

**Pays-Bas**  
**Conseil d'Etat**

***Netherlands***  
***Council of State***

## ACA-Europe Seminar

### 'Soft law, legal standards and sources of law'

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## Hierarchy of norms in Dutch legislation

### I. Norms forming part of the Dutch system of laws

#### 1. Constitutional norms

At the pinnacle of the national system of laws stand the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*) and the Constitution of the Kingdom of the Netherlands (*Grondwet*). The Charter governs the constitutional relationship between the Netherlands, Aruba, Curaçao and St Maarten. The Constitution is the highest Dutch law, but is subordinate to the Charter. The present Constitution, which dates from 1983, contains all the rules governing the Dutch polity and lays down the fundamental rights. It also describes how laws are enacted.

The Netherlands does not have a constitutional court. This means that there is no central body responsible for the ultimate interpretation and enforcement of constitutional law. Under the constitutional system, courts may review the constitutionality of delegated legislation and administrative orders and decisions (*besluiten*), but not of Acts of Parliament, which are adopted by the government and States General. The courts may not therefore review an Act in the light of the Constitution and then declare it to be non-binding or inapplicable if it is found to be incompatible with the Constitution. This is laid down in article 120 of the Constitution. In most other countries of the European Union, such a review *is* possible. Acts of Parliament may not be reviewed in the light of the Charter for the Kingdom of the Netherlands either (see the *Harmonisation Act* judgment, Supreme Court, 14 April 1989, NJ 1989, 469).

As a result, the review of the constitutionality of bills by all actors involved in the legislative procedure takes on added importance. The Advisory Division of the Council of State examines the legal quality of a bill to see whether it is compatible with higher law. A bill may not be incompatible with international law or general principles of law.

## 2. International and European law

The Dutch Constitution can be set aside by provisions of international and European law. The Netherlands has a partly monist system, based on articles 93 and 94 of the Constitution. Dutch courts may apply both written and unwritten international law. The system is 'partly' monist in that, in the event of incompatibility between international law and a Dutch statutory regulation, Dutch courts may declare the statutory regulation inapplicable only if it is incompatible with universally binding (directly effective) provisions of treaties and decisions of international organisations. See also the *Grenstractaat Aken* judgment (Supreme Court, 3 March 1919). The nature of the provisions of the treaty in question is therefore decisive. If the provisions are universally binding (directly effective), they can even set aside the Dutch Constitution, in accordance with article 93 in conjunction with article 94 of the Constitution.

As far as European Union law is concerned, the Court of Justice of the European Communities has established the direct effect and precedence of European law over national law in two important judgments (*Van Gend en Loos*, *Costa/ENEL*).

## 3. Parliamentary Acts

### a. Organic Acts of Parliament

A fairly large number of articles of the Constitution provide that various matters are further regulated by an organic Act, though the term itself does not appear in the Constitution. Acts are called 'organic' because they relate to the organs and organisation of the State and its constituent parts. Examples in the Netherlands include the Municipalities Act, the Provinces Act and the Elections Act. These Acts, too, must be consistent with constitutional law.

### b. Ordinary Acts of Parliament

Under article 81 of the Constitution, an Act of Parliament is enacted by the government and the States General. Compatibility with international law and the Constitution are reviewed during the legislative procedure.

## 4. Orders in council

In addition to Acts of Parliament, there are other general, externally applicable instruments, such as orders in council (*algemene maatregel van bestuur*) and ministerial orders. An order

in council is issued by the government (Crown) without the involvement of the House of Representatives and the Senate, but it is submitted to the Advisory Division of the Council of State for advice. Since an Act of Parliament cannot regulate everything in detail, it indicates what matters may be elaborated on later, for example by order in council. Independent orders in council are an exception as they are not based on an Act of Parliament.

#### 5. Case law

As already mentioned, the interpretation of the Constitution is not entrusted to a separate body. All bodies responsible for the administration of justice can be confronted with questions of this nature. The judgments of the highest courts, such as the Supreme Court and the Administrative Jurisdiction Division of the Council of State, naturally enjoy the most authority. Judgments of general importance given by the various highest courts are usually followed by lower courts, otherwise the latter run a considerable risk that their judgments will be set aside on appeal.

#### 6. Administrative rules

Administrative rules are rules adopted by an administrative authority regarding the exercise of *the power entrusted to it*. Under section 4:84 of the *General Administrative Law Act (Algemene wet bestuursrecht)*, an administrative authority must act in accordance with its administrative rules unless, owing to special circumstances, the consequences would be manifestly unreasonable. The public may invoke administrative rules and they may be applied by the courts. They are adopted without any formal procedure and can easily be amended. If a minister adopts administrative rules for exercising a power accruing to him under an Act of Parliament, those rules are also known as a ministerial order. Administrative rules are found in all areas of government concern.