

# Report on the Netherlands

## Double Dutch: the Referendum on the European Constitution

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On 1 June 2005 the Dutch rejected the Treaty establishing a Constitution for Europe in a referendum which asked the voters whether parliament should approve it, yes or no. About 63 per cent of the persons eligible to vote actually cast a vote, and nearly 62 percent of them answered 'NO'. Yet, the actual meaning of this rejection is in several respects hard to explain. This is so, particularly because of the fact that both the Dutch government and parliament have been massively supporting European integration, while – although the matter was never put to the vote – support in parliament for the draft EU Constitution previous to the referendum was about 85 %. And surprisingly, after a brief moment of confusion, members of parliament were nearly jubilant over the 'success' of the referendum. Part of the confusion was the call for a 'broad social debate on Europe' – similar to the Irish Forum on Europe organized after the negative in the first Nice referendum<sup>2</sup> – which found huge support in parliament and also with the government.<sup>3</sup> But once it was to be organized, it floundered on unwillingness both of the government and parliament to agree on who should do what and how. So after some three months the nearly unanimous enthusiasm over a national Europe debate, it was called off.<sup>4</sup>

In this brief report we try to provide some information on the background of the referendum and its results in an attempt to make sense of this double Dutch.

### *Why did the voters say they voted the way they did?*

There has been a Eurobarometer opinion poll analysing responses as to what certain people say about their own voting behaviour.<sup>5</sup> The outcomes of this opinion poll is surprising and unconvincing on some scores, but revealing on certain others, as we shall see. Other quick polls were conducted,<sup>6</sup> and the government commissioned an in-depth research in 'focus groups' – four selected groups of no-voters, two groups of yes-voters and two control groups of average citizens – on how to proceed to speak in the public debate on 'Europe', of which the results give a keen insight into motives of no- and yes-voters.<sup>7</sup>

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<sup>2</sup> See Cathryn Costello, Irish Lessons. In: (2005) European Constitutional Law Review, 3, 357-382.

<sup>3</sup> Resolution Van Bommel c.s., Kamerstukken TK [Parliamentary Documents, Lower House] 2004-2005, 29 993, nr. 14.

<sup>4</sup> Letter from the *Presidium* of the Lower House, 11 October 2005, Kamerstukken TK [Parliamentary Documents, Lower House] 2004-2005, 30 257, nr. 6.

<sup>5</sup> Flash Eurobarometer 172, The European Constitution: post-referendum survey in The Netherlands. [Fieldwork: 02/04 June 2005, Publication: June 2005], European Commission.

<sup>6</sup> A number are summarized in Arjen Nijenboer, The Dutch Conversion. In: (2005) European Constitutional Law Review, 3, 393-405.

<sup>7</sup> 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](http://www.tweedekamer.nl) → documentation → Parlando.

Obviously, on quite a few points the outcomes of these various polls diverge. The most significant divergence was the Eurobarometer's estimate of the role a possible accession of Turkey to the EU: only 3 % of the no-voters would have taken this as their reason. This is contradicted by certain other polls and with anecdotic evidence. Thus, one poll taken on the day of the referendum asked whether accession of Turkey played a role: 22 % of the no-voters said it did so. This is relatively low as compared to some polls concerning the French 'no', but very much more than the Eurobarometer suggests. Generally, the feeling is that the issue of Turkey's accession did play a role at the background.

Although the figures vary considerably, also due to methodic differences, the polls are converging on certain other explanations, which are the loss of control over political affairs, the perceived pecuniary cost of the EU ('we pay too much'), while in all polls the lack of information about the EU in general and the EU Constitution in particular figures prominently.

The argument as to the loss of control should not be misunderstood, particularly as to the aspect of 'loss of sovereignty', as was the language used in the Eurobarometer's poll. Conceptions of 'sovereignty' have never been very strong in the political debate, and 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 which seems to be at play here. The metaphor of the European Union as a 'unstoppable fast train' was resonating throughout the intense popular debates in the weeks preceding the referendum. Also, the unfathomable nature of what the EU is doing and is all about is particularly striking.

#### *Constitutional explanations: the nature of referenda*

Among the many different explanations, some are put forward which do not focus on the claims of the voters themselves on their voting behaviour.

Thus it is pointed out that this was the very first national referendum in the Netherlands since the beginning of the Kingdom in 1813. It is said that in a country where there is no tradition of referenda, and you give citizens the binary choice of saying 'yes' or 'no' to something – an option they do not have in normal elections - they will say 'no'. This not a matter of sheer obstreperousness. A rather sophisticated politico-psychological explanation of this is that under such circumstances citizens will want to say something really meaningful which makes a change to things which otherwise (had no referendum been held) would happen nevertheless (i.e., the EU Constitution would have passed). The most meaningful vote, in short, is 'no'. A 'no' has more impact than a 'yes', and citizens seize the opportunity to make a difference the one time they get it.

It is outside the competence of this author to judge to what extent this mechanism has played a role in the outcome of this particular referendum. Nevertheless, it touches on how to interpret the 'no' in terms of the constitutional system's function of representative democracy: many authors, also very reputable ones,<sup>8</sup> claim that the 'no' shows that representative democracy is disfunctioning. This is often phrased in terms of the complaint of the existence of a wide gap between politicians and citizens. This 'gap' is by now a traditional in the literature on the governmental system of the Netherlands. It has been at the basis of all discussions on reform or modification of the constitutional system, particularly the parliamentary system of government, ever since the late 1960s. Two remarks deserve to be made in this respect.

Firstly, it is a necessary assumption behind any referendum that there is a possible divergence between the majority opinion of politicians and citizens – otherwise referenda would only be

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<sup>8</sup> For instance Herman Van Gunsteren, *The Birth of the European Citizen Out of the Dutch No Vote*. In: *European Constitutional Law Review*, nr. 3, pp. 406-411.

symbolic. In other words, it is in the very nature and purpose of referenda to establish that there can indeed be a gap.

Secondly, the complaint that the gap is structural is partly a reflection of the role attributed to individual citizens within the political order. This has a historical background and explanation in the development of Dutch society and politics.

One of the most striking features of society and politics from the 1880s up to 1990s was the 'pillarized' nature of society. Dutch society was made up of permanent social-denominational minorities: a protestant, a catholic, a neutral *cum* liberal and a socialist minority. Each of these had its own soccer clubs and other sports clubs, culture associations, scouting groups, choirs, brass bands, trade unions, employers organizations, broadcasting associations, and political parties. In such a structure of denominational minorities, it is important to work through representatives in order to guarantee the coherence of public society by respect for others through mechanisms based on permanent consultation of each other towards endless compromises acceptable to as many as possible. Under such circumstances there are no clear issues of 'yes' or 'no'. Counting numbers only, would not normally lead to a majority result anyway. And if it results in any majority at all, it might lead to accidental and unrepresentative outcomes, upsetting a social balance and rocking boats too heavily.

With economic growth leading to wealth for individual citizens at a scale unheard of previously, together with a broad process of secularisation, the representative nature of the system became questionable. This became immediately evident in calls for constitutional change, for introducing elements of a majority system in the strictly proportional electoral system, and hence elements of a majority system in government, as well as for referenda. It took a very long time before such calls mustered the occasional majority, as was the case in the organisation – at the initiative of Lower House majority – of the referendum on the EU Constitution.

#### *Lack of information and the form of the referendum*

One of the things prevalent both in the public debates preceding the referendum and in the polls afterwards, was the general sense that one was not well informed about the European Union and the European Constitution. The Eurobarometer – for what it is worth – even finds it is the most often mentioned single reason for voting 'no'.

This lack of information is in part a matter of voters' behaviour. In principle every voter could acquire a free copy of the EU Constitution's text at the municipality. Yet, the official national referendum commission who organized the referendum, has been blamed for the information which it put in a leaflet it had produced. In this extremely brief synopsis of the text of the document it said such things that the 'primacy clause' in the Constitution was a new thing. Of course, European lawyers would argue that there is little new about this since the *Van Gend & Loos* and *Costa/ENEL* judgments of the European Court of Justice. But also there are those who say it is indeed a new provision, as it is not written into the treaties at present, and extends primacy to what are now second and third pillars to which it presently does not apply. However this may be, the lack of politically guided information may well have been exacerbated by the particular legal form chosen for the referendum.

Firstly, the referendum was not binding but consultative. The reason for this is that there is consensus on the assumption that the Constitution's provision which locates the legislative power in the States General and government acting jointly (Article 80 of the Constitution of the Kingdom of the Netherlands) prevents the electorate by referendum acquiring legislative power.

Because the referendum was consultative in nature, the referendum was decided to take place *before* any debate on the text of the Constitutional Treaty took place in parliament. The government had introduced a bill into the Lower House approving the Treaty, but the Lower

House postponed any treatment of it until after the referendum, in order not to frustrate the electorate's free and uninfluenced advice on the matter. This had disastrous consequences.

The government initially failed to take any steps towards having a campaign in favour of the Treaty it had negotiated and signed until a few weeks before the referendum, when all signs were gradually pointing towards a 'no'.

Similarly, political parties in favour of the Treaty did not engage in previous debates either within their own constituencies or between parties. In fact, even during the campaign the 'yes' parties covered an unusually broad spectrum, making for odd bed fellows from the leftist Green Party to the right wing of the conservative liberal party. This broad coalition was unable to articulate a strong politically partisan view on why this EU Constitution should be supported also by the citizens. Public debate, however, began being unusually intense. Unlike normal electoral campaigns, meeting halls were not filled with the handful of dutifully present party members of one's own party, but filled to the brim with citizens who had all kinds of questions to which the large majority of established parties only gave too easy, superficial or unconvincing answers. Symbolic was an entirely unconvincing statement about the necessity of adopting the Constitution, which seemed to imply that otherwise war could break out between European states. One very brief statement by the German minister of Foreign Affairs, Joschka Fisher, in a television broadcast in the Netherlands made more impression and political sense than any politician in The Hague was able to foster. There is general consensus that in the face of an efficient and relatively aggressive 'no'-campaign from small left and right wing parties, the 'yes'-campaign was weak, unconvincing, presented too little and came too late.

The matter might have been considerably different had the referendum been a *corrective* referendum, that is to say *after* parliament not only decided but had deliberated on the Constitutional Treaty, during which parties would have had to articulate the strengths and weaknesses of it. Loyalties are not bought automatically by such debates, but they can in fact inform the public about arguments in favour and against the adoption of a particular instrument than when citizens basically left to themselves to inform parliament.

### *Beyond the EU Constitution*

One of the interesting things in the Eurobarometer poll is not so much the figures themselves, but the possibility it offers for comparisons. The Eurobarometer also did an identical poll in France after the referendum. The result which strikes a public lawyer the most, in comparing the answers for France and the Netherlands is the quite different opinion which French and Dutch voters have on the importance of the EU Constitution for the future of European integration.

First of all, the Dutch voters massively support European integration. Membership of the European Union is supported by no less than 78 % of the 'no'-voters, and 87 % of both 'yes' and 'no'-voters.

What is even more surprising is that a relative majority of 50 % of all Dutch voters do not consider the EU Constitution to be essential in order to pursue the European construction (against 41 % which do and some 9 % with no opinion on the matter).

This view is further confirmed in the answer to the question whether the EU Constitution should be abandoned if after two years four fifths of the Member States would have ratified and one or more had found difficulties in ratification. Nearly half (45 % ) of the Dutch would want to abandon the EU Constitution, while only 27 % think another referendum should be held in those countries where it was initially rejected. A significant number of those who voted *in favour* of the EU Constitution (35 %) found it should be abandoned once it had been rejected, even if 20 member states had ratified.

This is significantly different from the French results: there, only 36 % thought the project of an EU Constitution should be abandoned and as much as 35 % found it should be put to a second referendum.

The difference may well be explained by the different importance attached to the phenomenon of a 'constitution' bearing that name. Whereas France and the French constitutional tradition belong to the continental tradition according to which all power devolves from the sovereignty embodied in the Constitution, the constitutional culture of the Netherlands is different and much weaker. The Constitution in the Dutch context is only one particular instrument in regulating the exercise of political power, but it does not have that exalted and exclusive nature it has in a country like France (or other EU member states for that matter). The Dutch view of the Constitution is much more similar to the British conception of its constitution, which is that of a flexible set of norms which reflect practice rather than steer and dominate it. If practice shows that so far we have done without any particular content to an instrument bearing the name of a constitution, there is no reason to assume that doing without in the near future is the end of the world – or Europe.

This finding suggests that the electorate found itself quite safe to vote 'no'; the EU Constitution cannot be that indispensable – or even important – after all.

#### *The future of the European Constitution*

The present government has in the meantime withdrawn the bill for the approval of the Constitutional Treaty.<sup>9</sup> And also in external fora it enunciates as the official view of the government, in this respect supported by parliament, that the present text of the EU Constitution is dead beyond resurrection – though in reality it has not been buried yet in all the other member states, where at best it is shelved. Indeed, the Dutch government takes as its view that present arrangements within the EU and its institutions may not be perfect, but they are manageable with 25 member states; after all, in Nice the agreement was that it could work this way also with an EU of 27 member states.

Nice is precisely the horizon. If negotiations with Croatia – supported also by the Dutch and French governments – were to be successful, then also new institutional arrangements shall have to be agreed upon. At the soonest this will need to be negotiated by approximately 2007. This is convenient timing for the Dutch government which very obviously wishes not to burn its fingers on any text of any EU Constitution: national elections are to be held at the latest in that year. Should the corpse of the earlier text suddenly be tumbling from the shelves, that will be the business of another cabinet.

In the meantime we will have to make do with the European constitution which lawyers have been saying the EU has already had for decades.

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<sup>9</sup> Letter from the prime minister of 1 July 2005, Kamerstukken TK [Parliamentary Documents, Lower House] 2004-2005, 30 025, nr. 8 (reprint).