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The European Constitution and National Constitutions

Ratification and Beyond

Editors:

Dr Anneli ALBI, Lecturer in EU Law at the University of Kent, UK

Prof. Dr Jacques ZILLER, Professor of European Public Comparative Law, European University Institute (Florence) and University of Paris 1 Panthéon-Sorbonne

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Chapter 11

The Dutch Constitution, the European Constitution and the Referendum in the Netherlands

*Leonard F. M. Besselink**

This contribution develops a constitutional understanding of the 'No' vote in the referendum on the Constitutional Treaty (TCE) in The Netherlands. In order to arrive at such an understanding, it is first necessary to understand the nature, character and the concept of the constitution with respect to the constitutional history of The Netherlands. The contribution will outline the nature of the current formal Constitution of the Dutch Kingdom with regard to European integration. Against this background, the legal nature of the referendum is examined, before reflecting, in the final parts, on the meaning of the 'No' vote in constitutional terms.

1. TWO TYPES OF CONSTITUTION

Schematically, there are two main types of constitution in Europe into which individual constitutions could be classified. The first are the constitutions of the 'historic' type, comprising the 'old-fashioned', historically incremental constitutions which are mostly long-term constitutions. They are often older than the French

* Professor of European Constitutional Law, Jean Monnet Chair, Faculty of Law, University of Utrecht.

A. Albi and J. Ziller, *The European Constitution and National Constitutions: Ratification and Beyond*, pp. 113–123.

Revolution, and in pertinent cases, take this revolution to be one of many political events to be incorporated into a broader constitutional framework. These constitutions tend to incorporate various political and social changes and experiences, even where these are relatively dramatic, at least in the short-term; these constitutions are non-formalistic and they are at least as much political in nature as legal. The formal constitution does not constitute political reality – conversely, the reality of the political order determines the constitution. Hence, there is no great need or urgency to trace a historically 'original constitution' because it is the evolution, not the original intent or the original circumstances, that determines its meaning. The archetype of this type of constitution is the British Constitution, with the constitutions of the Nordic countries (at least before their revisions towards the end and at the turn of the 20th century), Switzerland and the European Union also falling into this group.

The second type of constitution is of a 'revolutionary' character. The constitutions belonging to this group tend to have their origin in a revolutionary event, a political or social cataclysm which forms the 'moving myth' inspiring the constitution. They are found at the basis of, for instance, the *liberté, égalité, fraternité* in France, and the *Nie wieder* in Germany. These constitutions have a blueprint character; they tend to be designed from a clean slate, as under the circumstances in which it originated one wishes to consign the past to history and design a new future. The intention of the (formal) constitution is to constitute the political reality, not the other way around. Obviously, the 'original' constitution is important in terms of establishing an overall understanding of these constitutions, and as soon as there is a 'new' formal constitution, a new political order is constituted. The 'revolutionary' constitutions tend to have a strongly legal character, demonstrating enforceability in (some kind of) courts of law. These courts have a constitutional function not only in theory but also in practice. Examples of countries with this type of constitution are Ireland, Germany, Italy, France and the USA.

2. THE CONSTITUTION OF THE NETHERLANDS

The Constitution of The Netherlands is of the first, 'historic' type. There is no agreement on the question of whether the present Constitution of The Netherlands, *Grondwet van het Koninkrijk der Nederlanden*, originates from the Constitution of 1814 or 1815. However, this does not matter a great deal, since the present Constitution is entirely different from both the Constitution of 1814 and that of 1815. In order to understand some of the fundamental features of the present Constitution and the constitutional culture of The Netherlands, it is more instructive to take a long-term perspective, taking into account the more than two centuries during which The Netherlands was a Republic.[1]

During this Republic, The Netherlands was a world power, with the 17th century representing the Golden Age in terms of economics, politics, art and other

1. Somewhere towards the latter quarter of the 16th century until 1795/1798.

forms of culture. The constitution was fairly unique, although contemporary literature compared the document to those of biblical Israel, Venice and Switzerland. The Constitution was, at least formally, confederal in nature: although there was a constitutional document in the form of the treaty of alliance called the *Union of Utrecht* of 1579, the constitutional practice was more important than the letter of that text.

This was most conspicuous with regard to the role played by sovereignty. The official doctrine of the period held that the seven provinces, which together made up the United Republic, were sovereign. This sovereignty was not located in any particular institution other than the 'States', which was the name of the parliament in each province. The States-General of the Federacy were composed of various delegations from the provinces, which acted under full instruction from their provincial States. At the federal level – the 'Generality' or 'Federacy' – there was neither sovereignty nor a sovereign; the country did not manage to find a successor to King Philip II who was abjured at the end of the 16th century because he was, so to say, too much of a sovereign lord – so the country did without one. There was indeed a surrogate replacement within each province, the *stadholder*, literally a *locum tenens* or governor, but he enjoyed no sovereignty and never carried the title of 'sovereign' or any equivalent title. This office tended to be filled, with the exception of the province of Frisia until 1747, by the Prince of Orange who was the successor to the father of the fatherland, William of Orange. And at times when the Prince of Orange was considered unsuitable, the politically and economically hegemonic province of Holland and Zeeland did without him: altogether there was no *stadholder* there for more than seventy years during the two centuries of the Republic (1650–1672 and 1702–1747).

Having experienced centuries in which one could do without {sovereignty/ a sovereign}, it was difficult to get used to claims of sovereignty for the overarching polity. Some of the failure of the Batavian republic, and of the French rule between 1798 and 1813, must be attributed to this. Additionally, it accounts for the near absence of a meaningful theory of sovereignty in the Dutch constitutional theory and practice throughout the 19th and 20th centuries. The absence of such a theory of sovereignty is, in my view, important in understanding the Dutch constitutional attitude to Europe.

3. THE PRESENT CONSTITUTION AND EUROPE

The Constitution states in Article 94 that self-executing provisions of treaties, and also those of decisions of international organizations, overrule conflicting provisions of national law.[2] These provisions of national law that may be overruled

2. Art. 94 Constitution provides that 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone'.

are usually taken to include those of the Constitution.[3] Hence, the majority of authors hold that self-executing provisions of treaties and of decisions of international organizations have supra-constitutional status, with this priority being usually understood in the doctrine in *hierarchical* terms.[4]

In this respect, the Constitution of The Netherlands has been since 1953 well disposed towards European integration, by taking an approach that can be said to substantively coincide with that developed by the European Court of Justice in *Van Gend en Loos*,[5] *Costa v. ENEL*[6] and *Simmenthal* (II)[7].[8] Articles 93 and 94 of the Constitution were geared towards European integration in the framework of the E(E)C and EU. During the general revision of the Constitution in 1983, Parliament and the Dutch Government explicitly reconfirmed their applicability to EC law. It is somewhat paradoxical that while The Netherlands had a Constitution which was so well prepared for the supranational character of EC law, a majority of authors in the field of constitutional law held that EC law had direct effect, primacy and superiority *per se*, that is to say even beyond and quite independently of the constitutional provisions on the status of treaties and of decisions of international organizations (*praeter constitutionem*). This view was also adopted by the penal chamber of the Dutch Supreme Court (*Hoge Raad*) in a laconic judgement in November 2004.[9]

4. POLITICS AND EUROPE

The political elite in The Netherlands has always favoured European integration. Although there have been parliamentary objections to the democratic deficit and the

3. Art. 91(3) of the Constitution provides that 'If a treaty contains provisions which depart from the Constitution or which lead to such a departure, it may be approved by the Houses only with at least a majority of two-thirds of the votes cast'. However, this latter provision has not been used in approving the EC/EU Treaties and their amendments. These two provisions, read together, led a minority of authors to suggest that if the procedure of Art. 91(3) of the Constitution has not been followed, courts are not at liberty unilaterally to override a provision of the Constitution. After all, by not following the procedure of Art. 91(3), Parliament and Government have declared that there is no incompatibility between the Constitution and the Treaty. This is so due to Art. 120 of the Constitution, according to which 'Courts shall not review the constitutionality of Acts of Parliament and treaties.'
4. One of the few notable exceptions is C.A.J.M. Kortmann, *Constitutioneel Recht* (5th edn, Deventer, Kluwer, 2005), p. 364. He has not expounded on this view, which is remarkable given its relative minority position.
5. *Van Gend en Loos*, Case No. 26/62 [1963] ECR 10.
6. *Costa v. ENEL*, Case No. 6/64 [1964] ECR 585.
7. *Simmenthal*, Case No. 106/77 [1978] ECR 629.
8. Incidentally, the same person who, as a Member of Parliament, introduced an amendment to the Constitution incorporating the present Art. 94, was the first President of the European Court of Justice, Mr Serrarens. The next President of the ECJ, A.M. Donner, was a member of all committees which prepared this and other relevant constitutional amendments, particularly the one of 1956 which specified the parallel to the doctrine of direct effect in EEC law; Donner was President both when the decisions in *Van Gend en Loos* and *Costa v. ENEL* were delivered.
9. Hoge Raad, 2 November 2004, NJ 2004, 156, to be found under nr LJN: AR1797 at <www.rechtspraak.nl>, 28 April 2006.

lack of democratic accountability for decisions made by the Communities since the time of the adoption of the ECSC Treaty, no anti-Europe groups of any significance have existed. The only exception was the Communist Party, which disappeared during the second half of the 1980s, though it has now found something of a successor in the SP, a populist leftist party[10] which has a consistent anti-European programme and was quite effective during the referendum campaign.

Factors that contributed to the international orientation of The Netherlands are the geographic position of the country in the delta of the Rhine and Meuse rivers, with major North Sea harbours, which has greatly favoured trade since the 16th century. Commercial interest has always been synonymous with international interest; the open economy has meant a high dependence on the international economy and international trade. International co-operation has therefore always been to the advantage of the Dutch. European integration has never been viewed as a 'zero-sum game', as the sovereignist language of *Van Gend en Loos* and *Costa v. ENEL* suggests, with its articulation of the idea of transfer of sovereignty from the Member States to the EEC. In The Netherlands, European integration has been viewed as much more favourable than a zero-sum game.[11] And yet, the 'Constitution for Europe' was rejected in the consultative referendum.

5. THE REFERENDUM

The referendum of 1 June 2005 on the Treaty Establishing a Constitution for Europe was the first national referendum held in the European part of The Netherlands in hundred years,[12] although the referendum was consultative in nature rather than a binding one. It was consultative inasmuch as the legislature took the initiative to consult the electorate on its opinion concerning the Constitution for Europe.

The consultative nature of the referendum had one far-reaching consequence: it preceded political decision-making on the European Constitution. The Treaty was submitted to Parliament, but its scrutiny and all parliamentary debates were

10. This is short for *Socialistische Partij*, but the full name is no longer used by the party, which has reneged on its originally Maoist inclinations. The party holds 9 out of 150 seats in Parliament, but is more strongly represented at local level.
11. However, international co-operation should extend also beyond the EU: the maritime interest makes The Netherlands Western-oriented – and so has been its politics. This has meant for the Dutch foreign policy that European integration and an Atlantic orientation were viewed not merely as reconcilable but as a high priority. Nowadays this orientation spills over into a broader concept of international trade co-operation, in particular through the WTO.
12. There have been several referendums in the overseas territories, in particular on the islands of The Netherlands Antilles, concerning the future status of these territories. To understand why there have previously been no national referendums, one needs to know that The Netherlands was a country of religious and political minorities for centuries: since the end of 19th century until the 1960s it was a pillarized society, with a very strong civil society, in which the political elites of the various denominations met at the apex of the political system in order to broker political compromises that could not be determined on the basis of numbers only. This increased the importance of the representative nature of democracy, in which single issues could not predominate the decision-making for the risk of stalling the system.

postponed until after the referendum. As a consequence, political parties had not seriously debated the question whether to approve the text submitted for approval, or indeed responded in any articulate manner to the Government's defence of the text in the Explanatory Memorandum attached to the Bill for approval. A political debate within and between political parties, an overwhelming majority of whom were in favour of the text, could have clarified the strengths and weaknesses of the proposed Constitution in a representative manner, through politicians. Lack of necessary information was found to be a problem by 56 per cent of the electorate before voting, according to one opinion poll; for those who did not vote, this percentage was even higher at 62 per cent. The largest single explanation given by 'No' voters in this poll was the lack of information (32 per cent).[13]

The referendum was not legally binding because it was argued that the Constitution makes the approval of treaties a matter for Parliament alone. This argument is analogous to the general opinion that legislation can, according to the Constitution, only be decided by Parliament and Government together, and therefore cannot be made dependent on a referendum. Moreover, a binding referendum would conflict with the representative nature of the political system enshrined in the Constitution. The Constitution thus locates decision-making on Treaty approval in Parliament (together with the Government), and not in the electorate as such.[14] This legalist approach taken in the run-up to the referendum was hiding a practical truth – no legislature could afford to ignore a 'No' of a vast majority of the voters in a referendum, particularly since this referendum had a much higher turnout than the European Parliament elections. On 1 June 2005, about 63 per cent of the electorate cast a vote, and nearly 62 per cent of the voters answered 'No' to the question whether the Kingdom of The Netherlands should approve the Treaty Establishing a Constitution for Europe.

6. AFTER THE REFERENDUM: THE POPULAR RESPONSE

It is still difficult to say definitively why voters voted against the Constitution – they seem to have done so for a number of different reasons. A Eurobarometer

13. Eurobarometer, Flash Eurobarometer 172, The European Constitution: post-referendum survey in The Netherlands. [Fieldwork: 2–4 June 2005, Publication: June 2005], European Commission, pp. 6 and 15.
14. The analogy is not decisive. Whereas Art. 80 of the Constitution stipulates: 'Acts of Parliament shall be enacted jointly by the government and the States General,' Art. 91(1) and (2) of the Constitution provide the following: '1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General.. . . 2. The manner in which approval shall be granted shall be laid down by act of parliament, which may provide for the possibility of tacit approval.' So it mentions only Parliament (the States General), and leaves it to an act of Parliament to stipulate the particulars of parliamentary approval. In reality, this act has made express treaty approval dependent on the adoption of an act of Parliament – that is to say, not only the consent of Parliament is required, but also that of the Government. This being so, it is not apparent why an act of Parliament could not allow for a binding referendum.

opinion poll has analyzed the responses as to what people said about their own voting behaviour.[15] The outcomes of this opinion poll may be unconvincing on some scores, but they are revealing on certain others. Other quick polls were conducted,[16] and the Government commissioned an in-depth research in 'focus groups', with four selected groups of 'No' voters, two groups of 'Yes' voters and two control groups, each made up of average citizens. The aim of these was to find out how to respond to the public debate on 'Europe', and gain a clear insight into motives of both the 'No' and 'Yes' voters.[17] The outcomes of these polls and research efforts diverged on a number of issues, the most significant divergence being the Eurobarometer's estimate of the role played by the potential accession of Turkey to the EU, with only 3 per cent of the 'No' voters indicating this as their reason. This result contradicted certain other polls, and it also seems to be somewhat at odds with anecdotal evidence. For example, a poll conducted on the day of the referendum, asking whether the accession of Turkey played a role, found 22 per cent of the 'No' voters saying that it was indeed significant. This may be relatively low in comparison with some polls concerning the French 'No', but it is significantly higher than the Eurobarometer suggests, with the general feeling being that Turkey's accession did play at least a background role. Although the figures vary considerably, which can also be attributed to methodological differences, the polls do converge on certain other explanations, such as the loss of control over political affairs, the perceived financial cost of the EU ('we pay too much'), and the lack of information about the EU generally and the EU Constitution in particular; the last point figured prominently in all polls.

The issue regarding the loss of control should not be misunderstood, particularly as to articulating this as a 'loss of sovereignty', as was the language used in the Eurobarometer poll. Conceptions of 'sovereignty' have never been very strong in The Netherlands, neither in the constitutional history nor in the political debate, while on the whole public opinion is strongly in favour of European integration. It is indeed a matter of 'loss of control' rather than 'transfer of sovereignty' that seems to be at play here. The metaphor of the European Union as an 'unstoppable fast train' was resonating throughout intense public debates in the weeks preceding the referendum. Also, the unfathomable nature of the EU and what it is doing is particularly striking; this is corroborated by the motive of 'lack of information' amongst the 'No' voters.

A major reason for not taking the 'loss of sovereignty' in such terms, but rather for understanding it in terms of a 'loss of political control', is the fact that The Netherlands have still not recovered from the political upheaval caused by the

15. Eurobarometer, supra note 13.
16. A number of these are summarized in A. Nijenboer, 'The Dutch Conversion' (2005) 3 EUConst, 393–405.
17. *Kom maar naar de camping! Tijd voor een reality check* [Come to the Holiday Camp (i.e. the debate on Europe), Time for a Reality Check], Eindrapport focusgroepen Buitenlandse zaken, September 2005; downloadable via <www.tweedekamer.nl>, follow link < documentation>, next link < Parlando>, last consulted on 28 April 2006.

rise (and demise) of the political sentiment stirred up by Pim Fortuyn. A cleavage between popular sentiment and political elites, a recurring event in Dutch political history in cycles of approximately 40 years, can easily manifest itself in a referendum on a proposal which is favoured by the overwhelming majority of politicians and political parties. The fact that the electorate has never had a chance to express itself directly on decisive issues seems to have psychologically reinforced the tendency to say 'No' as soon as the opportunity to do so emerged.

The same may be said about the negative image which the EU institutions have in the public opinion in The Netherlands: for 61 per cent of the electorate, the European institutions do not evoke a positive image.[18] It is likely that this scepticism is another indication of the sense of alienation of citizens from political institutions, although this is not necessarily a destructive thing. Indeed, the Eurobarometer poll made it quite clear that there remains a general support for European integration in The Netherlands, including among the 'No' voters, with as much as 78 per cent of the 'No' vote perceiving membership of the EU as a good thing.[19]

7. THE CONSTITUTIONAL EXPLANATION

The above reflections concern the political sentiment of the day. In order to understand the constitutional aspect of the vote and its aftermath, the cultural understanding of constitutions in the political order of The Netherlands must be considered. In this respect, the answer to one question posed in the Eurobarometer poll immediately after the referendum is telling, providing an insight into the importance the Dutch electorate ascribes to the European Constitution. In one question, citizens were asked to indicate whether they tend to agree or disagree (or do not know) with the following statement – 'The European Constitution is essential in order to pursue the European construction.' Nearly 50 per cent of the respondents disagreed with this statement. Even one-third of the 'Yes' voters stated that they disagreed that the Constitution is essential to the European construction, against two-thirds of the 'No' voters.[20]

The poll continued with the following question: 'If between now and November 2006, at least 20 of the 25 Member States ratify the Constitutional Treaty, the European Council, composed of Heads of State and Government of the Member States, should decide on the procedure regarding the application of the Treaty within the European Union. Which of the following propositions would you prefer?' The options for answer were: (a) organizing a new vote in the countries which had not ratified the Treaty; (b) applying the Treaty only in the countries which ratified it; (c) abandoning the Treaty for all Member States; (d) another solution; and (e) 'don't know'. Almost one in two of the Dutch citizens (45 per cent) would like to see the Constitution abandoned in such a scenario. Not only 54 per cent of the 'No' voters

18. Eurobarometer, supra note 13, p. 22.
19. Eurobarometer, supra note 13, pp. 20–21.
20. Eurobarometer, supra note 13, p. 21, statistical annex p. 44 and last page.

thought so, but also 36 per cent of those who voted in favour of the Constitution. In an identical poll in France, the overall opinion to abandon the Constitution was significantly lower, at 36 per cent.[21]

The above data reveal a striking contrast in the attitude of citizens towards the Constitution. From a constitutional point of view, the explanation can be relatively simple: it conforms to the different type of constitution the Dutch and the French have, in terms of the two types of constitutions delineated in the introduction to this essay. The formal Constitution of The Netherlands is a constitution, the text of which is taken to follow political realities, not to constitute political reality. For the French, the opposite holds true – the Constitution constitutes the political order, and a new Constitution signifies a new Republic. For the Dutch, rejecting the European Constitution is not an abandonment of the idea of a European Union at all, not even of the constitutional order of the European Union; it is merely a political fact to be reflected in the political order. By contrast, for the French it may be suggested that it may be more difficult to imagine the existence of a truly constitutional order for the European Union, without a formal 'Constitution'.

8. THE RESPONSE IN POLITICS

The attitude towards constitutions has to be taken into account in the political response to the referendum; it may also explain the short-term response by the political elites to the Dutch 'No'. Paradoxically, a certain enthusiasm about the intensity of popular debate preceding the referendum governed the response of politicians. For the first time in a long period, they were not visiting their own local party meetings, at which a handful of the faithful would dutifully listen to dull speeches. Politicians had to speak at least four or five times a day in all kinds of halls, cafés and other locations filled to the brim with a very critical audience of politically non-affiliated citizens. This phenomenon has led to a short-term renewed attempt to introduce referendums.

However, apart from this consequence of the cognitive dissonance between the citizens and politicians on the EU Constitution, the politicians were unsure on how to proceed. To begin, there was a call for a broad debate in the society about the European Union, to be organized together by Government and the Lower House of Parliament. Differences about the protocol and apparent {reticence/reluctance} of the Government to have its fingers burnt on the EU once more led the Government towards a gradual opt out. As the Lower House did not want to assume the responsibility, it also opted out of the debate.

At the time of writing, there is a {roaring/deafening} silence reigning in The Hague as to what should be done. Carefully and very much in the political twilight, political parties must however be considering the matter, because the 2007

21. Eurobarometer, supra note 13, pp. 26–27.

national elections should clear the way to resolving the European problem, at least as regards the stand The Netherlands presents towards the other Member States. A Dutch Protocol like the Danish or Irish precedents is excluded, as nobody knows what should be in such a Protocol, and nobody is asking for such a protocol. Nevertheless, the issue of formal constitutions not being decisive might leave some room to manoeuvre, as long as the Member States are willing to follow a very pragmatic approach. Perhaps dropping the name 'Constitution' might soothe the Dutch concern over creating stiff and formal arrangements, which mostly seem to benefit the larger states.

9. THE FUTURE OF THE EUROPEAN CONSTITUTION

Whether the European Constitution should be revived or not, and how this would have to be done, is uncertain. Be that as it may, things have to be viewed in the right perspective, and, in so doing, it is necessary to consider the nature of the European Constitution.

Constitutionally, the European Union has been a purposive construction, which was intentionally given the form of an incremental project. The Founding Fathers clearly had a vision about a united Europe. At the time this vision had its origin in the political cataclysm constituted by the tragedy of the World Wars, Nazism, fascism, and in the necessity to overcome the associated French-German enmity, which had been a permanent threat to peace and stability in Europe. However visionary the design, the approach and choice of instruments were functionally oriented.

Now, however, it has become difficult to think of one single and unified 'motivating myth'. Since the series of enlargements from the six via the nine to 15 and then to the 25, the moving myth is no longer one single experience at the root of one equivalent 'never again', but an amalgam of quite different experiences of dictatorship, which in the experience of at least one generation in the newest Member States is not directly linked to the Second World War (let alone the First).

The European Union has a historically developing, incremental constitution, based on a set of Treaties, case-law and other documents, together making up a constitution. It has become by its very nature and make-up a typically 'historical' constitution, not a 'revolutionary' constitution. For a lack of a unifying political disaster afflicting the 25 Member States, which would usher in a new design, it will be difficult to apply the constitutional rhetoric of revolutionary traditions to any newly invented Constitution – the 'area of freedom, security and justice' is the epitome of rhetorically flawed parallels to the French Revolutionary Trinity. Additionally, the Treaty Establishing a Constitution for Europe was not really of a revolutionary design anyway, but a construct that tried to make a number of things run slightly more smoothly in the operation of the EU system.

Somehow, we shall simply have to make do with whatever we have. If the Nice Treaty was not a grand design, it did not lead to a breakdown either; to the contrary,

the failed Constitution seems to cause many more problems than the relative failure of Nice did. It is not risky to predict that the Dutch would rather opt for a muddling through towards a more effective Europe, rather than opting for grand designs. The solution to the constitutional crisis must therefore be entirely pragmatic, with or without a Constitution, the ultimate reason for this being simply that the EU constitution is inescapably historical in nature and entirely un-revolutionary.