THE PROTECTION OF FUNDAMENTAL RIGHTS IN A DIGITAL AGE

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ICT and fundamental rights: the debate in the Netherlands

In the Netherlands, as in all modern societies, all kinds of data on every individual person are being collected, stored, sold, and distributed. Governments hold extensive records of all their citizens. Retail businesses provide their customers with electronic discount cards, in exchange for their personal particulars and information about their shopping habits. Surveillance cameras observe crowds in football stadiums, shops, bars, and streets. In a growing number of places it is becoming increasingly difficult to go unnoticed. Most people, however, do not experience this development as a threat: they tend to accept an infringement on their privacy if it yields them a profit, or helps to fight public disorder and feelings of insecurity. Nevertheless, questions with regard to privacy remain valid. For what purpose may governments process or make use of their citizens’ data? What use may private companies make of the personal data gathered from their customers? Under which conditions is it allowed to film or photograph a person? Is it allowed to make use of that information, for example for criminal investigations, or for commercial purposes? The Dutch Constitution and legislation protect the right to privacy, but do not always provide direct answers to those questions.

Equally difficult questions arise from the extensive use of media such as e-mail and internet. In the course of the last decade, e-mail and internet in the Netherlands have become available, either at home or at work, to approximately 55% of the population.1 This is generally regarded as a positive development, but has also lead to some problems. Recently, several companies have threatened to fire, or have actually fired, employees who used the companies’ network for illegal or immoral purposes, such as downloading and distributing pornographic material, sending e-mails containing offensive language, sexual harrassment via e-mail, etc.2 While the immoral or illegal character of that kind of behaviour is hardly disputed, the question whether an employer has the right to monitor the electronic communications of his employees is harder to answer. The Dutch Constitution protects the secrecy of communications, and can not be without significance for the relation between a company and its employees. On the other hand, it is clear that a company may not be

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1. In September 2001, the Current Internet Universe Estimate by Nielsen/NetRatings for the Netherlands was 8,899,365. The Nielsen/NetRatings Internet universe is defined as all members (2 years of age or older) of households which currently have access to the Internet. The total population of the Netherlands in August 2001 was 16,061,921 (sources: <http://epm.netratings.com/it/web/NRpublicreports.usagemonthly> and <http://statline.cbs.nl/statweb/index.stm>.

2. See the editorial comment on a report of the Dutch College Bescherming Persoonsgegevens (Data Protection Authority; see infra, par. 2.1) on the matter, by J.F.R. Bergfeld in: Computerrecht 2000/2, p. 109-110; for the report (Goed werken in netwerken - Regels voor controle op e-mail en internetgebruik van werknemers), see: <http://www.cbpp.nl/bis/top-1-1-9-3-1-1.html>.
expected to accept all kinds of illegal or immoral behaviour from those employees.³

Cases such as these have lead to a debate on the constitutional aspects of new information and communications technology. The availability of new means of communication and of new technical devices to monitor communications, puts traditional questions regarding the privacy of information and of correspondence in a new light. Both governmental and non-governmental organizations, such as large companies, have the technology to gather various data on individual citizens, and to deduce valuable information from those data. To what extent may the government limit the rights of citizens? What is the meaning of those rights in "horizontal" relations, where no government is involved?

Discussions on these topics have made clear that the provisions of the Constitution have become inadequate due to new information and communications technology. A few examples can illustrate this. The Dutch text of article 13, paragraph 1, of the Constitution⁴ reads: ‘Het briefgeheim is onschendbaar, (...)’. It protects the privacy of correspondence, but it uses the term ‘brief’, which means ‘a letter’. The second paragraph protects the ‘privacy of the telephone and telegraph’. What is the meaning of these terms in view of new information and communications technology? Is an e-mail to be regarded as equal to a letter, or is it more similar to the use of a telegraph?⁵ Does the protection of the second paragraph extend itself to wireless communications, for example via a mobile phone⁶?

Similar questions have been raised with respect to article 7 of the Constitution, which protects the freedom of expression. In the first paragraph, it protects the freedom to publish thoughts or opinions through the press; the original Dutch text uses the term ‘drukpers’, which is a traditional printing press. If the publication of a text on the internet is to be regarded as equal to making use of the printing press, difficult problems with regard to the application of this provision arise (see infra, par. 3). If, on the other hand, it would not be regarded as such, expressions via the internet would not be protected by paragraph 1 of article 7, but by paragraph 3, which leaves more room for limitations.

The provisions concerning communication and privacy in the Constitution address various types of communication, based on the technology which is used. Both the level of protection for each of the rights concerned, and the possibilities for limitation of those rights vary. This is becoming increasingly problematic, not just because new media emerge, but also due to the fact that new technological developments have caused different media to converge. The traditional distinctions between various types of broadcasting, internet, and communications are no longer valid, as the both the pc and the mobile phone potentially combine almost all of those functions. In some cases, it will be hard to decide which provision of the Constitution is relevant, and which regime of protection should therefore apply.⁷

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4. For the relevant articles of the Constitution, see par. 3; the complete text of the Constitution in English can be found at <http://www.buza.nl/Menu.asp?key=300111>.
7. Report of the Commissie Grondrechten in het Digitale Tijdperk (Commission on
In a first attempt to provide an answer to these fundamental questions, the Dutch government proposed a bill in order to amend article 13 of the Constitution in 1997. The bill was heavily criticized, mainly because its preparation had left no room for public debate. It was withdrawn in 1999, and a commission (named, after its president, the ‘Franken Commission’) was installed and asked to advise on the amendment of the Constitution in view of the developments concerning information and communications technology. The commission consulted numerous organizations and individuals on the matter; it delivered a report in which it proposes to amend articles 7, 10, and 13 of the Constitution, and to insert a new provision concerning access to information. In October 2000, the cabinet published its position on the matter in order to prepare parliamentary debate.

In our report, we will discuss the developments regarding the protection of fundamental rights with respect to privacy and communication in the Dutch Constitution. Before doing so, we will point at some general characteristics of the Dutch Constitution, and of the fundamental rights system which is laid down in its first chapter.

2 General characteristics of the fundamental rights system

First of all, it is important to note some general characteristics of the Dutch Constitution. The current outlook of the Constitution was established to a large extent with the 1983 revision. In that year, its structure was clarified and a large number of provisions were amended, simplified, or even discarded completely. New provisions were added, especially with respect to social and cultural rights. The resulting Constitution is a relatively compact and clear text, which constitutes a sober and open system. It is sober, as it contains only the main features of the Dutch constitutional system (and not even all of those); superfluous or unnecessarily detailed provisions have been left out. Consequently, it is also an open system, in the sense that it leaves room for other constitutional rules, either written or unwritten, to


12. See Kamerstukken II 2000/01, 27 460, hrs. 1 and 2.
15. For example, the crucial rule constituting the Dutch parliamentary system of government B a cabinet or minister can not function without the confidence of a majority in parliament B remains an unwritten rule of constitutional law.
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complement, elaborate, or interpret the Constitution.\textsuperscript{16} Furthermore, the Constitution is essentially a \textit{codification} of rules which have an established place in the constitutional system. New provisions have, in most cases, been added to the Constitution, not to create new social or legal structures, but to reflect the generally accepted and sustainable outcome of social or political issues.\textsuperscript{17}

The Dutch Constitution is an example of a \textit{rigid constitution}: amendment of its provisions requires two parliamentary readings, separated by general elections, and a two thirds majority in the second reading in both houses of parliament.\textsuperscript{18} Experience proves that it can take rather a long time before important legal or social developments may be reflected in the text of the Constitution. For example, preparations for the 1983 revision had started shortly after the 1963 revision.\textsuperscript{19} In recent years, however, amendments of the Constitution have been proposed more frequently, and some of those have already reached the \textit{Staatsblad}.\textsuperscript{20}

A last important general characteristic of the Constitution is that article 120 forbids constitutional review of Acts of Parliament by the courts. As a consequence, it is not the judiciary who ultimately decides on the correct interpretation and application of the Constitution, but the legislature. With respect to the protection of fundamental rights (see also infra, par. 2.1), it means that once an Act of Parliament is adopted which is deemed to be contrary to one of those provisions, the Constitution itself\textsuperscript{11} offers no protection against such an act before the judiciary.\textsuperscript{22}

The first chapter of the Constitution (articles 1-23) contains a catalogue of fundamental rights. It was put together in the 1983 revision by gathering the provisions that had been scattered throughout the previous text, at the same time adding a number of new provisions. Apart from some minor amendments, this catalogue has remained unchanged since 1983; the amendments in view of the 'digital age’ which have been proposed by the Franken Commission, have initiated the next major revision.

During the preparation of the 1983 revision, in the late sixties and seventies, the characteristics of the fundamental rights system have been widely discussed.\textsuperscript{23} From these discussions, a number of important notions may be deducted. One of the issues that was raised during the preparation of the 1983 revision, concerned the necessity of a national catalogue of fundamental rights, in view of the growing importance of international law.\textsuperscript{24} Most of the rights and freedoms protected in the Dutch

\begin{itemize}
\item \textsuperscript{16} Report of the Franken Commission, p. 47; Kamerstukken II 1973/74, 12 944, nr. 2, p. 2.
\item \textsuperscript{17} Report of the Franken Commission, p. 48.
\item \textsuperscript{18} See article 137 of the Constitution.
\item \textsuperscript{19} C.A.J.M. Kortmann, Constitutioneel recht, 4th ed., Deventer 2001, p. 93-94.
\item \textsuperscript{20} For an overview, see Kortmann 2001, p. 96-97.
\item \textsuperscript{21} Article 94 of the Constitution obliges the courts to apply self-executing provisions of international law; see infra, par. 2.1.
\item \textsuperscript{23} For a brief overview, see Kortmann 1987, p. 39-60.
\end{itemize}
Constitution correspond with provisions in, for example, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). However, the existence of those international documents does not mean that there is no need for a national catalogue. International provisions tend to have a broad scope and are usually rather generally phrased, to allow for the application of those rights in various legal systems. The catalogue of rights and freedoms in the Dutch Constitution offers more precise guarantees, tailored to the requirements of the Dutch legal system, in combination with restricted possibilities for limitation.25

The fact that the Constitution is essentially a codification of established constitutional rules, which is not easily amended, means that the catalogue of fundamental rights is ‘a product of its time’.26 The social, economic, and cultural rights that were added in 1983, for example, are an expression of the dominant role of the state within society, which was characteristic of the mid seventies.27 The provisions concerning communication and privacy reflect the state of technology in that period. Devices and phenomena such as the printing press, radio, television, the letter, the telephone, and the telegraph are mentioned explicitly in view of the protection of communication and privacy. The clauses which regulate the limitation of those rights and freedoms (see infra, par. 2.2) also reflect the amount of government intervention that was deemed necessary at the time.28 It is obvious that those provisions are becoming increasingly problematic in view of the ‘digital age’.

The first chapter of the Constitution contains both classic freedoms, which are basically obligations for the state to respect the freedom of its citizens, and a number of social rights, which urge the state to actively ensure or promote the enjoyment of those rights. There is no strict separation between the two types of fundamental rights; it has become clear that for the realization of classic freedoms, such as those with respect to communication and privacy, positive action by the government is often indispensable.29

The provisions of the first chapter protect the rights and freedoms of individual persons, but they can also apply to legal persons, and even to groups or organizations without a formal legal status.30 Furthermore, they can in principle apply in horizontal relations, i.e. where no governmental organization is involved (see infra, par. 2.3).

2.1 The protection of fundamental rights

27. Ibidem; see also Kamerstukken II 1975/76, 13 872, nr. 3, p. 9-10.
28. For an example, see Kamerstukken II 1975/76, 13 872, nr. 3, p. 44-46, with respect to the limitation of the privacy of correspondence and of the telephone and telegraph.
In the Netherlands, international treaties, the Constitution, national legislation, and the judiciary all have an important role in the protection of fundamental rights. Besides these, a number of special institutions has been created to guard over the just application of specific fundamental rights, and the legislation concerning those rights. Lastly, self-regulation plays an increasing role with respect to the protection of fundamental rights relating to ICT.

*International law*

The Netherlands are a signatory party to the major human rights treaties that have been concluded within the frameworks of the United Nations and the Council of Europe. The importance of those international treaties is especially great in Dutch law, since article 120 of the Constitution forbids judicial review of the constitutionality of Acts of Parliament, while article 94 obliges the courts to review those same acts against similar provisions in international treaties. The Netherlands have a principally monistic view with respect to the application of international law,\(^3\) which means that the relevant human rights treaties are automatically a part of the Dutch legal system. However, not all provisions of international treaties are suitable for direct application by the judiciary in individual cases. Provisions which contain obligations for the state to promote certain interest, or to take steps, for example through legislation, to attain certain goals, are binding to the legislature and to the administration; at the same time, they do not create directly enforceable rights for individual citizens. Article 94 of the Constitution is an expression of this: only self-executing provisions of treaties and resolutions of international organizations, are directly applicable.\(^2\)

The question whether a specific international legal provision is self-executing or not, is for the national courts to decide; most of the rights and freedoms protected by the ECHR and the ICCPR are deemed to be self-executing. In case of a conflict between a Dutch Act of Parliament and such an internationally protected fundamental right, the act shall, according to the text of article 94 of the Constitution, not be applied. Although this seems to indicate that the consequences of the judicial decision are limited to the present case, the eventual effect may often be permanent: the act involved will be practically annihilated.\(^3\)

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31. This is an unwritten rule of Dutch constitutional law; the existence of such a rule was recognized by the Supreme Court in the case ‘Grenstraktaat Aken’ (HR 3 March 1919, NJ 1919, p. 371). See F.M.C. Vlemminx, R. Boekhorst, Artikelen 93 en 94, in: Koekkoek 2000, p. 455-478; J.M. Chorus et al. (eds.), Introduction to Dutch Law for Foreign Lawyers, The Hague/London/Boston 1999, p. 315-317.

32. Article 93 adds the requirement of publication to this; the underlying idea is that international law may only produce legal obligations for individual citizens, if the relevant provisions have been duly published.

The Constitution
As we already noted above, the Constitution contains a catalogue of fundamental rights (articles 1-23). Roughly the first 17 articles are classic fundamental rights and freedoms. Most of these provisions contain specific clauses with respect to limitation. The clauses determine whether limitations must be provided by an Act of Parliament, or if that power can be delegated to other authorities. A number of clauses bind limitation of the relevant fundamental right to specific objectives, or prescribe a specific procedure for limitation. An individual person enjoys judicial protection against any unlawful limitation of the classic fundamental rights, with the exception of limitations provided by an Act of Parliament. The social, cultural and economic rights protected by the Constitution (roughly 18-23) are not directly enforceable. Those provisions contain instructions for the state to realize certain goals, and to take appropriate measures. The resulting legislation creates enforceable rights and freedoms for individual persons.

Fundamental rights and the legislature
The limitation and regulation clauses in the fundamental rights articles of the Constitution are the basis for a large number of Acts of Parliament and other regulations which determine the exact scope and substance of those rights and freedoms. A few examples may clarify the importance of this body of legislation. The right to equal treatment and the principle of non-discrimination, protected in article 1 of the Constitution, is elaborated inter alia in the Algemene wet gelijke behandeling (the General Act on Equal Treatment) and the Wet gelijke behandeling mannen en vrouwen (Equal Opportunities Act). The first of these acts defines the meaning of the term ‘discrimination’, it provides categories of exceptions to the prohibition to discriminate, and it regulates a number of frequently occurring conflicts between the right to non-discrimination and other fundamental rights and freedoms. In a similar way, the Wet openbare manifestaties (Act on Public Manifestations) regulates certain aspects of the enjoyment of the freedom of religion and the right of assembly and demonstration (articles 6 and 9 of the Constitution respectively). On the basis of article 10, legislation on various aspects of the protection of privacy and the use of personal data has been established (Wet bescherming persoonsgegevens: Act on the Protection of Personal Data). Article 23, concerning the right to education and the freedom of education, is the constitutional basis for a vast complex of educational legislation. These acts and regulations spread responsibilities for education, translate the general principles of

34. We should note that the Constitution contains some provisions outside its first chapter which have the character of fundamental rights, such as articles 53 (on the secrecy of elections), 110 (on ‘open government’), and 114 (the prohibition to apply the death penalty).
35. Article 13, 2nd paragraph, contains a procedural requirement for limitation; see par. 3.2.
37. Stb. 1980, 86. Note that article 1 of the Constitution, with its current broad scope, dates from 1983; before 1983, the right to equal opportunities for men and women with relation to labour was protected only by ordinary legislation.
article 23 into specific rights for schools and parents, determine the conditions attached to those rights, and create various control mechanisms.

Some fundamental rights are not protected by the Constitution, but exclusively by ordinary legislation. The most obvious examples are the freedom of contract (the Civil Code), the academic freedom (the legislation on higher education and academic research), and guarantees for pluralism within the media (the legislation concerning the media and telecommunications).

Due to article 120 of the Constitution, and in view of the fact that the scope and substance of most of the fundamental rights are determined by the legislature, the emphasis in Dutch constitutional law with respect to the protection of fundamental rights is on ordinary legislation. However, the courts do have an important role, especially in the application of internationally protected fundamental rights in the Netherlands.

**Fundamental rights and the judiciary**

In Dutch constitutional law, there is only one example of a fundamental right which is protected exclusively by judge-made law. Article 7 of the Constitution protects the freedom of expression. This article may also apply to expressions via electronic media,\(^{40}\) and is subject to a proposal for amendment. Taken literally, both the first and third paragraphs of the current provision protect only the expression of an opinion or idea via written media or other means; preventive measures are prohibited, and repressive sanctions must be laid down in an Act of Parliament. It applies to activities such as the printing of a book, or a newspaper, or pamphlets, or other written documents (paragraph 1), or to the expression of ideas by other means (paragraph 3),\(^{41}\) but it does not explicitly cover the active public distribution of the relevant documents or products. In a series of case-law, the existence\(^{42}\) of a fundamental right concerning the distribution of expressions of opinions and ideas has been recognized, and its scope and substance have been determined.\(^{43}\)

More important is the role of the judiciary in the application of self-executing fundamental rights laid down in international treaties. Firstly, a number of internationally protected fundamental rights have no equivalent in the Constitution.

\(^{40}\) B.P. Vermeulen, Artikel 7, in: Koekkoek 2000, p. 113; Report of the Franken Commission, p. 01-92.

\(^{41}\) Not including radio or television: expressions via these media (including e.g. videotext) are protected by the second paragraph of article 7.

\(^{42}\) Views in legal doctrine differ with respect to the question whether the right concerning the distribution of written documents or other products is implied in both the first and third paragraphs, or is based purely on case law. The latter option is the most commonly accepted one: see B.P. Vermeulen, Artikel 7, in: Koekkoek 2000, p. 118-121, who himself favors the first option.

\(^{43}\) The right concerning the active distribution of the products of an expression was recognized by the Supreme Court most clearly in the case ‘APV Tilburg’ (HR 28 November 1950, NJ 1951, 137). Initially, this construction applied only to what is now the first paragraph of article 7; after 1983, when the other paragraphs were added to article 7, the same construction was applied to the third paragraph: B.P. Vermeulen, Artikel 7, in: Koekkoek 2000, p. 129. For an overview of the relevant case law, see: B.P. Vermeulen, Artikel 7, in: Koekkoek 2000, p. 121-123 and 129; J.M. de Meij, Uitingsvrijheid, Amsterdam 1996; R.E. de Winter, De heersende leer, Den Haag 1993.
An important example is article 6 of the ECHR, which offers guarantees regarding fair trial that are not protected to the same extent by the Dutch Constitution. The same is true for article 8 of the ECHR: it protects family life in a very broad sense, which is beyond the scope of the provisions concerning privacy in the Constitution.\(^4^4\) Furthermore, international law may be used to review Acts of Parliament, while constitutional review of those acts is prohibited by article 120 of the Constitution. A well-known example is article 26 of the ICCPR, which has been used by the courts to review parts of the national legislation concerning social security and taxation.\(^4^5\)

**Special institutions**

With respect to the protection of fundamental rights concerning communication and privacy, two special institutions, both established by Act of Parliament, should be mentioned. The first of those is the *College Bescherming Persoonsgegevens* (Data Protection Authority), an independent organ based on article 51 of the *Wet bescherming persoonsgegevens*. It supervises the application of the Act, and it advises on bills and proposals for Orders in Council relating to data processing. In 2000, it published a report on the control of internet and e-mail use at the workplace.\(^4^6\) The criteria formulated in this report are not binding, but they may have effect in concrete cases as a form of ‘soft law’, for example by helping the courts to determine the wrongfulness of the actions of both employer and employee. In this way, the Authority bears an important responsibility in the protection of the privacy rights, guaranteed in article 10 of the Constitution.

The second organ is the *Commissariaat voor de Media* (Dutch Media Authority), which supervises the implementation of the legislation concerning the media. It is based on article 9 of the *Mediawet* (Media Act). One of its most crucial tasks is to advise the State Secretary of culture on the recognition of broadcasting corporations, required for the provision of radio and television programs.\(^4^7\) Due to the definition of radio and television ‘programs’ in article 1 of the Mediawet, this may also apply to broadcasting activities using new media.

**Self-regulation**

Since the late eighties, a trend towards alternatives for ‘classical’ state regulation is


\(^{4^6}\) Data Protection Authority, Goed werken in netwerken - Regels voor controle op e-mail en internetgebruik op de werkploek (2000); available at: <http://www.cbpweb.nl/bs/top-1-1-9-3-1-1.html>.

\(^{4^7}\) Articles 31 and 32 of the Media Act; an electronic version can be found at: <http://www.cvdn.nl/index.html>. An English version is also available there, but unfortunately it is rather outdated.
visible in the Netherlands. The term ‘self-regulation’ refers to various phenomena, which all have in common that a greater role is attributed to ‘non-governmental regulation’: rules or norms created by or with the cooperation of the persons or organizations to whom these rules or norms apply.\(^{38}\) This trend is also visible in the field of fundamental rights and freedoms.\(^{39}\) Especially with respect to the privacy of communications and correspondence, we can point out some clear examples of self-regulation. The Dutch association of internet providers NLIP has adopted a ‘Netiquette’, which is a code of conduct for internet users. It has also created a ‘quality policy’, for Dutch internet service providers. Part of this policy is a code of conduct which is a requirement for NLIP membership. That code states, among other things, that a provider shall respect the right to privacy of correspondence with respect to personal e-mail, and that all personal data from its users will be kept secret.\(^{40}\)

Other organizations have created similar codes and documents: the employers’ organization VNO-NCW has created a code of conduct on the use of e-mail and internet at the workplace;\(^{41}\) for the same purpose, the employees’ organization FNV created a model protocol, to be signed by the employer and the chairperson of the Works’ Council.\(^{42}\)

2.2 Limitation of fundamental rights

The limitation of fundamental rights in the Dutch Constitution is based on a system of specific limitation clauses. Fundamental rights may only be limited in the manner and to the extent the relevant provisions themselves allow. Most fundamental rights provisions include such a clause; the few that do not (e.g. article 5 on the right to petition), may not be limited in any way.

All clauses determine whether limitations to fundamental rights must be provided exclusively by an Act of Parliament, or if the power to limit those rights can be delegated by Act of Parliament to other authorities. The terminology of the clauses is decisive: only if the provisions allow for limitations ‘by or pursuant to an Act of Parliament’, or limitations by ‘rules’ or ‘regulations’, may the legislature delegate the power to limit the relevant fundamental right; in all other cases, only an


\(^{40}\) Both documents are available at: <http://www.nlip.nl>.


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Act of Parliament may limit the right concerned.\textsuperscript{53}

One of the consequences of this system is that provinces and municipalities do not have the competence to limit fundamental rights on the basis of their autonomous powers, guaranteed by article 124, paragraph 1, of the Constitution.\textsuperscript{54} That competence should be specifically delegated to them by an Act of Parliament, provided that the limitation clause of the relevant provision allows for delegation. Another consequence is that every now and then legislation surfaces which unexpectedly and unintentionally limits one or more fundamental rights, without having a basis in the relevant clauses, while at the same time pursuing legitimate and necessary goals. As the system of the Dutch Constitution offers no remedy for such problems, it is for the courts to solve them by determining the exact scope and meaning of the relevant fundamental right in the case at hand.

A number of clauses bind limitation of the relevant fundamental right to specific objectives, such as the protection of health, the prevention or suppression of disorder, or the interest of traffic. Finally, a number of clauses prescribe a specific procedure for limitation. These are mainly in the field of the protection of privacy (articles 10-13).

2.3 The ‘horizontal effect’ of fundamental rights

The Constitution itself keeps silent about the meaning of fundamental rights in relations between between private persons or non-governmental organizations. In principle though, all fundamental rights in the Dutch Constitution may be applied in horizontal relations.\textsuperscript{55} The explanatory memorandum to the 1983 revision of the Constitution distinguishes between five modes of application of fundamental rights in horizontal relations, constituting a sliding scale. In its least far-reaching mode, a fundamental right encompasses an obligation for the legislature to realize the relevant interest or principle in relations between private persons; in its most far-reaching form, a fundamental right obliges the courts to allow only those infringements which comply with the limitation clause.\textsuperscript{56}

In some areas, legislation indeed converts the interest protected by fundamental rights into specific legal norms which apply also in relations between private persons. The General Act on Equal Treatment, for example, does so for the right to equal treatment and the non-discrimination principle (art. 1 of the Constitution), as does the Wet bescherming persoonsgegevens (Act on the Protection of Personal


\textsuperscript{54} The courts have accepted one exception to this principle; the right concerning the active public distribution of the products of an expression, which was recognized in case law on article 7 of the Constitution, may be limited by decentralized authorities on the basis of their autonomous powers; while doing this, they may not completely prevent an independent means of distribution: Chorus 1999, p. 298; B.P. Vermeulen, Artikel 7, in: Koekkoek 2000, p. 110-136; Kortmann 2001, p. 382.


\textsuperscript{56} Kamerstukken II 1975/76, 13 872, nr. 3, p. 15-16.
Data) for the right to privacy with respect to personal data (art. 10 of the Constitution).

Case law on the horizontal effect of fundamental rights as such shows various modes of application. Most commonly, the relevant rights are applied in an indirect manner. They may be used to determine the wrongfulness or unlawfulness of the behaviour of the parties involved, or to interpret rather general norms of private law which apply in the relevant conflict (e.g. 'goed werknemerschap': acting as a 'proper employee', or 'maatschappelijke zorgvuldigheid': 'due care' to be observed in society). In such cases, fundamental rights represent interests which are to be weighed against other relevant interests. Direct application of fundamental rights in horizontal relations is a rare phenomenon.

3 Fundamental rights in relation to ICT

The fundamental rights that apply to the use of new technologies are protected by various provisions in the Dutch Constitution, but also by ordinary legislation; the right to access of information is protected almost entirely by an Act of Parliament, and by the regulations based on that Act. We will therefore discuss the main features of the most relevant articles of the Constitution, as well as the applicable Acts of Parliament.

3.1 The freedom of expression

The freedom of expression is protected mainly by article 7 of the Constitution. Article 7 reads:

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act

62. Specific aspects of the freedom of expression are also within the scope of articles 5 (the right to petition), 6 (the freedom of religion and religious expression), and 9 (the right of assembly and demonstration) of the Constitution.
of Parliament in order to protect good morals.
4. The preceding paragraphs do not apply to commercial advertising.’

With respect to both the first and third paragraph of this provision, a distinction is made between the expression of an opinion or idea, and the distribution of the product of that expression. With respect to the expression, preventive measures are prohibited, and repressive sanctions must be laid down in an Act of Parliament. With respect to the distribution of expressed opinions or ideas, case law has established that any public authority may regulate this, and even take preventive measures; at the same time, regulations regarding the content of the distributed expression, as well as regulations which directly or indirectly prohibit the use of a recognized means of distribution, are not allowed. 63

The first paragraph of article 7 protects the freedom to publish thoughts or opinions through the press; the original Dutch text uses the term ‘drukkers’: a traditional printing press. Although the meaning of this term has been extended to practically all forms of written expressions, it will not encompass all types of expression of ideas via electronic media. 64 Consequently, the freedom of expression via ICT is protected partly by the first, and partly by the third paragraph of article 7. The latter applies to all means of expression, including images and sound, other than written expressions and expressions via radio or television. This is not without importance, since case law has made clear that the third paragraph leaves room for a system of permits in order to limit the distribution of opinions or ideas, while the first paragraph does not. 65

Apart from this terminological issue, the application of article 7 to electronic media meets with a number of systematic problems. Firstly, the distinction between the expression of an idea or opinion, and the active distribution of the product of that expression, which is the basis for two different regimes of protection and limitation of the freedom of expression, poses problems. The ‘intellectual’ phase of the expression, and the ‘physical’ phase of distribution often coincide. A person taking part in an internet chat box, for example, distributes his ideas to potentially billions of people at the very moment he expresses them. Furthermore, the idea that the product of an expression has a tangible and physical character, so that it is susceptible to regulation and enforcement, is becoming obsolete. The powers and instruments of national governments to control such communications, are simply inadequate. And if an effective instrument would be found to effectively prevent the distribution of illegal content, it would at the same time prevent the expression of those ideas, while article 7 of the Dutch Constitution forbids preventive measures with respect to the expression of ideas. 66

A second development which makes the application of article 7 increasingly

64. See the Report of the Franken Commission, p. 91-92.
problematic, is the convergence of new media. Modern information and communication technologies often combine functions for the production and reproduction of text, images, and sound. Different technological devices may have a number of identical or highly similar functions, reducing the functional and technical differences between, for example, pc, radio, television, fax, and phone. Since article 7 of the Dutch Constitution distinguishes between these media, convergence makes it difficult to decide which paragraph should apply, and therefore which level of protection and limitation regime is valid.\footnote{With regard to the legal problems caused by convergence, see: Report of the Franken Commission, p. 24-25 and 64-70; Asscher 1999, p. 2-6.}

In consideration of these problems, the government has put forward a proposal for amendment of (inter alia) article 7,\footnote{Kamerstukken II 2000-2001, 27 460, nr. 1.} based on the above-mentioned report of the Franken Commission (see par. 1). In the proposed provision, the freedom of expression will be protected in more general wordings, without mentioning the applicable media. In this way, the provision should become more robust in view of technological developments. Furthermore, its scope will be widened, so that it will protect not only the expression of ideas and opinions, but also the supply of factual information, the reception of information, and commercial advertising.\footnote{Kamerstukken II 2000-2001, 27 460, nr. 1, p. 8 and 12.} The distinction between the expression of an opinion and the distribution of its products, however, is preserved. Therefore, the proposal does not solve the issues related to this systematic element of article 7.

### 3.2 The respect of privacy, of home, and of correspondence

The right to respect of privacy, of home, and of correspondence is protected by a number of provisions in the Constitution, of which articles 10 and 13 are the most relevant with respect to the digital age. Article 10 establishes a general principle of privacy; the clauses in its 2nd and 3rd paragraphs contain specific provisions, instructing the legislature to regulate the administration and use of personal data. Articles 11, 12 and 13 elaborate a number of specific elements of the general principle of article 10: the inviolability of the person, the respect of home, and the protection of various modes of communication (correspondence, telephone and telegraph). These specific privacy rights may often be applied in connection with article 10. The latter provision has a complementary function: when a person seeks legal protection against a threat to his privacy, he may refer to one of the specific privacy rights, in combination with article 10. This may be useful, for example, in cases where new technologies are used to breach the privacy of communications. If it would be unclear whether the terms used in article 13 (‘correspondence’, ‘telegraph’, and ‘telephone’) would allow for the application of that specific provision, the general principle of article 10 brings relief (see also infra).\footnote{G. Overkleef-Verburg, Artikel 10, in: Koekkoek 2000, p. 159; Kortmann 1987, p. 94, 96.}

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Articles 11\textsuperscript{72} and 12\textsuperscript{73} seem to have only limited relevance to issues regarding the digital age. Article 11, on the physical inviolability of the person, may be relevant to, for example, the introduction of electronic means of identification, such as the iris scan or the digital fingerprint. Article 11 demands regulation by or pursuant to Act of Parliament for the realization of limitations to the inviolability of the person.\textsuperscript{74} Article 12 protects the inviolability of the home. In view of the digital age, questions regarding the meaning of this provision for the ‘intrusion’ into private homes by means of hidden camera’s or other electronic devices may be put forward. The scope of article 12 is limited in this respect: it covers only the physical entering of a person into the home of another person. Other types of infringements of the privacy of the home are covered by the general principle, laid down in article 10.\textsuperscript{75}

Article 10 reads:

1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.
2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.
3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.’

Article 10 was not introduced in the Dutch Constitution until 1983, partly as a reaction to developments with respect to electronic databanks and data processing. However, its scope is wider than just the privacy of personal data: it protects the right to personal freedom and individual autonomy, both in relation to the state, and in relation to the rights and freedoms of other persons.\textsuperscript{76} Because of its wide scope, article 10 is likely to conflict with other rights and freedoms, such as the freedom of expression or the principle of open government. As in all such conflicts, it is up to the courts to solve them by weighing the relevant interests.

On the basis of the 2\textsuperscript{nd} and 3\textsuperscript{rd} paragraphs of article 10, three important Acts of Parliament have been established: the Wet bescherming persoonsgegevens (Act on the Protection of Personal Data),\textsuperscript{77} the Wet politieregisters (Police Records Act),\textsuperscript{78} and the Wet gemeentelijke basistransponders (Act on Municipal...
Records for Personal Data). The acts, and the regulations based on them, concern the processing of data, the administration of databanks, and the rights of persons of whom data are being stored and processed.

Article 13 protects the privacy of communications by a number of rather traditional means: correspondence (the Dutch text uses the term ‘brief’, meaning ‘a letter’), the telephone, and the telegraph:

1. The privacy of correspondence shall not be violated except, in the cases laid down by Act of Parliament, by order of the courts.
2. The privacy of the telephone and telegraph shall not be violated except, in the cases laid down by Act of Parliament, by or with the authorization of those designated for the purpose by Act of Parliament.’

Although the terms used in article 13 suggest that the provision has a rather limited scope, it actually applies to several other modes of communication. The term ‘correspondence’ encompasses not only the letter, but also media such as computer discs, and tapes carrying sound or video. The same is true for the second paragraph: it covers not only the ‘wired’ communications mentioned therein, but also modes of wireless communications.

In view of the digital age, proposals for amendment of articles 10 and 13 of the Constitution have been published by the government in October 2000. According to these proposals, a new paragraph will be added to article 10 instructing the legislature to regulate a number of specific rights for private persons with respect to personal data. These include the right to be informed of the objectives for which data are being stored, of the source of those data, and to have them removed. Article 13 will be rephrased in order to avoid the mention of specific technologies or devices; it will protect ‘confidential communication’, regardless of the mode of communication. Furthermore, new paragraphs will be added containing more detailed procedural requirements for infringements on the right of confidential communication.

3.3 The access to information

The catalogue of fundamental rights in the Dutch Constitution does not contain a right of access to information held by the government or by other organizations or persons. A general principle of ‘open government’ is laid down in article 110, but

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80. Not all modes of wireless communications are protected by article 13: it applies only to private communications. The person concerned should have the intention to communicate privately, and should choose a mode of communications according to this intent (Kamerstukken II 1975/76, 13 872, nr. 3, p. 46). In our opinion, this means that, for example, encrypted wireless communications will be covered by article 13, while ‘open’ communications will not. It does not mean that ‘open’ modes of wireless communications are not protected against infringements: the guarantees of article 13 have been extended to all types of telecommunications by specific provisions in the Dutch Penal Code (art.139c, 139e, 374 and 374bis). See P.A.M. Mevis, T. Blom, Artikel 13, in: Koekkoek 2000, p. 193; Report of the Franken Commission, p. 137-139.
81. Kamerstukken II 2000/01, 27 460.
this should be seen in relation to provisions such as articles 80, first paragraph, 66, 121, 125, first paragraph, 133, second paragraph, and 134, second paragraph, concerning public access to the meetings of advisory bodies, representative organs, and the judiciary. None of these provisions establish a right of access to information.82

The right to access of information held by the government is protected in the Wet openbaarheid van bestuur (Public Information Act).83 It states that public bodies are obliged to deliver information laid down in documents B which includes electronically stored information B upon request (articles 3-7), unless specific interests, such as national safety, or international relations, should prevail. The situations and interests which may prevail over the principle of 'open government' are listed in an exhaustive account in article 10 of the act. Furthermore, public bodies should provide information on their own initiative ‘as soon as this is in the interest of proper and democratic government’ (article 8 of the act). The provisions of the act have been given a rather broad scope. The act has been used, for example, to force a cabinet minister to hand over to the press copies of all diner bills, travelling expenses, and other cheques which had been paid out of public funds.84

In another respect, however, the scope of the act is limited: it refers only to information which is publicly accessible. Information to which only certain groups of people, or individual persons may have access, such as personal data, is not covered by it. Furthermore, it does not regard information which is held by non-governmental organizations. For these types of information, the right of access is regulated by the Wet bescherming persoonsgegevens.

In October 2000, the government proposed to add a new fundamental right to the Constitution, concerning the right of access to information held by the government (see infra, paragraph 5). In this way, the principles laid down in the Wet openbaarheid van bestuur are included in the Constitution.

4 Case-law on ICT and fundamental rights

Case law on the meaning of articles 7, 10, and 13 of the Constitution, and on the right to access information held by the government (protected in the Wet openbaarheid van bestuur) in view of the digital age is scarce. Legal conflicts with regard to ICT usually concern copyright law, other aspects of intellectual property rights, or, more specifically, internet domain names. Apparently, legal conflicts with respect to ICT are rarely linked to fundamental rights and freedoms protected in the Constitution or relevant legislation. With respect to communication and privacy, this may be due partly to the fact that provisions such as articles 8 and 10 of the ECHR are directly applicable within the Dutch legal system. In cases where the wordings of the relevant articles of the Constitution raise doubt with respect to their applicability to new media or technologies, the more generally phrased rights and freedoms of the ECHR can be especially useful instruments. Furthermore, the provisions of the

ECHR demand that all limitations of the freedom of expression and the right to privacy are proportionate to their aim ('necessary in a democratic society'), a requirement which the Dutch Constitution lacks. Nevertheless, case law from Dutch judicial organs on the application of articles 8 and 10 in relation to the digital age is equally scarce.

A rare example, however, can be found in a case decided by the district court of Rotterdam on March 29, 2001. An employee of the Rotterdam Rijnmond region police had apparently abused the police pc facilities extensively for private purposes. Some e-mail messages containing pornographic language had accidentally become public; in response to this, the employees' superior had asked her permission to view the content of all other e-mail she had been sending via the police pc network. When the employee denied this permission, the superior took legal steps to obtain it. In front of the court, the employee invoked article 8 of the ECHR and articles 10 and 13 of the Constitution, stating that viewing the content of her e-mail would constitute a violation of her privacy of correspondence.

In its decision, the court does not express any doubt that both article 8 of the ECHR and article 10 of the Constitution apply to the case; both provisions protect (inter alia) private correspondence, regardless of the medium used. With respect to the applicability of article 13, the court notes that the wordings of the provision make it unclear whether the privacy of e-mail correspondence falls within its scope. However, the court argues, as legislation concerning the protection of personal data has extended the principles underlying article 13 to other means of correspondence, the guarantees of article 13 apply to e-mail correspondence as well. The court then treats the case accordingly (but dismisses all the arguments put forward by the employee).

A similar problem can be found in the 'KLM/Reinders'-case. As in the former case, an employee had abused his employers' pc facilities extensively for private purposes, including the distribution of e-mail messages with pornographic content. The employer had searched the desk, pc, and diskettes of the employee, and consequently decided to ask the court to set aside the employment contract. The case differs in one important respect from the former: the employer is not a government body, and therefore fundamental rights apply in a horizontal relation. In his decision, the court does not apply articles 10 and 13 of the Constitution, or article 8 of the ECHR directly. It states that the developments in communications technology, such as e-mail, have created a 'private sphere' within working relations. While at work, an employee has, to some extent, the right to private communication, which is to be respected by the employer. On the other hand, the employer may prevent or sanction abuse, and monitor the communications network to that avail. In this way, the privacy of the employee is limited.

Generally speaking, the leading principle in the application of the Constitution

86. The court actually anticipated on the coming into force of the Wet bescherming persoonsgegevens (1 September 2001).
88. For an analysis of both cases, see: Asscher/Steenbruggen 2001, p. 1791-1794.
in the digital age seems to be: ‘what applies offline, should also apply online’.\textsuperscript{89} The constitutional guarantees with regard to privacy and traditional means of communication are to be extended to the use of new media and technologies. To be able to do this, the terms used by articles 7 and 13 of the Constitution are to be interpreted extensively by the courts.\textsuperscript{90} Furthermore, specific Acts of Parliament may extend the scope of the respective rights and freedoms to new media and technologies. The same is true for the legislation concerning the right to access information held by the government: the courts are to apply the constitutional principles, both to traditional documents or data, and to new media.

5 A new fundamental right in the Constitution

As we already noted above (see par. 1 and 3), the ‘digital age’ will have important consequences for the Dutch Constitution. Article 7, concerning the freedom of expression, will be amended substantially; articles 10 and 13 will also be amended, although not as drastic. Besides these changes to existing provisions, a new fundamental right concerning the right of access to information held by public authorities has been proposed by the government.\textsuperscript{91} The proposed article reads:

\begin{quote}
‘1. Everyone shall have the right to access information held by the authorities. This right may be limited by or pursuant to Act of Parliament.
2. It shall be the concern of the authorities to ensure the accessibility of information held by the authorities.’
\end{quote}

According to the government, both the right to access information held by the authorities, and the obligation to ensure the accessibility of that information, are basic requirements for any democratic legal system. The existing article 110 (see also par. 3.3) has only a limited meaning in this respect: it only urges the authorities to practice ‘open government’, without granting enforceable rights to individual persons.\textsuperscript{92} Although the relevant rights are protected by the Wet openbaarheid van bestuur (see par. 3.3), they are of such ‘constitutional ripeness\textsuperscript{93} that they deserve to be added to the fundamental rights catalogue of the Constitution.

6 Conclusion

To conclude our report, we will summarize the most important effects of developments in information and communication technology B in particular the


\textsuperscript{90} Of course, this will be no remedy in cases where convergence makes it unclear which provision, and consequently which level of protection, is to be applied in a concrete case.

\textsuperscript{91} Kamerstukken II 2000/01, 27 460, nr. 1, p. 30-39.

\textsuperscript{92} Translation from the original Dutch text by the author of this report.

\textsuperscript{93} Kamerstukken II 2000/01, 27 460, nr. 1, p. 30.

\textsuperscript{94} Report of the Franken Commission, p. 171.
internet B on fundamental rights like freedom of expression, the right to privacy, and freedom of communication in the Netherlands.

- Developments in ICT have raised both systematic and fundamental questions with respect to the application of fundamental rights concerning communication and privacy. The relevant provisions of the Constitution are based on rather traditional technologies and on the existing distinctions between media, such as written communications, television and radio, telephone, and telegraph. Due to technological developments, it is becoming increasingly difficult to decide which provision B if any B applies in a specific situation, and which level of protection should therefore apply. Moreover, the idea that the state can limit those rights in order to prevent illegal or immoral activities, is becoming obsolete: new media are global and often ‘virtual’ means of communication and data processing which defy traditional means of control.

- The main principle in solving questions regarding fundamental rights and ICT is: ‘what applies offline, should also apply online’. This means that the general legal principles underlying a fundamental right will be applied in cases where the relevant fundamental right can not be applied for some reason (e.g. because the wordings of a provision do not cover new media or techniques).

- ICT may lead to an even greater role of international law within the Netherlands. The relatively broad scope of the provisions on communications and privacy in treaties such as the ECHR or the ICCPR, and the fact they are not ‘technology based’, make them useful instruments for Dutch courts. In some cases, international treaties are the only instrument available, as article 120 of the Constitution forbids constitutional review of Acts of Parliament. We expect that especially article 8 of the ECHR will gain importance for Dutch law concerning ICT, mainly because of its broad scope.

- In reaction to this, a bill has been proposed in order to amend some of the articles regarding communication and privacy (articles 7, 10, and 13) of the Constitution. These amendments should make its provisions less dependent upon existing technology and media. A new provision granting a right to access information held by the government will be added.

- Furthermore, legislation concerning telecommunications and the privacy of data has been amended in view of ICT. Ordinary legislation can be amended more easily than the provisions of the Constitution, and is used to extend the constitutional guarantees that apply in the ‘offline world’ to the ‘online world’.

- Finally, the proposed amendments of the Constitution draw new attention to article 120. Even though international law can be used to protect the rights of Dutch citizens regarding communications and privacy, an up to date catalogue of fundamental rights will remain a valuable part of the Dutch Constitution. The provisions in the Constitution may offer more precise guarantees and possibilities for limitation, tailored to the specific requirements of the Dutch legal system. However, due to article 120, the courts sometimes have to turn to the rather open en more generally phrased rights protected in international treaties in order to protect the interests of individual persons. The relevant provisions of the Constitution would be more valuable instruments for the courts, if they would have the power to use them to review Acts of Parliament.

THE PROTECTION OF FUNDAMENTAL RIGHTS IN A DIGITAL AGE