—when constitutionally relevant concerning their object—can be different for reasons of their purposes and the nature of impact (e.g. at the one hand an arbitrary opinion or judgment in concrete cases and on the other hand advising in the strict sense concerning policies and legislation) as well as of the extent of impact. Hereafter I will explore the advisory task of some of these Councils and bodies in more or less detail.

### 4.4.1 Internal Governmental Constitutional Advice and Assessment

The Department for Constitutional Affairs and Legislation of the Ministry of the Interior and Kingdom Relations can be consulted for advice in constitutional matters, including fundamental rights. It can be consulted by the Departments of the same ministry or by other ministries. Besides, the Department of Legislation and Legal Affairs of the Ministry of Justice and Security and the Department of Legal Affairs of the Ministry of Foreign Affairs can be consulted for advice with regard to some more specific constitutional issues (e.g. the Ministry of Justice for issues like the judiciary) and human rights standards. There can be many reasons for this governmental-internal constitutional advice, in general: preparing legislation, policy and to be held responsible to the parliament or external oversight committees. Concerning policy which has to result in legislation, constitutional advice can and should be given in the earliest possible stadium. This happens however ad hoc and must/is prioritized by at least constitutional relevant projects or issues which are dealt with in a coalition agreement of the cabinet.

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\(^{24}\) In short: the Council of State has its own legal basis, the National Ombudsman also, but does not have a formal task of giving advice.
When it comes to legislation, constitutional advice and assessment can be distinguished but do often overlap. The decision whether legislation is constitutionally relevant is made by the legislator ‘ex ante’. To this end an assessment on constitutionality is performed in the legislative process. In first instance, the assessment of the quality—including constitutionality—of legislation is performed before bills are presented to the cabinet which decides whether the bill can be sent to the Council of State for advice. The outcome of this first ‘internal’ assessment is included in the decision-making process. The explanatory note attached to legislative proposals explicitly deals with constitutional matters in a separate paragraph. In order to aid civil servants in making constitutional based policies and composing the constitutional paragraph in the explanatory note different aids have been compiled, which provide resources and background information. Among them, a general checklist of fundamental rights does exist as well as various other, more detailed aids, like a guide on the national application of the EU Charter of Fundamental Rights, a guide on the economic, social and cultural rights and a third guide on property rights under the ECHR. Besides, there is a model for privacy impact assessment and a flow chart for impact on gender equality (in the framework of the SDGs). The Ministry of the Interior and Kingdom Relations recently has drafted an integrated Guide on constitutional review by the government as co-legislator. These constitutional quality aids—manuals, guides, checklists and privacy impact assessment—make also part of the integrated assessment framework (Integraal afwegingskader, IAK). The integrated internal assessment of the quality of draft-legislation is performed by the Department of Legislation and Legal Affairs of the Ministry of Justice and Security in close cooperation, as far as constitutional affairs raise matter, with the Department for Constitutional Affairs and Legislation of the Ministry of Internal Affairs and Kingdom Relations.

Although these aids do exist for quite some decades now, they do not always result into policy or legislation with the best (constitutional) results, as e.g. some court decisions and the parliamentary committee of inquiry on the implementation of the childcare allowances system have illustrated, although in the last case there have been many actors who should have acted more in line with the constitution. There are many professional, organization-based and political reasons for this. The government aims anyhow to make better use of the assessment framework, involve stakeholders in the preparation of policy and legislation, and strengthen inter-ministerial assessment of legislation. Thereby the focus will be on the enforcement and execution of legislation, although strengthening of the discrimination assessment makes part of it. The government explained this in detail in a letter that has been sent to parliament at the end of June 2021.

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26 See https://www.kcwj.nl/kennisbank/integraal-afwegingskader-voor-beleid-en-regelgeving (in Dutch only).

27 Parliamentary documents I 2021/21, 31731, I.
4.4.2 High Councils of State

The Council of State, the National Ombudsman, the Houses of Parliament, the Court of Audit and the Cabinet of the King are High Councils of State. These bodies are regulated by the Constitution and carry out their tasks independently of the government. Most of them play an important role in e.g. constitutional advice, although the effectiveness of (some of) its advice is sometimes discussed or at least hard to verify.28

4.4.2.1 Council of State29

The Council of State has two primary tasks, carried out by two separate divisions. The Advisory Division advises the government and Parliament on legislation and governance, while the Administrative Jurisdiction Division is the country’s highest general administrative court. The basis for these responsibilities can be found in Articles 73 and 75 of the Dutch Constitution. Hereafter I will focus on the (constitutional) advisory task of the Advisory Division.30

The Advisory Division of the Council of State provides the government with independent advice on (a) all Bills introduced in Parliament by the government, (b) all orders in council, before they are promulgated by the Crown, (c) all treaties that the government puts before Parliament for approval, (d) all matters on which its advice is required by law, such as the Budget Memorandum and expropriation orders, and (e) other matters on which the government seeks the Council’s advice. The House of Representatives also seeks the Division’s advice on Bills introduced by one or more members of parliament before considering them in the House. In addition, the government and both Houses of Parliament may ask the Division to provide information concerning legislation and public administration.

In assessing Bills and other requests for advice the Advisory Division uses an assessment framework made up of three elements: policy analysis, legal issues and technical aspects. This gives rise to the following nine questions. The first three of them regard the policy analysis: (a) is the problem being addressed one which can or should be solved by legislation?, (b) will the proposed legislation be effective, efficient and balanced as regards costs and benefits?, and (c) will it be possible to implement and enforce the proposed legislation and to monitor its effects? The next four questions concern the legal issues: (d) Is the Bill compatible with higher law:

28 Van Gestel and Van Lochem 2021, pp. 597–604; Nap 2021 (https://doi.org/10.33612/diss.156211901). In their own words, the National Ombudsman, the president of the Court of Audit and the Vice-president of the Council of State observed in a recent interview: ‘The three supervisory bodies are often not listened to’, Naar de drie toezichthouders wordt vaak niet geluisterd, NRC Handelsblad, 1 October 2021.

29 The English description of the general tasks is taken from the website of the council itself, see: https://www.raadvanstate.nl/talen/artikel/.

30 See for a more extensive description and analysis Nap, Chap. 11 in this Yearbook.
the Constitution, treaties (such as the human rights conventions) and European law?, (e) Is it in accordance with the principles of democracy and the rule of law? (f) Is it compatible with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection and proportionality? and (g) Can it be easily incorporated into the existing legal system? The last three questions concern the technical aspects: (h) Is the Bill well drafted from a technical point of view? And (i) Does it establish a logical, systematic regime?

At the end of the advisory opinion, the Advisory Division gives its judgment (the dictum). If negative, the dictum will recommend against introducing the Bill or promulgating the order in council, or it may recommend waiting until substantial amendments have been made. In such cases, the proposed legislation is returned to the Cabinet. Once the Advisory Division has issued its opinion, the relevant minister formulates his view of the opinion in a report (nader rapport) presented to the King. The report proposes that the Bill should or should not be submitted to the House of Representatives and may contain amendments to the Bill. The Division’s opinion on a Bill is only made public at the point when the Bill is introduced into the House. Its advisory opinion on a draft order in council is made public when the final text of the order is published in the Bulletin of Acts and Decrees.

The Advisory Division of the Council of State produces about 500 advisory opinions on legislation annually, about 95% of them within three months. Most of these opinions concern regular obligatory advisory opinions during the legislative process. Some of them concern non-solicited advisory opinions. In the period 2010-2020 the Council submitted three times such a non-solicited advisory opinion. In the same period the Council provided 87 so called informative advice (voorlichting), sometimes requested by the parliament. Some of this informative advice is issued

31 The full text of all advisory opinions that have been published is available on the Council of State’s website.
32 https://www.raadvanstate.nl/talen/artikel/.
33 Sections 17–19, Council of State Act.
34 Non-solicited advice on the ministerial responsibility (18 June 2020), Annex to Parliamentary documents II 2019/20, 35300, nr. 78; Non-solicited advice on the impact of digitalisation for the voor de constitutional relationships (31 August 2018), Parliamentary documents II 2017/18, 26643, nr. 557; Analysis of some differences in the legal protection and legal position of the person subject to a certain jurisdiction in criminal law and in administrative law (13 July 2015), Staatscourant 2015, nr. 30280 (advies), Parliamentary documents II 2015/16, 34300-VI, nr. 72 (interim reaction) and annex to Parliamentary documents II 2017/18, 34775-VI, nr. 102.
36 E.g. informative advice responding to a request from the Senate following the motion-Backer c.s. on the strengthening of the quality of the legal protection for the individual citizen (2020), Parliamentary documents I 2020/21, 35300 VI, nr. BD; informative advice on the question of how the obligation for registration for natural persons at religious communities [kerkgenootschappen] relates to the General Regulation of Data Protection [Algemene Verordening Gegevensbescherming; AVG] and other regulations, such as the Law on the Registration of Companies [Handelsregisterwet
during the legislative process, some not. Not all of these advisory opinions and informative advice are constitutionally equally relevant, although many of them concern at least some constitutional aspects.\textsuperscript{37} Even when constitutionally relevant, the nature of the informative advice can differ, depending on the underlying request. Especially advice the House of Representatives asks from the Council of State in a concrete case dealing with the interpretation of the Constitution could be regarded as a kind of constitutional arbitration, what is quite different from an advice concerning the constitutional compatibility of draft legislation during the legislative process. The advisory opinions issued by the Council are considered to be authoritative. To what extent the Council actually lives up to its reputation, however, remains to be seen according to some researchers. A recent thesis answers to the question how advisory opinions on legislation contribute to assessing the constitutionality of bills. By examining how the Council interpreted the Constitution in 168 opinions, issued between 1980 and present day, the thesis provides a critical image of the consistency and quality of constitutional review in legislative advice.\textsuperscript{38} Over the years proposals have been done in order to strengthen the (effectiveness of the) Council’s task of giving constitutional advice and doing a scrutiny test.\textsuperscript{39} One of the concrete instruments or measures adopted by the Council has been the establishment of a permanent constitutional gathering (\textit{Constitutional Beraad}) within the Council.

\subsection*{4.4.2.2 National Ombudsman}

The National Ombudsman doesn’t have the explicit task of giving (constitutional) advice, but has the task to test the properness of governmental conduct.\textsuperscript{40} Its position and task are enshrined in Article 78a of the Constitution, and are elaborated in the National Ombudsman Act and in provisions of the General Administrative Law Act. Although the ombudsman does not have the explicit constitutional task to safeguard human rights, these rights make evidently part of the properness test framework of the ombudsman. More generally, the role and function of National Ombudsman institutes

\begin{footnotesize}
\textsuperscript{38} See: Nap 2021 and also Nap’s contribution in this Yearbook.
\textsuperscript{39} See e.g. De Poorter and Van Roosmalen 2010.
\textsuperscript{40} The National Ombudsman Act provides however explicitly in a formal task of giving advice for the Children ombudsman (Article 11b, Section 2, Subsection b) and for the Veterans ombudsman (Article 11g, Section 1, Subsection b).
\end{footnotesize}
in protecting and promoting human rights are internationally well acknowledged,\textsuperscript{41} although the extent of its efforts and commitment in this field will also depend on the existence and tasks of NHRIs.\textsuperscript{42} When citizens experience difficulties in their dealings with the government, the National Ombudsman can mediate or intervene. Alternatively, the ombudsman can launch an investigation. The investigations fall into two categories: those prompted by individual complaints and those initiated by the organisation of the National Ombudsman itself. Investigations can be seen as free—sometimes: constitutional—advice to the government. In 2020, 56 investigations have been conducted.\textsuperscript{43} Some of them dealt with the complaints of citizens about the protection of their fundamental rights, like complaints about the use of current surge weapons by the police and detention circumstances during the Covid-19 pandemic.\textsuperscript{44} The ombudsman informed the House of Representatives about the follow-up of these investigations and announced he will take care of the situation in the next future. More general, the ombudsman noted in its year report on 2020, that eight times the government gave a reaction on a report or letter of the ombudsman. In a follow-up to the reports and letters Members of Parliament posed written questions to the government six times. 19 times MPs referred in their written questions to the government to a report or letter from the ombudsman, where these reports or letters were not the direct reason for these questions.\textsuperscript{45} Worth mentioning, it was in 2017 that the National Ombudsman issued its report ‘No power play but fair play. Onevenredig harde aanpak van 232 gezinnen met kinderopvangtoeslag’ \textsuperscript{46} As has been concluded by the POK, no (adequate) follow-up was given to this report.

\textbf{4.4.2.3 Houses of Parliament}

The Houses of parliament have three major own ‘investigation’ instruments which can lead to (partly) (constitutional relevant) advice or recommendations: inquiry, inquiry, inquiry.


\textsuperscript{42} Concerning the human rights function of ombudsman institutes and NHRIs as well the need for a good cooperation between them, see: Recommendation CM/Rec(2021)1 on the development and strengthening of effective, pluralist and independent national human rights institutions (NHRIs), adopted by the Committee of Ministers on 31 March 2021.


\textsuperscript{44} Annual Report of the National Ombudsman, the Children’s ombudsman and the Veterans’ ombudsman over 2020 (o.c.), pp. 25–30.

\textsuperscript{45} Annual Report of the National Ombudsman, the Children’s ombudsman and the Veterans’ ombudsman over 2020, Parliamentary documents II 2020/21, 35743, nr. 2.

investigation and interrogation. The parliamentary committee of inquiry is a particular type of temporary committee of the House. The parliamentary inquiry is the most powerful instrument the Dutch parliament has at its disposal to carry out its duty to scrutinize the work of the Government. It is not only held to establish who is responsible for what has gone wrong, but also to get a clear picture of an issue, in order to develop improved policy. Over the past thirty years, various parliamentary committees managed to bring new facts to light. Since the Second World War, the House of Representatives carried out twelve parliamentary inquiries and at the moment several inquiries are going on.\(^47\) Besides, both Houses of the Parliament have the instrument of investigating policies and projects done by the Members of parliament themselves. Different instruments can then be used, among others instruments based on the Parliamentary Enquiry Act (Wet parlementaire enquête), but without the legal enquiry competences. A recent example of such a parliamentary investigation is the Temporary Commission Enforcement organisations (Tijdelijke Commissie Uitvoeringsorganisaties; TCU) and the Temporary Commission Natural Gas Groningen. Furthermore, since 2016 the House of Representatives has had at its disposal the experimental instrument of a parliamentary interrogation (parlementaire ondervraging) (a so-called mini-enquiry), an instrument in between the former ones. Like in the case of enquiries, witnesses are obliged to appear and they are examined on oath. The Pocob and the POK, mentioned before, are examples of such an interrogation.\(^48\)

In general, these parliamentary instruments have much political and (social) media attention because of the nature of the instruments and (mostly highly sensitive) topics. Above all, especially the inquiries are rather powerful because of the competences that can be used.

### 4.4.3 Netherlands Human Rights Institute

The Netherlands Human Rights Institute (NHRI) (College voor de Rechten van de Mens) is the Dutch national institute for human rights, as defined in Resolution A/RES/48/134 of the UN General Assembly of 20 December 1993 on National institutions for the promotion and protection of human rights and in Recommendation R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national institutions for the promotion

\(^47\) Post war parliamentary inquiries: 2021- (Childcare allowance issue); 2021- (Natural Gas Groningen); 2013–16 (Fyra); 2013–14 (Housing corporations); 2011–12 (Financial System); 2002–03 (Srebrenica); 2002–03 (Building industry); 1998–99 (Plane disaster Bijlmermeer); 1994–96 (Methods of criminal investigations); 1992–93 (Enforcement organisations Social Assurances); 1988 (Passport project); 1986–88 (Building grants); 1983–84 (Rijn-Schelde-Verolme; RSV). For a more extensive overview and short explanations, see: https://www.parlement.com/id/vh8lnhrpmxvd/parlementaire_enquetes_1851_heden.

\(^48\) Since 2016 three ‘mini enquiries’ have been established and published their reports: POK (2020), Pocob (2019), Fiscal constructions (2017).
and protection of human rights. The NHRI aims to protect human rights in The Netherlands, including the right to equal treatment, promote awareness of these rights and to further compliance with these rights. These aims as well as the NHRI’s powers are defined by Act of Parliament (National Human Rights Institution Act; Wet College voor de rechten van de mens). One of the legal tasks of the NHRI is giving advice on legislation and policy, either on own initiative or not. Since its foundation in October 2012 until 2021, the NHRI issued 112 advisory opinions. Besides, the NHRI has the legal task to issue on a yearly basis a general annual report on the human rights situation in the Netherlands of the precedent year. Until 2021 the NHRI issued 9 of these general annual reports, always including several recommendations.

What about the follow-up of these advice and recommendations? The year reports (different form the annual reports) mention the results to a certain degree, especially the results from the advice, not from its ‘letters’ to the government and parliament. Concerning the general annual reports, the cabinet always sends a policy letter to the parliament giving its vision on the report and reaction to the recommendations of the NHRI. Both recommendations and reactions are most of the times rather general by nature, which means that it is equally difficult to conclude whether and if so, to what degree, recommendations are exactly followed by the government. The parliament itself pays hardly or even no (structural) attention to the general annual reports and governmental reactions. Nevertheless, looking at the results of evaluations of the NHRI one has to conclude that the NHRI is functioning effectively. These conclusions are encouraging but ameliorations seem still to be possible, as will be amplified in Sect. 4.8. For the next evaluation, the follow-up of the year report on ‘access to justice’ seems to be worthwhile in the light of the POK.

### 4.4.4 Legal-Based Permanent Specialized Commissions

The Dutch Data Protection Authority (Dutch DPA) supervises processing of personal data in order to ensure compliance with laws that regulate the use of personal data.

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49 The recommendation has been revisited and renewed recently, see: Recommendation CM/Rec(2021)1 on the development and strengthening of effective, pluralist and independent national human rights institutions (NHRIs), adopted by the Committee of Ministers on 31 March 2021.

50 Article 3, c jo. Article 5 National Human Rights Institute Act.


52 Evaluations took place concerning the finances of the NHRI (ProFacto; 2015), concerning the position of the NHRI as a so called autonomous administrative body (zbo) (Kwink; 2017), and concerning the functioning of the complex of relevant legislation on the NHRI and antidiscrimination (NHRI; 2017). These reports and evaluations did not suppose recommendations containing (fundamental) review of the tasks and position of the NHRI. See for the reaction of the cabinet on these evaluations: Parliamentary documents II 2017/18, 34338, nr. 3.
The tasks and powers of the Dutch DPA are described in the General Data Protection Regulation (GDPR), supplemented by the Dutch Implementation Act of the GDPR. The tasks and powers of the Dutch DPA can be roughly divided into four sections: supervision, providing advice, providing information, education and accountability, and international assignments. The task of providing advice concerns legislative proposals and draft texts of general administrative regulations that wholly or significantly deal with the processing of personal data (Article 36(4) GDPR). The Dutch DPA provides both solicited and unsolicited advice and consults with the legislature. In the period 2010-2020 the Dutch DPA provided 436 such pieces of advice. Among these pieces of advice and reports, there was one from 17 July 2020, where the DPA pointed out that the Tax and Customs Administration’s risk assessment system, based on Artificial Intelligence, had not respected the EU General Data Protection Regulation (GDPR) and had relied on discriminatory data on double citizenship. With regard to the functioning of the Data Protection Authority, data on the measuring of the effects of the advice are hard to find.

4.4.5 State Commissions and Other Ad Hoc (Constitutional) Advisory Commissions

Since 1814/15 the Dutch government has established special so-called (ad hoc) state commissions for advice and/or the preparation of at least amendments to the Dutch Constitution. These commissions on the Constitution differ in nature and tasks rather extensively, as well as the nature of the subsequent different amendments to the Constitution. Since 1982/83 there have been eight (state) commissions on (elements of) the Constitution: the state commission Biesheuvel (1982–1985), the Commission De Koning (1991/93), the commission Vrancken (2000), the National Convention (2006), the state commission Thomassen on the Constitution (2009/10), the

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56 See also Sect. 4.7.
58 Rapport Staatscommissie Grondwet, annex to Parliamentary documents II 2010/11, 31570, nr. 17.
state commission Remkes on the parliamentary system (2017/18)\textsuperscript{59} and the com-mission Fokkens on the amendment of legislation concerning office crimes of MPs and members of cabinet.\textsuperscript{60} Common to the follow-up is that just a very few of their pieces of advice have been adopted and resulted in concrete proposals for amendments of the Constitution.\textsuperscript{61} Nevertheless, but not incomprehensible, the establishment of new state commissions is being prepared: one concerning antidiscrimination and one concerning the rule of law.

State commissions not only deal with constitutional affairs, see for example the state commission Reverification Parenthood (2016), although this is predominantly the case. Legally, a state commission is ‘just’ an advisory commission in the sense of the Framework Act on advisory bodies. Traditionally, state commissions are estab-
lished by Royal Decree (Koninklijk Besluit). Since 1945 also ministerial commis-
sions have been created as well as other more informal entities of preparation and advice on amendments to the Constitution. An example of such an informal entity or structure has been the ‘Proof of a new Constitution (Proeve van een nieuwe Grondwet)’ prepared by a working group of civil servants and scientists, which was published—a long time ago—in 1966 in order to involve the whole society in the process. This process finally led to the last general amendment of the Dutch Constitution in 1983. Ad hoc commissions which were established by the Minister but at the same time were rather unconventional have been the National Convention (2006) and the Citizens Forum Electoral system (Burgerforum Kiesstelsel; 2006), both characterized by the active participation of citizens. Unfortunately, despite the inclusive and innovative processes and at least partly meaningful advice, none of the advice of both commissions have been adopted by the cabinet in 2008.

Up to the fifties/sixties state commissions were formed by a mixed composition of active politicians and scientists. Even the Minister of the Interior himself once chaired such a commission. Most of the times the outcome of such commissions was already clear from the beginning. The state commissions aimed not only in giving advice as such but also especially at creating socially and political basis for proposals to be worn off more specifically later on.\textsuperscript{62} This approach occurred during the social pillarization and therefore might have been necessary that period. Since the nineties (commission-De Jong, Framework Act on advisory bodies) however a separation between advice and deliberation was introduced for reasons of ‘primacy of politics’.\textsuperscript{63} Politicians should concern themselves on new (constitutional) policy

\textsuperscript{59} Lage drempels, hoge dijken. Democratie en rechtsstaat in balans. Eindrapport van de staatscom-
missie parlementair stelsel, annex to Parliamentary documents II 2018/19, 34430, nr. 9.
\textsuperscript{60} Rapport Commissie herziening wetgeving ambtsdelicten Kamerleden en bewindspersonen
(Commission Fokkens), presented 14 July 2021.
\textsuperscript{61} This conclusion cannot (yet) be drawn for the follow-up to the Commission-Fokkens.
\textsuperscript{63} See in this regard for example also the findings of inter alia the scientific council for governmental policy on the role of knowledge in dealing with acute, chronical or predicted crisis, that (even then) science, advice and politics don’t need to be inter-
woven too much: https://www.wrr.nl/wrr-en-corona/publicaties/publicaties/2021/06/10/verwerven-
and legislation, not non-elected experts, so was the idea. The government takes the initiative and the parliament ‘had to’ adopt the bills, what would be more difficult when social and political basis would have been created at forehand. The margin of appreciation for deciding differently would otherwise become very small. This approach of more dualism could be regarded as being in favour of transparency, but not of the social and political basis of the advice. Advisory commissions on the constitution composed only by experts seem to lack the political authority which seems to be necessary for the acceptability of the advice or recommendations when it comes to amendments of the constitution or constitutional structures. In opposite of old-style state commissions, the (state) commissions in the sense of the Framework Act Advisory bodies are not allowed to be composited by active politicians or civil servants who are involved with the topic about which the commission will give advice.

4.5 International and European Constitutional Advice

Besides all the different national constitutional advisory institutions there are many international and European ones, like the Venice Commission and—with only a mandate for fundamental rights—the EU Fundamental Rights Agency. They will be presented hereafter.

4.5.1 European Commission for Democracy through Law (Venice Commission)

Although not addressed to the Netherlands especially, much advice from the Venice Commission is relevant for the Netherlands as well, like the Commission 2011 Report on the Rule of Law, and the 2016 Rule of Law checklist. For the first time in history, the Venice Commission of the Council of Europe has been requested for an opinion by the Netherlands recently. This request deals with the rule of law in the Netherlands and followed the so-called ‘childcare benefits scandal’ and more concretely the motion Omtzigt c.s., adopted on 26 January 2021 in the context of the debate on the report of the POK and the reaction of the cabinet thereto. The request was lodged on 25 February by the Speaker of the Dutch House of Representatives. The commission has been asked to examine the extent of legal protection of citizens

64 Framework Act, Chapter 3.
67 Parliamentary documents II 2020/21, 35510, nr. 11 (motion-Omtzigt c.s.).
68 Parliamentary documents II 2020/21, 35510, nr. 53.
under administrative law and the system of checks and balances, more specifically two questions have been put forward by the House of Representatives:

1) What laws, what implementation or what practices have contributed to the fact that power and countervailing power worked insufficiently in this case and that the citizen was crushed in the middle? What possible solutions are there to repair this and to prevent its occurrence in the future?

2) Is administrative law in the Netherlands, including the Council of State, sufficient, and what checks and balances should be added to the law or the implementation of administrative justice (and possibly adjoining branches of the law), to give citizens adequate protection, including effective access to justice and to legal aid?

Having accepted the request, a working group of the Commission visited the Netherlands in July 2021 (online) and spoke to inter alia members of parliament, civil servants of the ministries and representatives of different institutions and the civil society. The opinion has been adopted in the October plenary session of the Venice Commission. It concluded among others:

In general, the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law. While the shortcomings in individual rights protection uncovered in the Childcare Allowance Case are indeed serious and systemic and involve all branches of government, it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the Childcare Allowance Case are taken seriously by all branches of government, which is very positive. In the interest of its citizens, the Netherlands appears to be capable and willing to address and redress its mistakes. But in this case, this reaction has taken a much longer time than it should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance. The Venice Commission hopes that this opinion will contribute to the on-going process of reforms. Prevention is always better than cure.

The Venice Commission makes thirteen proposals, which are ‘far-reaching and are meant as food for thought in the reflection to be carried out by the Dutch authorities.’

4.5.2 EU Fundamental Rights Agency

Within the EU there are many agencies and mechanisms which deal with (aspects of) constitutional affairs, most notably fundamental rights. One of them, an important one due to its broad scope, is the EU FRA. It has many tasks in the field of

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71 Six of the proposals concern the legislative power, five of them the executive power and two the judicial power, although one of these two states that ‘it could be considered whether Article 120 of the Constitution should be amended, or whether other mechanisms of constitutional review should be introduced’, and therefore concerns truly the legislative power.
72 Several of them have the nature of supervision or review and less of advice. For constitutional supervision mechanisms in particular, see Stremler 2021.
fundamental rights, among which delivering advice and expertise to policy makers in the EU and its Member States. More specifically the FRA can e.g. ‘formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission’. Also Member states are allowed to request the EU FRA for such advice on their own initiative. Until so far just a few Member states have done so; not so the Netherlands. The functioning of the EU FRA has been evaluated positively twice. ‘Overall, the Agency’s work is clearly highly regarded by stakeholders. The Agency should continue doing what it does’, according to the second evaluation, which follows: 'In practice, the usefulness of FRA’s outputs is reflected in the fact that many duty bearers regularly use and reference FRA reports.' One key element when assessing relevance is, according to the researchers, ‘that there is not always a common understanding of what the objectives of the Agency are. This lack of common understanding can lead to situations where some stakeholders have a more negative view of the Agency’s impact given that they expect its objectives to be much wider than they actually are according to its Founding Regulation.’

4.6 Focus: Advice on the Undesirable Foreign Funding of Organisations and on the Rule of Law

In order to illustrate the functioning and practical use of the procedural mechanisms on constitutional advice mentioned before, I will focus in this section on a concrete policy and legal topic that was discussed intensively last years in the Netherlands, and probably also elsewhere: the so called undesirable foreign funding of organisations (Sect. 4.6.1). Another topic illustrates the use and practice of constitutional advice will be advice on the Rule of Law and state powers. That topic will be addressed briefly in Sect. 4.6.2.

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76 Optimy Advisors (2012), p. 142.
77 Optimy Advisors (2012), p. 141.
4.6.1 Constitutional Advice Regarding Undesirable Foreign Funding of Organisations

The coalition agreement in 2017 raised concerns on the foreign funding of political, civil society or religious organisations in the Netherlands:

The use of social media or funding of organisations in the Netherlands for the purpose of exerting influence from countries that are not free is undesirable. Steps must be taken to ensure that funding from abroad to political, civil society or religious organisations is not used to buy undesirable influence. To this end funding flows of this kind will be rendered more transparent, with reciprocity as an important benchmark. Funding flows that abuse our liberties, originating from unfree countries, will be restricted as far as possible.78

In order to operationalize this passage of the agreement, many efforts and initiatives have been taken by the government. The parliament followed its own way, but in the end all efforts of both government and parliament came, the more or less, together. All these efforts resulted in, inter alia, a draft bill on undesirable foreign funding of organisations. I shall come back to this later. I’ll first describe some of the steps taken which finally ended into this bill. These steps can be interpreted as seeking constitutional advice or at least advice on a topic about which constitutional elements could not be neglected in advice.

In February 2019 the cabinet issued a policy letter to the parliament informing the parliament on the cabinets considerations how to implement the plan; an appendix to this letter concerned a professional survey that raised different constitutional difficulties, especially concerning the compatibility of possible solutions with constitutional norms.79 Sometime later, after many years of relatively fruitless debate in the parliament on the undesirable financing of especially mosques and executing a motion,80 the House of Representatives initiated an inquiry on the undesirable influence of unfree countries by installing a parliamentary committee on inquiry (Pocob) on 2 July 2019. Its report of 25 June 2020, based on February hearings on the issue, noted a lack of transparency on foreign funding of mosques, the extensive use of social media to disseminate ‘strict’ religious messages within the Muslim community, and the influence of some countries, including Kuwait, Qatar, Saudi Arabia, and Turkey, in local mosques through their training of imams.81 The report, however, made no recommendations on how to counter possible extremist influence accompanying donations from ‘unfree countries’ to local Islamic institutions. The Muslim community, Dutch Muslim Council (CMO), and Council of Jews, Christians, and Muslims (OJCM) stated they were disappointed with the report, noting that it, among others, did not make a clear distinction between the small number of ‘ultra-orthodox’ Muslim groups and the majority of Muslims active in mainstream society. On 23 November (2020), the government stated in a reaction to the enquiry

80 Parliamentary documents II 2017/18, 29 614, nr. 91 (motion Van der Staaij/Karabulut).
81 Parliamentary documents II 2019/20, 35 228, nr. 4 (report ‘(Non) visible influence’ from ‘Pocob’).
results that it shared concerns on undesirable influences through foreign funding and proposed legislation that would give mayors and the Public Prosecution Service the authority to inspect all donations from outside the EU or European Economic Area to any organization.82

Besides, the cabinet informed the parliament about the results of a research it had organized trying to get more clarity on the scope and nature of the foreign financing by research via the Scientific Research and Documentation Centre (SRDC) (Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC)).83 The research could not really give that clarity however. Meanwhile, the cabinet did not succeed in drafting a bill on the issue of limiting foreign funding. Therefore, and probably for political reasons, the government requested the Council of State for an informative advice, which was issued on 28 August together with its advice on the bill Transparency of civil society organisations.84 The advice was made public with the mentioned policy letter.85 Like the professional survey from 2019, the advice was very critical on both topics. The critic concerned both the policy analysis and the constitutional compatibility of the intention to forbid undesirable foreign funding from unfree countries and of the proposed Bill Transparency. In its policy letter the cabinet announced an amendment of the bill which was prompted to the parliament the same week.86 At the same time it acknowledged the problems identified by the Council of State concerning the intention to forbid the undesirable foreign funding, but also announced new investigations and an alternative approach for a draft bill, namely by focusing on the conduct of organisations and not on unfree countries.87 Then, during the parliamentary debate on the Bill Transparency in the spring of 2021 the government was asked about the execution of a motion presented during the debate on the Pocob, which motion asked the government to introduce ‘enforcement instruments in order to be able to block flows of money, introduce a ban on receiving money or to confiscate this, when there is some talk of undermine of our democratic values, fundamental values or human rights’.88 In order to execute this motion, which was carried by a large majority, the government drafted in some months a letter of amendment to the Bill Transparency. It was the object of internal constitutional advice, referring inter alia to the advice of the Venice Commission, advice via an internet consultation and then sent to the council of ministers in order to send the draft bill to the Council of State for advice.

82 Parliamentary documents 2020–21, 35228, nr. 33 (policy letter of the cabinet).
83 The research has been done in order to execute a motion Sjoerdsma/Segers from 30 May 2018, Parliamentary documents II 2017/18, 29614, nr. 82.
84 Transparancy of social organisations Act (Wet Transparantie maatschappelijke organisaties; Wtmo).
86 Parliamentary documents II 2020/21, 35646, nr. 1 e.v. (Wtmo).
88 Parliamentary documents II 2020/21, 35228, nr. 7 (motion Becker and others).
In short, the intention of banning the undesirable foreign funding of civil society and religious organisations by a new law was apparently the object of study, research and political debate for many years, and finally it was made concrete by a draft bill within a few months. The issue must have been the object of at least seven pieces of (more or less constitutional) advice. It is not clear yet whether, and if so when, the final draft will be issued to the parliament and how convincing the final arguments for its constitutional compatibility will be.

4.6.2 Rule of Law and State Powers

As mentioned before, another topic that illustrates the use and practice of constitutional advice is the advice on the Rule of Law and state powers. As long as the nation state and its state powers exist, their functioning and relationship have been object of constitutional advice by different actors. The government established a state commission on the parliamentary system in 2018, which delivered its advice in 2019. The senate organised policy debates on the rule of law once in two years. A parliamentary commission for Internal affairs organised a round table conference for members of parliament, judges and legal scientists on so-called dikastocracy (government by judges). Later on the House of Representatives organized another conference on the trias politica. Furthermore, the Council for Public Administration delivered an important advice called ‘A stronger Rule of Law’. Not at least, the topic was really an issue for the House of Representatives’ parliamentary committee of inquiry on the implementation of the childcare allowances system. This ended in different motions, e.g. on a request to the Venice Commission for advice and on the preparation of the installation of a state commission on the rule of law. The House of Representatives adopted a motion that announces a yearly parliamentary debate on the State of the Rule of Law in the Netherlands. Meanwhile, the commission Fokkens advised—in a different context—on a specific issue. Besides, since 2017 there is a Rule of Law dialogue in the EU and since 2019 a European Commission rule of law mechanism exists. They all have their own backgrounds and rationales.

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90 Some of its recommendations are also relevant for the rule of law, like the advice on judicial constitutional review. The parliamentary system and the rule of law cannot of course really be separated from each other in a democracy based on the rule of law anyhow.
93 Motion Arib c.s., Parliamentary documents II 2020/21, 35570, nr. 64.
94 See for the second yearly Commission report on the Rule of Law in the member states: COM(2021)700 final, 2021 Rule of Law Report—The rule of law situation in the
At the same time still has to be considered what will be the exact added value of (the accumulation of) all these mechanisms.

### 4.7 Impact and Effectiveness of Constitutional Advice Evaluated

In order to know whether advisory bodies do function effectively it would be practical to have an overview of at least the follow-up of their (constitutional) advice. One would expect that advisory bodies have—and make public—such overviews themselves. This seems not always to be the case and certainly not always in an extensive way, at least from the perspective of an external observer. Otherwise, it must be rather difficult to measure that effectiveness and impact, as becomes clear from e.g. evaluations from the functioning of the NHRI, the Scientific Council for governmental policy, the Council for Public Administration and the Data Protection Authority, as will now shortly be illustrated by some findings from these evaluations or reactions there upon.

As mentioned before, evaluations of the NHRI were carried out in 2015/2017. The researchers assessed the effectiveness of the Institute. As is the case in evaluations of other autonomous administrative bodies (zbo) as well, it appeared to be difficult to determine to what extent the legal aims of the NHRI had been realized and to what extent the outcome would be due to the efforts of the Institute. For that reason, the researchers involved in their assessment the way in which the NHRI arranged its working methods in order to function as effective as possible. The researchers concluded e.g. that there were possibilities to increase the effectiveness by paying ‘more attention to evaluation and monitoring of the effect of decisions, advice, research, and communications/reports’. 97

The legal based Scientific Council for Governmental Policy was evaluated externally in 2018. In short, the external evaluation commission observed inter alia that there can be impact in the form of (social) media-attention for the WRR (e.g. when a communication stimulates public debate and contributes to reflection on a certain policy-practice) but also impact by effects on policy and legislation (e.g. when recommendations are adopted). The commission noticed that the WRR has evaluation reports of each separate project in which the policy impact of projects is

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96 See Sect. 4.5.

97 Parliamentary documents II 2017/18, 34338, nr. 3.

'obviously' addressed, as well as of effect-reports in which is addressed what has been the attention for the projects in (social) media and parliamentary documents. Furthermore the evaluation commission gives as its opinion: ‘A general opinion on the policy impact of the WRR-products is hard to give. Policy effectiveness is dependent of many factors which make the measuring a very perilous undertaking.’ It then continues that above all, the nature of the WRR-products makes that their effect on policy will only become clear on the long term. ‘The cabinet responses to the reports of the WRR are just a first indication of the effect in policy and legislation. De WRR-project evaluations respond to that later on, but the reported effects of each project are different and are not ready for aggregation. By reason of proxy-indicators, such as the number of WRR-records in Parliamentary documents (…), the evaluation commission concludes that at least the policy attention for the WRR has been increased in the researched period.’ Concerning the evaluation of the Council for Public Administration (CPA), the researchers conclude in their report from 2021 that the CPA has a solid base for exercising its legal tasks and for having realized it’s targets. From this base they see possibilities for increasing the impact of the advice of the CPA. The researchers indicate that the way the CPA fulfils its role as advisor is supported by the majority of the groups aimed at. According to the researchers the advice of the CPA deal with the right themes and are appreciated as qualitative thorough and do fit to the policy agenda, what leads to governmental and parliamentary support. Quite another thing appears to be the political administrative and social impact of the advice among the groups aimed at. The evaluation points out that that impact is still ‘relatively limited’. Then the evaluation continues: ‘The CPA doesn’t work in its advisory processes straightforward to the realisation of the aimed impact of its advice and realises this impact with varying success.’ This conclusion is regarded by the CPA as the most important one of the evaluations. The CPA regards the last two recommendations—enlargement of its network and further improvement of its strategic communication—as important additional instruments in order to improve the impact of the advice of the Council. With regard to the functioning of the Data Protection Authority, independent research has been carried out by KPMG in 2020. It concluded among others that the DPA is not able to fulfil its legal based tasks well, for reasons of lack of budget...
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and capacity. It concluded more specifically—among others—that elementary functions for a supervisor do lack, like risk analysis, ongoing prioritizing and effect measuring.\(^{103}\)

### 4.8 Conclusion

As mentioned at the beginning, there seems to be an urgent need for the continuation or even strengthening of constitutional advice. This need addresses the functions of advice, like delivering knowledge, experiences and expertise and thus contributing to—among others—the quality and/or legal, democratic and public legitimacy of decisions, policies, legislation or the execution. There are many possibilities for different actors to get that advice. Sometimes advisory institutions are, whether or not obliged, requested, other times advice is given on the own initiative of institutions.

Slightly remarkable is the increasing awareness of the House of Representatives in getting constitutional advice, as can be concluded by the establishment and use of its (partly new) instruments of parliamentary committees and its requests for advice to the Council of State and even to the Venice Commission.

More or less in line with the observations of the European Commission concerning the Netherlands in the Rule of Law cycle, the Venice Commission concluded in general that the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law, and that the reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. Nevertheless, the Netherlands still has to do some important homework. The Venice Commission makes thirteen far-reaching proposals that are meant as food for thought in the reflection to be carried out by the Dutch authorities; reflections that already had started and partly have contributed to concrete measures. Next to this, the Netherlands will be peer reviewed twice in 2022; first, in the context of the EU Rule of Law mechanism and secondly by the United Nations Universal Periodic Review in the Human Rights Council (UPR). These reviews contribute to the examination of the (constitutional advice on the) compatibility of national (non)interventions by policies, legislation and the execution. Nevertheless, three additional conclusions might already be drawn from the above.

First, some opportunities for getting constitutional advice seem to be underused. For example, the EU FRA has not been discovered yet by the government and/or parliament for giving direct advice, as was the case with the Venice Commission until very recently. Besides the National Ombudsman could explicitly be given the formal task of giving advice. It is the question however, whether or not the underuse and non-existing competences are a positive or negative thing. For this moment I do

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consider this for at least as a neutral observation, for reasons connected to the next two conclusions.

Second, what happens with all advice? Was the quality of the advises far enough and what has been the concrete impact? There seems to be a very limited insight in the phenomenon, national and international. Advisory bodies should start continuing or strengthening give insight and keep control over the quality of and follow-up to their advice. Besides, meta evaluations on the effectiveness of constitutional advice should be exercised, both national and international. The same applies to the rather unknown effectiveness of oversight mechanisms and—making part of it—their connected observations or advice.

Third, strengthening the impact on constitutional approved policy cycles and finally legislation by creating a more national orientated rule of law cycle, so called feedback loops, constitutional dialogue, and constitutional review. It should be regarded as useful that the government will render once in two years a public report on the ‘State of the legislative quality’ in order to promote those insights from the legislative analysis and signals and reports from—among others—the High Councils of State will be used better when laws and regulations are being drafted. This might be linked to the yearly parliamentary debate on the State of the Rule of Law, announced by the House of Representatives.

At the same time the absorption capacity of the government sometimes should not be exaggerated. Its limitations should be taken into account when advising or creating new mechanisms which can lead to new advice; proliferation of account mechanisms and new mechanisms should be tempered, existing ones be strengthened. Therefore, constitutional advisory bodies should take care of the quality of their advises and of their effectiveness for having impact, while the government should be responsive and make full use of the know-how of advisory bodies where possible and should motivate whether or not follow-up has been given to advice.

Above all, maintaining the constitution and thus the rule of law is not only about institutions and formal legal safeguards, but also about maintaining an enabling environment for the constitution and rule of law through the political culture. This means a political culture with a high degree of awareness of the constitution and thus rule of law consequences of political decisions and exercising self-restraint when politically desired measures are contrary to the constitution/rule of law. Loyal and constructive cooperation among State bodies is a fundamental and overarching principle for a constitutional democracy. In a previous opinion, the Venice Commission has defined the principle of loyal and constructive cooperation as a duty to ‘even if an institution is in a situation of power, when it is able to influence other state institutions, it has to do so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary

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104 CDL-AD(2016)007rev, Rule of Law Checklist, I.A para 42.
minority.\textsuperscript{106} In short, self-restraint in the use of powers might be one of the keys to constitutional success.

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\textsuperscript{106} Venice Commission, CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N\textsuperscript{o} 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N\textsuperscript{o} 3/2000 regarding the organisation of a referendum of Romania, para 87.
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