

Constitutional Law / Droit constitutionnel

2010

THE NETHERLANDS / PAYS-BAS

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1. INTRODUCTION

THE General Elections for the Second Chamber, the directly elected chamber of the Dutch Parliament, and the formation of a new Cabinet which started after the elections, dominated the Constitutional debate in the Netherlands in 2010. For the first time in modern parliamentary history a minority cabinet was formed having the support of a third populist party, the Party of Liberty (*Partij voor de Vrijheid*, PVV), which is led by the controversial politician Geert Wilders. Furthermore, there was a fundamental change in the compilation of the Dutch Council of State, the most important advisory body of the Government. In an important case the Dutch State was convicted by the European Court of Human Rights. In 2010 also an important Commission on Experts on the Constitution presented their final report with some noteworthy recommendations. Besides the General Elections for the Second Chamber, also elections were held for all of the municipality councils.

2. GENERAL ELECTIONS AND A NEW CABINET

On the 9th of June 2010, the General Elections for the Second Chamber of the States-General were held. The result of these elections were

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remarkable and showed that the Dutch political landscape is fragmented¹. The Elections were held after the former Dutch government ended their coalition, which was formed by the Christian Democrat Party (CDA), the Dutch Labour Party (PvdA) and a small more fundamentalist Christian Party (ChristianUnion). In February 2010, a disagreement came up between the two largest coalition partners CDA and PvdA. The Christian Democrats wanted to continue the Dutch military campaign in Uruzgan, Afghanistan, whereas the Labour Party wanted to terminate this military mission. The Labour Party said that they had already in 2006 promised their voters to withdraw the troops in the next period of government. The third and smallest coalition partner tried to unite both parties, but did not succeed. On the 25th of February, Prime Minister Jan Peter Balkenende CDA went to the Dutch Queen and asked for the government's resignation.

The result of the General Elections for the Second Chamber was, as stated, remarkable. The 150 seats of Parliament were distributed to a spectrum of political parties which were not very cooperative to each other. Especially the landslide victory of the Party of Liberty with 24 seats showed that the formation of a new government would be difficult. The leader of this controversial political party Geert Wilders, has made some strong statements on Islam, which were not favourable for other elected politicians of other parties. For some of these statements Wilders has been prosecuted and in 2011 the District Court of Amsterdam will give its verdict². The winner (31 of the 150 seats) of the Elections was the Party for Freedom and Democracy (VVD). The leader of this political party Mark Rutte took lead in forming a new coalition. The Christian Democrats had lost many voters and declined from 41 to 21 seats. The leader of the Christian Democrats and former Prime Minister Jan Peter Balkenende left national politics. The leader of the Labour Party, Wouter Bos, had already left as leader before the elections³. His successor and former Mayor of

¹ See e.g. *The Telegraph*, <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/7816382/Dutch-election-Liberals-take-one-seat-lead-as-far-right-party-grows-in-influence.html>, 10 June 2010.

² *Dutchnews.nl*, Wilders prosecution to go ahead, http://www.dutchnews.nl/news/archives/2010/01/wilders_prosecution_to_go_ahlea.php, 14th January 2010.

³ *Dutchnews.nl*, Labour leader Bos quits, Cohen steps up, http://www.dutchnews.nl/news/archives/2010/03/wouter_bos_stands_down_as_lab_o.php, 12 March 2010.

Amsterdam Job Cohen won 30 seats in parliament. In the first weeks of the formation four political parties, VVD, PvdA, the Left Democratic Party (D66) and the Green party (GroenLinks) tried to make a compromise but did not succeed due to the differences in solving the economic crisis and the savings on the national budget. After several consultations with the leaders of the different political parties, Queen Beatrix asked Ivo Opstelten (VVD), former Mayor of the city of Rotterdam, to investigate if a minority cabinet between the Liberal Party (VVD) and the Christian Democratic Party with support of the populist Party (PVV) of Geert Wilders would be a possibility. Much resistance against such a coalition arose. Not only from the opposition, but also from the members of the Christian Democratic Party. One third of its members showed their rejection because they stated that support of the Populist Party was beyond the Christian principles the party stands for. Nevertheless, on the 14th of October 2010 a new cabinet was appointed by Queen Beatrix. Mark Rutte, leader of the Liberal Democratic Party (VVD), became the new Prime Minister⁴. Maxime Verhagen, the new leader of the Christian Democratic Party, became Deputy Prime Minister. The Populist Party did not join the cabinet, but claimed in favour of supporting the cabinet several strong measurements on integration and immigration. The coalition has the smallest majority in the Second Chamber, 76 of 150 seats.

3. A NEW STRUCTURE OF THE COUNCIL OF STATE

In April 2010, the First Chamber voted for a new Act of Parliament in which the Council of State (*Raad van State*) would be restructured⁵. The Council of State is the highest advisory body of the Dutch Government and also the highest (general) administrative court in the Netherlands⁶. In 2003, the European Court of Human Rights decided in the *Kleyn*-case that the Netherlands should be careful with the (old) structure of the Council of State because the two functions could conflict with each other⁷. For

⁴ *BBC-news*, Dutch queen OKs government backed by Geert Wilders, <http://www.bbc.co.uk/news/world-europe-11498595>

⁵ Eerste Kamer aanvaardt herstructurering Raad van State, http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/viejd9qr1ih8?ctx=vih9dp4hyqv1&start_tab0=60

⁶ www.raadvanstate.nl

⁷ See for a good abstract NIELS BLOKKER / J. G. LAMMERS / RENE LEFEBER / INEKE VAN BLADEL, *The Netherlands in court: essays in honour of Johan G. Lammers*, Leiden: Martinus Nijhoff Press, 2006, p. 159.

instance, it was not unthinkable that a member of the Council of State could be a judge in an administrative case in which he already had given advice to the Government. Article 6 of the European Convention on Human Rights could, therefore, be violated because a judge has to be independent and impartial. Although the ECtHR ruled in *Kleyn* that in that case there was no violation of Article 6 ECHR, they also stated that in the near future a problem could arise. In the former structure of the Council of State, 28 members had the task to give advice on all legislation and to judge on administrative cases. Furthermore, there were almost 50 members who only had the task to judge on administrative sanctions. The First Chamber wanted a total separation between the two tasks and no member of the Council of State should have both functions. Nevertheless, within the new structure 10 members of the Council of State have remained a double function. Most members, have within the new structure, only one task, advising or judging. There are more judges now than advisory members. The President of the Council is still the same, namely Queen Beatrix. It is more of a procedural presidency because daily business of the Council of State is the Vice-President Herman Tjeenk Willink. He is also the closest advisor of the Queen. Every year he gives a press conference in which he gave critic on the lack of Constitutional knowledge of the key-role players in politics such as the members of the Second Chamber⁸.

4. COMMISSION ON THE CONSTITUTION

In November 2010, an important report was presented by a special Commission on the Dutch Constitution⁹. This Commission was established in 2009 and consisted of 10 experts in the field of Dutch Constitutional Law. The task of this Commission was to do research and give advice to the Dutch Government on the question if the Constitution needs amendment and, if so, how these amendments should be constructed. The Government, furthermore, specified this general question into three more specific questions which have been answered by the Commission. In the first place, the Commission had to answer the question if the Dutch Constitution needed a preamble. The Commission stated in their final report that there was no need for a preamble because the judicial binding of preambles is not clear. Instead, the Commission gave advice to

⁸ www.raadvanstate.nl

⁹ <http://www.staatscommissiegrondwet.nl>

introduce a new Article 1 of the Constitution, in which the principle of democracy and the Rule of Law is regulated. Furthermore, the principle of legality should also be clearly mentioned in the new first article of the Dutch Constitution. In the second place, the Commission had to answer the question if new fundamental rights were necessary. The first chapter of the Dutch Constitution opens with 23 fundamental rights which were introduced in 1983, the last big reform of the Constitution. The Commission concluded that the fundamental right of access to a Court should be recorded in the Constitution, comparable with Article 6 of the European Convention on Human Rights. Also, a new article should be introduced in which would be stated that Dutch constitutional and fundamental rights can only be restricted if they are necessary in a democratic society, thus comparable again with the ECHR. In the current Dutch doctrine, fundamental rights can only be restricted by an Act of Parliament but this concerns a claim for a formal procedure and does not indicate which substantive measures are licit. Finally, the Government asked the Commission to give advice on the issue of the influence of international law on the Dutch legal order. The Dutch Constitution prohibits constitutional judicial review; therefore, Acts of Parliament cannot be (constitutionally) reviewed¹⁰. Nevertheless, all Dutch law can be reviewed with certain international treaties, which are self-executive such as the European Convention on Human Rights¹¹. The Commission concluded to keep this open system to international law in the Dutch legal order, but the Act concerning the approval of Dutch Parliament on international treaties has to be amended because of the too open provisions concerning the silent approval of Parliament which has been laid down in this Act.

¹⁰ Art. 120 Dutch Constitution: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

¹¹ Art. 93 and 93 Dutch Constitution:

Article 93: Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

5. VIOLATION OF FUNDAMENTAL RIGHTS

A few cases concerning fundamental rights are interesting to discuss. On the 9th of April 2010, the Dutch High Court (Civil division) adjudicated that the Dutch legislator did not abide by Article 7, section 1, sub c Convention on the Elimination of All Forms of Discrimination against Women in which is stated that the State has to take measures to guarantee that women can equally participate in the political process¹². The cases concerned a Dutch fundamentalist religious party (SGP) which does not allow passive female suffrage. This party has been elected with one or two seats in Dutch Parliament since 1917. The Dutch State, legislator and Government, never took any action to end this practice of the SGP. The Dutch Supreme Court ruled in this case that, under the UN women's treaty, the State is obliged to take measures to change this practice. Interestingly enough, in 2007 the highest administrative court in the Netherlands took a different position emphasizing the freedom of association and religion of the party. The SGP has taken the case to the European Court of Human Rights.

Another interesting case is the case between *Sanoma versus the Netherlands*. In September 2010, the Grand Chamber of the ECtHR ruled that the Netherlands had violated Art. 10 ECHR¹³. The police in Amsterdam wanted to obtain photos taken by a journalist of an illegal car race to use for a criminal investigation into another matter. When the editor (of *Sanoma*) refused, the police arrested him and threatened to close down the newspaper - without a court order. The ECHR reached a different opinion. It confirmed once again that the right of journalists to protect their sources is a cornerstone of the freedom of the press. By arresting the chief editor of the magazine '*Autoweek*' for some time and threatening to seal and search all *Sanoma* editorial offices (in the weekend of the wedding of the Dutch Crown Prince), thus pressurising *Sanoma* into surrendering the photographic materials, the Netherlands has acted in violation of Article 10 of the Convention. Moreover, this restriction of the freedom of expression lacked the statutory basis required by Article 10 (2)

¹² *nrc handelsblad*, Forcing a party to accept women easier said than done, http://vorige.nrc.nl/international/article2523775.ece/Forcing_a_party_to_accept_women_easier_said_than_done Dutch High Court, 9th April 2010, www.rechtspraak.nl

¹³ *The International Forum for Responsible Media Blog*, Case Law: *Sanoma Uitgevers BV v Netherlands*, <http://inform.wordpress.com/2010/09/14/case-law-sanoma-uitgevers-bv-v-netherlands/>

of the Convention. After all, Dutch law allows a public prosecutor to seize journalistic material without judicial control. The ECHR agrees with *Sanoma* that there should always be prior judicial control with legal procedural safeguards before the public prosecutor may seize journalistic source materials. The ECHR ordered the Netherlands to pay *Sanoma* an expense reimbursement of € 35,000.

Finally a small but nevertheless interesting case concerns the so-called '*Jesus saves*-case'¹⁴. A strong religious person had painted the words 'Jesus saves' on his roof (a large farm, near a highway). The Mayor and alderman of the municipality in which the farm was located demanded that these words should be removed from his roof on behalf of certain local environmental rules. The owner claimed that his freedom of religion and freedom of speech were illegally restricted. The highest administrative court in the Netherlands (Administrative bench of the Council of State) ruled that there was no restriction of fundamental rights because the challenged rules concerning the environment did not have the intention to restrict the freedom of speech or religion. These so-called general restrictions of fundamental rights do always give rise to a discussion in Dutch legal literature.

6. DECENTRALISATION

Once every four years elections for the 418 councils of municipality are held. On March 3rd 2010 these elections were held¹⁵. Although these elections are important for local democracy, in 2010 the outcome of these elections was seen as a poll for the General Elections which were held, as stated above, on the 9th of June 2010. One could already see the decline of the Christian Democratic Party (CDA). The Populist Party of Freedom (PVV) participated only in two cities, namely The Hague and Almere. They won in both cities a large amount of seats and became the largest political party in the municipality council of Almere. Nevertheless, in both cities they took seat in the opposition because there was too much resistance with the other political parties to form a coalition with the PVV.

Noteworthy as well is the case of the European Court of Justice of the European Union (ECJEU) between Mr. Josemans and the Mayor of the

¹⁴ *Publiekrecht en Politiek*, 'Jezus redt' op je dak, <http://www.publiekrechtropolitiek.nl/jezus-redt-op-je-dak/>

¹⁵ *Citizenreporter.org*, Dutch Municipal Elections Article, <http://citizenreporter.org/2010/03/dutch-municipal-elections-article>.

southern city of Maastricht¹⁶. Mr Josemans runs the 'Easy Going' coffee-shop in Maastricht. Following two reports attesting that persons who are not resident in the Netherlands had been admitted to it, the Mayor of Maastricht, by decision of 7 September 2006, temporarily closed that establishment. The question for the ECJEU was if that restriction was justified by the objective of combating drug tourism and the accompanying public nuisance, an objective which concerns both the maintenance of public order and the protection of the health of citizens at the level of the Member States and at the European Union level. Under the 1976 Law on opium (*Opiumwet* 1976), the possession, dealing, cultivation, transportation, production, import and export of narcotic drugs, including cannabis and its derivatives, are prohibited in the Netherlands. That Member State applies a policy of tolerance with regard to cannabis. That policy is reflected, *inter alia*, in the establishment of coffee-shops, the main activities of which are the sale and consumption of that 'soft' drug. The local authorities may authorise such establishments in compliance with certain criteria. In a number of coffee-shops, non-alcoholic beverages and food are also sold. In an effort to reduce drug tourism, and even to prevent it, the Municipal Council of Maastricht, by decision of the 20th of December 2005, inserted a residence criterion in the General Maastricht Municipal Regulation and thus prohibited any coffee-shop owner from admitting to his establishment persons who do not have their actual place of residence in the Netherlands. The Court states that there is a restriction on the exercise of the freedom of movement in so far as the proprietors of coffee-shops are not entitled to market lawful goods to persons residing in other Member States and those persons are precluded from enjoying such services. Nevertheless, the ECJEU stated that a prohibition on admitting non-residents to coffee-shops constitutes a measure capable of substantially limiting drug tourism and, consequently, of reducing the problems it causes.

ABSTRACTS / RÉSUMÉS

The most important Dutch constitutional issue in 2010 were the General Elections for the Second Chamber of the Dutch Parliament. After these Elections, a new minority Cabinet has been formed between the Liberal Democrats and the Christian Democratic Party, supported by the populist Party for Freedom of Geert

¹⁶ *nrc handelsblad*, 3rd of May 2010, European court weighs cannabis ban for foreigners, http://vorige.nrc.nl/international/article2537302.ece/European_court_weighs_cannabis_ban_for_foreigners

Wilders. Furthermore, a new structure of the Dutch Council of State, the most important advisory body of the government and the highest Dutch Administrative Court was introduced. The Commission on the Constitution presented their final report in which some interesting ideas were discussed. Also a few important judgments were made on several fundamental rights such as the equal political treatment of man and women. Finally, also elections for the 418 councils of the municipalities were held and an important judgment was given by the European Court of Justice of the European Union on the Dutch soft drugs policy.

La question constitutionnelle néerlandaise la plus importante en 2010 a été celle des élections générales pour la Deuxième Chambre du Parlement néerlandais. Après ces élections, un nouveau Cabinet minoritaire a été formé entre les Libéraux Démocrates et le Parti Chrétien-Démocrate, soutenu par le populiste "Parti pour la Liberté" de Geert Wilders. De plus, a été introduite une nouvelle structure du Conseil d'Etat néerlandais, l'organe consultatif du gouvernement le plus important et la Cour suprême administrative néerlandaise. La Commission constitutionnelle a présenté son rapport final dans lequel ont été discutées quelques idées intéressantes. En outre, ont été rendus quelques arrêts importants concernant certains droits fondamentaux comme l'égalité de traitement politique des hommes et des femmes. Finalement, des élections pour les 418 conseils des municipalités ont été tenues et un arrêt important a été rendu par la Cour de justice de l'Union européenne concernant la politique néerlandaise en matière de drogues douces.

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