Constitutional Law / Droit constitutionnel

2018

THE NETHERLANDS / PAYS-BAS

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MANY peculiarities shape the constitutional landscape of the Netherlands. The ban on constitutional review, which entails that courts are prohibited from reviewing the constitutionality of Acts of Parliament, is one of those noteworthy characteristics. At the same time, however, Dutch courts can review every Act of Parliament on its compatibility with binding norms of international law, which contributes to yet another peculiarity: the openness of the Dutch legal order towards international law, European law and external influences. Looking at the parliamentary side of the constitutional spectrum, the Dutch pride themselves on having a strong tradition of representative democracy. This implicates the general stance towards forms of direct democracy. Attempts to introduce referenda are commonly met with suspicion and often result in slogging legislative deliberations without concrete results. The same can be said of other instances of constitutional reform, which, partly due to the rigid character of the amendment procedure of the Constitution, occur only rarely. Consequently, constitutional change in the Netherlands is often of an informal nature, brought about by evolving conventions, changing interpretations of the Constitution and

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the introduction of legislation with constitutional implications[1]. With regard to all these characteristics, notable constitutional developments took place in 2018.

A string of cases that concern the open character of the Dutch Constitution were brought to the courts. While the District Court and the Court of Appeal in Amsterdam were faced with questions surrounding Brexit, the Court of Appeal in the Hague issued its judgment in the seminal *Urgenda* case, concerning the liability of the state of the Netherlands for climate change. This judgment, in which international human rights provisions played a central role, receives special attention in this chronicle. Outside the courtroom, many other constitutional issues arose. The repeal of the Advisory Referendum Act (ARA) stands firmly among them, as does the referendum that was organised on the Intelligence and Security Services Act while the ARA was still in force. In addition, with the definitive withdrawal of the proposal to introduce a limited form of constitutional review, the debate on this type of constitutional review seems to be closed for the near feature. The same cannot be said for the topics covered by the wide range of recommendations given by the State Committee on the Parliamentary System with a view to reforming the Dutch constitutional system. These, and many other constitutional issues that dominated the agenda of Dutch constitutional law in 2018 - and might dominate it in the years to come -, are discussed below.

IN FOCUS: *URGENDA FOUNDATION V. THE STATE OF THE NETHERLANDS*

In a previous chronicle, the judgment of the District Court of the Hague in the case of *Urgenda Foundation v. the State of the*

[1] These peculiarities are discussed in G.F. FERRARI / R. PASSCHIER / W.J.M. VOERMANS (2018), *The Dutch Constitution Beyond 200 Years. Tradition and Innovation in a Multilevel Legal Order*, The Hague: Eleven International Publishing, which constitutes the first thematic, English account of the Constitution of the Netherlands.

Netherlands was discussed extensively[2]. The District Court ordered the Dutch government to cut its greenhouse gas emissions by at least 25% before 2020 (compared to 1990 emission levels). The judgment is generally seen as a landmark ruling in the fight against climate change[3]. This noteworthy instance of public interest litigation - Urgenda being a citizens' platform striving for a sustainable society - raised important constitutional questions on the position of courts *vis-à-vis* the political branches of state, the role to be played by international human rights treaties in combatting important societal risks and the lawmaking role of the judiciary. It should be recalled, however, that the judgment was issued by a court of first instance. The bold reasoning of the District Court left it particularly vulnerable to be overruled in appeal.

Things, however, turned out to be different. On 9 October 2018 the Hague Court of Appeal upheld the judgment of the District Court[4]. In its judgment, the Court of Appeal starts by summarising the relevant facts concerning climate change and the role played by the Netherlands in that regard. The Court of Appeal points out that the Netherlands has a relatively high per capita CO_2 emission compared to other industrialised countries. Despite ambitious agenda-setting, for instance through the Paris Agreement of 2015 (in which the Convention parties agreed that global warming must remain well below the 2°C limit relative to pre-industrial levels, while aiming for a limit of 1.5°C), CO_2 emissions have hardly dropped since 1990. The overall reduction of greenhouse gases is due to the drop of other types of gases, with the Netherlands lagging behind by 5,4% in CO_2 reduction compared to the 15 largest EU Member States. The dangers posed by climate change, however, have never

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[2] District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196 (translated into English). See (critically) R. NEHMELMAN / M.J. VETZO (2016) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2015, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, pp. 510-514.

[3] *Ibid*, p. 510-511, especially footnote 3.

[4] Court of Appeal of The Hague, 8 October 2018, ECLI:NL:GHDHA:2018:259 (translated into English).

been more urgent. This discrepancy lies at the heart of the case brought by Urgenda and constitutes the basis upon which the Court of Appeal builds its judgment.

Whereas the District Court based its reduction order on the tort of negligence, the Court of Appeal opts for a different route to reach the same conclusion. The District Court held that the State failed to take sufficient measures against hazardous climate change and thereby neglected its duty of care. This reasoning was informed, in part, by international and European policy commitments and obligations that do not have direct effect in the Dutch legal order. Through what is commonly called a 'reflex effect' (*reflexwerking*) international norms that do not have direct effect can inform the court's interpretation of domestic law. To the contrary, the Court of Appeal bases its reasoning on norms of international human rights law that *do* have direct effect, more precisely Articles 2 and 8 of the European Convention on Human Rights[5]. Under steady case law of the European Court of Human Rights (ECtHR), these Articles give rise to both negative and positive obligations on the part of the State. The latter entail that the State must actively protect the lives of citizens (Article 2 ECHR) and that it is obliged to protect the right to home and private life (Article 8 ECHR)[6]. The Court of Ap-

[5] The District Court, to the contrary, held that these Articles could not be invoked directly by Urgenda. Article 34 of the ECHR reads that only victims can invoke the ECHR before a court of law. Urgenda, being a legal entity, could not claim to be a victim of climate change. The Court of Appeal, rightly, disagrees. Article 34 of the ECHR only concerns the question of whether cases can be brought before the ECHR. The question of which ECHR provisions can be invoked before domestic courts is one of national law. Based on Article 3:305a of the Dutch Civil Code organisations like Urgenda have access to Dutch courts and can invoke binding norms of international law before them. See paras. 34-38.

[6] The Court of Appeal reaches this conclusion by looking at the case law of the Strasbourg Court in which rather concrete instances of negligence by the State caused a loss of lives or an interference with the right to privacy. In those cases, the environmental dangers concerned were of a rather small scale, or at least of a scale incomparable to the environmental danger posed by climate change. For instance, the Court refers to the case of

peal establishes that these Articles have direct effect[7] and states that the aforementioned obligations apply with particular stringency in the face of industrial activities, which by their very nature are dangerous and may endanger the rights protected in these Articles[8]. Against this background, the Court assesses the question of whether the dangers posed by climate change, reach the level of imminence that is required to trigger the positive duty of the State. Based on the scientific evidence on climate change that is available to the Court, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in serious risk that the current generation of citizens will be confronted with loss of life or a disruption of their family life. The positive obligations of the Dutch State under Articles 2 and 8 of the ECHR therefore also cover the threats posed by climate change[9]. The Court subsequently is of the opinion that a reduction obligation of at least 25% by the end of 2020, as ordered by the District Court, is in line with the duty of care of the State[10].

The constitutional arguments brought forward by the State to reach the opposite conclusion are given short shrift by the Court of Appeal[11]. In its pleadings the State reiterated its arguments in first

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Öneryildiz/Turkey (ECtHR 30 November 2004, appl. no. 48939/99, ECLI:CE:ECHR:2004:1130JUD004893999) which concerned the loss of lives following an explosion at a rubbish tip. The Turkish authorities, which had known for years that there was a real danger of explosion, had not taken the required precautionary measures to prevent the future loss of lives.

[7] Para. 36 of the *Urgenda* judgment of the Court of Appeal.

[8] *Ibid.*, Paras. 40-43.

[9] *Ibid.*, Paras. 44-45.

[10] *Ibid.*, Paras. 46-53.

[11] Next to arguments based on domestic constitutional law, the State opposes the reduction order based on, for instance, EU law. More specifically, in this regard the State argued that the European Emissions Trading System (ETS) would make intensified efforts by the Netherlands pointless, as under the ETS this would create room for more emissions elsewhere in the EU. The Court of Appeal dismissed this argument. For these and other arguments, see *ibid.*, paras. 54-66. With regard to these points, and subse-

instance, being - essentially - that it is up to the democratically legitimised government to make the policy choices that come with imposing drastic measures to combat climate change. The Court of Appeal rejects this argument primarily because the State violates human rights by not doing more against climate change, which (apparently) automatically warrants judicial intervention. Moreover, the State is given sufficient discretion in deciding how, that is, through which means, it complies with the order[12]. In addition, the State - along the lines of the famous *Waterpakt*-case law[13], which entails that Dutch courts cannot order the political branches to produce legislation - argued that the reduction order constitutes an order to create legislation. The Court of Appeal dismisses this argument, because the reduction order is not intended as an order to legislate. Moreover, the reduction order only sets out the goal that must be achieved in terms of CO_2 reduction, but does not prescribe the contents of the measures to be taken. The State is given sufficient freedom in determining *how* to meet the requirement of the reduction order. The more general argument raised by the government, entailing that the *trias politica* and the role of the courts in our Constitution stands in the way of the order issued by the District Court, does not hold water in the view of the Court. The Court is obliged to apply directly effective treaty provisions, including Articles 2 and 8 ECHR. It is simply exercising its duty and acts in conformity with its constitutional mandate by applying these Articles in the present case. For these reasons, the constitutional argu-

quent criticism of the reasoning of the Court of Appeal in this regard, see S. ROY, Urgenda II and its Discontents, *Carbon & Climate Law Review* 2019, Vol. 13(2), pp. 130-141.

[12] Para. 67 of the *Urgenda* judgment of the Court of Appeal.

[13] Supreme Court 21 March 2003, *NJ* 2003/691, ECLI:NL:HR:2003:AE8462, with regard to which see R. NEHMELMAN / M.J. VETZO (2016) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2015, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, p. 514.

ments of the State are deemed unconvincing by the Court of Appeal[14].

The Court thus concludes that the State has done too little to prevent the imminent negative consequences of climate change and is doing too little to catch up. The reduction order issued by the District Court, which entails that greenhouse gas emissions must have been cut by at least 25% before 2020, is mandated by the positive obligation of the State to protect the lives of citizens and the right to home and private life under Articles 2 and 8 ECHR. The Court of Appeal upholds the *Urgenda* judgment of the District Court and thereby leaves intact the global hallmark of climate change litigation.

The *Urgenda* case will provide food for thought in the years to come[15]. For the time being, I rest by noting that the reasoning of the Court of Appeal on essentially constitutional questions is more sturdy than that of the District Court, particularly with regard to the choice of Articles 2 and 8 ECHR as the legal basis for its reduction order compared to the District Court's shaky reasoning based on the

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[14] The reasoning of the Court of Appeal is summarised in more detail by L.E. BURGERS / T.S.G. STAAL (2019), Climate Action as Positive Human Rights Obligation: The Appeal Judgment in Urgenda v The Netherlands, *in:* R. WESSEL / W. WERNER / B. BOUTIN (eds.), *Netherlands Yearbook of International Law 2018,* TMC Asser Press: The Hague.

[15] It has already done so in global academic literature. See, for instance, A.E.M. LEIJTEN (2018), The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease, *Verfassungsblog* 19 October 2018 https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/ (last visited on 25 September 2019); M.A. LOTH (2018), Too big to trial? Lessons from the Urgenda-case, *Uniform Law Review* 2018, Vol. 23(20), pp. 336-353; J. PEEL / H.M. OSOFSKY (2018), A Rights Turn in Climate Change Litigation?, *Transnational Environmental Law* 2018, Vol. 7(1), pp. 37-67; A.E.M. LEIJTEN (2019), Human Rights v. Insufficient Climate Action: the *Urgenda* Case, *Netherlands Quarterly of Human Rights* 2019, Vol. 37(2), pp. 112-118; B.W. WEGENER (2019), Urgenda - World Rescue by Court Order? The "Climate Justice"-Movement Tests the Limits of Legal Protection, *Journal for European Environmental & Planning Law* 2019, Vol. 16(2), pp. 125-147.

tort of negligence. This, however, does not mean that the judgment of the Court of Appeal is not open to criticism on other constitutional grounds. The reasoning with regard to the alleged 'order to create legislation' and the Court's own constitutional position in cases of public interest litigation is not uncontested and is susceptible to significant criticism. In the meantime, the State has lodged a final appeal in cassation. The Supreme Court of the Netherlands is likely to give all Dutch constitutional lawyers their ultimate Christmas gift, as its judgment is scheduled for 20 December 2019.

The *Urgenda* case highlights that the absence of a constitutional court does not bring along a lack of constitutionally relevant cases in the Netherlands. Below, and in addition to *Urgenda*, the most pressing, topical ones decided in 2018 are discussed.

THE SUPREMACY OF INTERNATIONAL LAW: A SMOKY ISSUE

Between the binaries of monism and dualism, the Netherlands is positioned on the monist side of the spectrum, being a country known for its relative openness towards international law and external influences. Article 94 of the Dutch Constitution plays a significant role in this regard. Under this Article, statutory regulations, including Acts of Parliament, shall not be applicable if they conflict with treaty provisions that are 'binding on all persons' (*een ieder verbindend*), *i.e*. directly effective self-executing provisions. The notion 'binding on all persons' determines which norms of international law rank supreme over conflicting domestic norms. In the seminal railway strike (*Spoorwegstaking*) case the Supreme Court established that the question of direct effect is of an absolute nature, that is either a provision of international law ranks supreme in all cases, or it never does, which depends on the content of the provision concerned[16]. In the 2014 smoking prohibition (*Rookverbod*) case, this interpretation was replaced by a contextual approach, one that gave the binding character of international law a more relative

[16] Supreme Court 30 May 1986, *NJ* 1986/688, ECLI:NL:HR:1986:AC1844.

character[17]. Whether a certain international norm is directly effective and self-executing still depends on the content of the provision but might differ from case to case.

Since 2016 a new cigarettes-related case is marching through the Dutch Courts. The case centres around the direct effect of Article 8, section 2 of the WHO Framework Convention on Tobacco Control (WHO FCTC). This provision entails that the State ought to take effective legal measures to protect people from exposure to tobacco smoke in, amongst others, indoor public places. Dutch law does so by prohibiting smoking in publicly accessible buildings, but makes an exception for designated smoking rooms within those buildings. The Dutch Non-Smokers Association started a collective action against this exception, specifically focusing on smoking areas in catering facilities, thereby invoking Article 8, section 2 of the WHO FCTC. Deciding on the question of whether this international norm was binding on all persons, the Hague District Court applied the relative approach and held that the provision did not have direct effect under Article 94 of the Constitution, despite the fact that in the 2014 smoking prohibition case the very same provision was qualified as being binding on all persons by the Supreme Court[18]. In 2018 the Hague Court of Appeal gave its judgment in this case, being more unclear about its approach towards the relative character of directly effective self-executing treaty provisions[19]. The Court established that the provision concerned did have direct effect, but regarded this as a preliminary point to be addressed before looking at the context of the specific case. Subsequently, the Court of Appeal decided that the exception for indoor smoking areas in catering facilities conflicted with the directly effective WHO FCTC provision and consequently declared the domestic law concerned to be non-binding. This approach, in which the question of direct effect is

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[17] Supreme Court 10 October 2014, *NJ* 2015/70, ECLI:NL:HR:2014:2928.

[18] District Court of The Hague, 14 September 2016, ECLI:NL:RBDHA:2016:11025.

[19] Court of Appeal of The Hague, 13 February 2018, ECLI:NL:GHDHA:2018:172.

considered *in abstracto*, reflects the old line of cases decided by the Supreme Court, but seems rather out of place from the perspective of the 2014 smoking prohibition judgment of the Supreme Court. Appeal in cassation has been lodged by the State against the decision. A judgment is expected to appear in September 2019.

What seems to be a rather technical matter of constitutional law, in fact has far-reaching implications for both the relationship between international law and domestic law, and for the relationship between the courts and parliament. When a court establishes that an international provision is binding on all persons and conflicts with domestic law, it establishes the supremacy of that provision over a democratically legitimised national norm. The Court of Appeal did so in this case, which highlights the importance of external norms as a standard of judicial review by Dutch courts. Another emerging feature of Dutch constitutional law is equally highlighted by this case, which is the importance of public interest litigation in generating constitutional questions.

BREXIT BEFORE THE DUTCH COURTS

Provided that the seemingly endless process following the 2016 referendum ever comes to an end, Brexit will have significant consequences, both for the UK and for the remaining EU Member States[20]. The Netherlands, which can be considered susceptible to external influences not only constitutionally, but also economically, will likely strike serious blows[21]. Moreover, about 45.000 UK citizens live in the Netherlands. The consequences of Brexit for them are highly uncertain. Several UK citizens living in Amsterdam brought interim procedures before the District Court of Amsterdam in order to obtain more clarity regarding their post-Brexit status and have their EU-citizen rights guaranteed, or at least prevent those

[20] At the time of writing (September 2019) this is still very much uncertain.

[21] For an overview of predicted consequences, see this webpage of the Dutch government <https://www.government.nl/topics/brexit/impact-of-brexit-on-the-dutch-economy> (last accessed on 27 September 2019).

rights from being taken from them without an individual proportionality assessment[22].

The primary arguments brought forward by the State and the municipality of Amsterdam (acting as the defendants) entailed that the judicial procedure interfered severely with the political and diplomatic negotiation process between the EU and the May government at the time. The defendants argued that the court should stay out of a case like this, which essentially touches upon political questions. The preliminary relief judge elaborately engaged with this appeal to a Dutch version of the political question doctrine. The judge acknowledged that the case was surrounded by political sensitivities. However, the judge reasons, this fact alone does not mean that there is no role to play for courts. After all, offering legal protection to individuals is part of the courts' constitutional mandate. The real threat of eviction for these citizens, leads to a situation in which they must seriously consider acquiring Dutch nationality, which would detrimentally impact their ability to visit the UK and sustain lasting family relations with their British family members. Considering this predicted interference with their fundamental rights, the preliminary relief judge asked preliminary questions to the Court of Justice of the European Union (CJEU). The questions focused on the loss of EU citizenship and the rights attached to it due to Brexit, and the possibility to counter the adverse consequences of such a loss. Brexit thus appeared to raise interesting constitutional questions of a European nature, not only in London[23], but also in Amsterdam.

Things, however, turned out differently. After the judgment, parties requested the possibility to appeal against the judgment. The preliminary relief judge granted this possibility and decided that it would be for the Court of Appeal to decide on the question of whether a preliminary reference was to be made to the Court of Justice. In the appeal procedure in interim relief the Court of Appeal of

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22 District Court of Amsterdam, 7 February 2018, ECLI:NL:RBAMS:2018:605.

23 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

Amsterdam decided not to engage with constitutional matters elaborately[24]. Instead, it held that the claim made by the plaintiffs in this case (the UK citizens) was insufficiently precise and therefore could not be granted anyway, irrespective of the answer to preliminary questions. The Court of Appeal thus did not refer questions to the Luxembourg Court. With this rather minimalistic approach towards the matter, the Court of Appeal avoided broad sweeping statements on the constitutional nature of the issues before the court and the necessity to have recourse to the CJEU. The judgment therefore will not receive a spot in the Dutch hall of fame of illustrious constitutional cases, most probably to the delight of the CJEU, which was prevented from being dragged even further into an already extremely complex Brexit negotiation process[25].

STATE, CHURCH AND A FLYING SPAGHETTI MONSTER

Constitutional case law comes in all shapes and sizes. The 2018 judgment of the Administrative Jurisdiction Division of the Council of State (one of the highest administrative law courts in the Netherlands) concerning freedom of religion is of a particularly odd shape and size[26]. The separation between state and church mandates institutional reluctance when it comes to interfering with matters of religion. This reluctance was hard to sustain for the Council of State, when confronted with the curious case of 'Pastafarianism'. Its fol-

[24] Court of Appeal of Amsterdam, 19 June 2018, ECLI:NL:GHAMS:2018:2009.

[25] At least, it was not due to the Dutch courts that the CJEU was forced to answer questions on Brexit. See *e.g.* C-621/18, *Wightman and Others v Secretary of State for Exiting the European Union*.

[26] Administrative Jurisdiction Division of the Council of State, 15 August 2018, *AB* 2018/361, ECLI:NL:RVS:2018:2715. An English summary of the judgment, as well as an English translation of key paragraphs of the ruling, can be found at <https://www.raadvanstate.nl/@112548/pastafarianism-not/> (last visited on 27 September 2019). For English press coverage see <https://www.theguardian.com/world/2018/aug/16/pastafarianism-is-not-a-religion-dutch-court-rules> (last visited on 27 September 2019).

lowers, Pastafarians, have a strong belief that the universe was created by an invisible Flying Spaghetti Monster. Their parody on religion, initiated to promote a satirical, light-hearted view of religion, raised constitutional issues when a woman from Nijmegen applied for an identity card. The woman submitted passport photos in which she was wearing a colander and argued that the colander is a symbol of her religion, Pastafarianism. Dutch passport legislation, however, specifies that one's face should be clearly visible on passport photos and that one is not allowed to wear headgear, except for religious reasons.

In deciding whether this exception applied to the Pastafarians, the Administrative Jurisdiction Division first confronted the question of whether Pastafarianism is a religion at all. The Administrative Jurisdiction Division engaged with this question elaborately in light of Article 6 of the Constitution and Article 9 of the ECHR. Referring to the case law of the ECtHR, the Division held that Pastafarianism lacked the required 'level of cogency, seriousness, cohesion and importance'[27]. The satirical character of Pastafarianism is at odds with this requirement. The Administrative Jurisdiction Division thus concludes that 'Pastafarianism', as embraced by the Church of the Flying Spaghetti Monster, is not a religion. Therefore, the wearing of a colander by adherents of Pastafarianism cannot be regarded as an expression of religious belief. Remarkably, the Administrative Jurisdiction Division cites a recent judgment of the Oberlandesgericht Brandenburg in support of its conclusion, thereby engaging in an explicit judicial dialogue with its German colleagues[28].

The Council of State chose to do things the hard way by outright confronting the religious character of Pastafarianism, instead of pragmatically asking whether the persons concerned could still be

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[27] ECtHR 25 February 1982, *Campbell/Cosans v. United Kingdom,* ECLI:CE:ECHR:1982:0225JUD00075117; ECtHR 1 July 2014, *S.A.S. v. France*, ECLI:CE:ECHR:2014:0701JUD004383511.

[28] Oberlandesgericht Brandenburg 2 August 2017, ECLI:DE:OLGBB:2017:0802:4U84.16.00. The German court held that this type of satire and parody is not covered by freedom of religion but rather falls within the scope of freedom of expression.

identified based on the submitted photo[29]. What results is a constitutionally interesting judgment on the delicate topic of the relationship between state and church and the scope of religious freedom. As national branches of the Church of the Flying Spaghetti Monster continue to strive to have Pastafarianism recognised as an official religion, courts around the world might face similar questions in the years to come.

LEGISLATION AND REFERENDA

The proposed repeal of the Advisory Referendum Act (ARA) has been mentioned briefly in the 2017 chronicle[30]. As the Bill repealing the ARA[31] expressly stated that no referendum could be organised regarding the withdrawal of the ARA, it was predicted that many interesting constitutional questions would arise with regard to this matter. And so it did. The Council of State, which advises the government and Parliament on legislation and governance, argued that it was legally possible to explicitly prevent the withdrawal bill from becoming subject of a referendum. In addition, numerous constitutional scholars were invited to give their opinion on the matter. They ensured that the Bill would indeed be legally effective in excluding the Act repealing the ARA from its own scope, but nonetheless raised several questions with regard to the democratic and constitutional appropriateness of this move by the Dutch government[32]. Court proceedings before the District Court of the Hague,

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[29] This lack of judicial minimalism was criticised by many authors. See the criticism by BOOGAARD and UZMAN in their case note (*AB* 2018/361), as well as C. GRÜTTERS / A. TERLOUW (2019), Niet te geloven!, *NTM/NJCM-bulletin* 2019/10.

[30] M.J. VETZO (2018) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2017, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, p. 467.

[31] *Kamerstukken II* 2017-2018, 34854, no. 2.

[32] *Kamerstukken I*, 2017-2018, 34854, A. A lively discussion in academic literature emerged as well. See *e.g.* W.J.M. VOERMANS (2018), De

initiated by the Dutch association 'More Democracy' (*Meer Democratie*) to stop the repeal of the ARA, were unsuccessful. The drafting of the Bill and the political choice to repeal the ARA could not be interfered with by a court of law. As long as there was no definitive repeal of the ARA, no role was to be played by the court[33]. The government eventually succeeded in repealing the ARA. On July 10, 2018 the Bill was passed by the Senate and a short, but noteworthy episode titled 'direct democracy: advisory referenda' in the Dutch series of parliamentary democracy ended. Months before, attempts to lay down a binding corrective referendum in the Constitution had also stranded in the Lower House at second reading, which makes the introduction of referenda in the nearby future unlikely[34]. However, in light of the recent recommendations by the State Committee on the Parliamentary System (see below), a new episode called 'direct democracy: binding, corrective referenda, part II' might start recording soon.

While the ARA was still in force, a referendum was held on the Intelligence and Security Services Act 2017[35]. After a tumultuous campaign by both proponents and opponents of the new Act, 49,44% voted against, whereas 46,53% voted in favour and 4,03% of the votes were blank. With a (relative) majority of the voters rejecting the new Act, the government was required to reconsider the original Act and promised to make alterations to meet the concerns of the Dutch electorate.

Another significant piece of legislation, concerning donor registration (the Donor Act or *Donorwet*), passed through the Senate in 2018. In the current system organ donation after death can only take

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Catch-22 van de intrekking van de wet raadgevend referendum, *Nederlands Juristenblad* 2018/544, pp. 732-738.

33 District Court of The Hague, 4 July 2018, *AB* 2018/399, ECLI:NL:RBDHA:2018:7888.

34 *Kamerstukken* 34724.

35 Elaborately discussed in R. NEHMELMAN / M.J. VETZO (2017) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2016, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, pp. 527-528.

place with explicit consent from the donor or their surviving relatives. The new Act introduces a system of active donor registration. When the new Act comes into force in summer 2020, everyone in the Netherlands aged 18 or older will be registered in the Donor Register, unless they have explicitly objected. The Bill passed through the Lower House in 2016 with a majority of only 1 vote (75 to 74), because a Member of Parliament, who intended to vote against the Bill, missed his train and could not be present at the crucial vote. No such instances of bad luck with far-reaching consequences influenced the voting procedure in the Senate. After a fundamental, intense debate, in which several constitutional questions reached the surface, the Senate voted in favour of the Act with a narrow majority of 38 to 36 votes. While an attempt was made to subject the Donor Act to a referendum while the ARA was still in force, insufficient signatures were collected to initiate a referendum.

Municipal Elections

On 21 March 2018, the same day as the referendum on the Intelligence and Security Services Act 2017, in a large number of municipalities elections were held. Local parties, *i.e.* parties not affiliated with parties at the national level, are on the rise. One third of the electorate voted for a local party in 2018. The fragmentation that traditionally characterises the election results at the national level, also took place in the municipalities. This fragmentation will probably lead to coalitions consisting of a wide range of parties, a trend that also occurred after the 2014 municipal elections.

Constitutional Reform

In as far as amendments to the Constitution are concerned, two noteworthy issues are to be discussed. The first issue concerns the possibility of introducing a system of elected mayors. As it currently stands, the Crown, on the nomination of the Minister of the Interior and Kingdom Relations, appoints a mayor in every munici-

pality after a recommendation by the municipal council (*Gemeenteraad*). This procedure was laid down in Article 131 of the Constitution. On 21 December 2018 this Article was amended[36]. The Article now reads that the procedure for the appointment of mayors is laid down in an Act of Parliament. The procedure as such has thus not changed, but this 'deconstitutionalisation' opens up the possibility of introducing a system of directly elected mayors without having to change the Constitution. The second issue concerns the introduction of a (limited) form of constitutional review[37]. The initial amendment was proposed in 2002. After the Council of State advised the Lower House to explicitly withdraw the languishing proposal, the House did so. With that decision, the discussion on constitutional review in the Netherlands came to a provisional end in 2018.

At least, this was what was expected before the State Commission on the parliamentary system delivered its final report. This State Commission had been assigned to advise the government on whether the parliamentary system of the Netherlands is future-proof. The Commission published its final report in 2018 titled '*Lage Drempels, hoge dijken*' (somewhat oddly translated to 'Democracy and the Rule of Law in Equilibrium')[38]. Several of the issues discussed above are likely to rise again because they are the subject of recommendations made by the Commission. In its report the Commission sketches the picture of a democracy that requires urgent reform, against the background of the loss of confidence in the political systems among some societal groups, the rise of illiberal democracy,

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[36] Stb. 2018, 493.

[37] Discussed in the 2017 and 2016 chronicles. See respectively M.J. VETZO (2018) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2017, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, p. 471 and R. NEHMELMAN / M.J. VETZO (2016) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2015, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, p. 530,

[38] An English summary can be accessed at <https://www.staatscommissieparlementairstelsel.nl/actueel/nieuws/2019/07/18/download-the-english-translation-of-the-final-report-of-the-state-commission> (last accessed on 27 September 2019).

populism and digitalisation. The recommendations made by the Commission are wide-ranging. Of a less sweeping nature are, for instance, the introduction of a duty for political parties to be transparent on the use of digital instruments (to be laid down in a new Political Parties Act), the improvement of democratic knowledge and skills in and outside of educational institutions and the introduction of a specific form of the right for the Upper House to send a bill back to the Lower House. More far-ranging recommendations concern the introduction of a binding corrective referendum and the introduction of constitutional review *ex post*, to be carried out by a Constitutional Court. The State Commission delivered a succinct report with useful recommendations that provides food for thought (and action!) in the years to come. It might very well be that debates on, for instance, referenda and constitutional review resurface because of the advice of the Commission. The government will respond to the recommendations of the Commission in due time.

ABSTRACTS / RÉSUMÉS

The year 2018 was an eventful year in Dutch constitutional law. The Court of Appeal of the Hague issued its judgment in the *Urgenda* case and confirmed the order for reduction of greenhouse gases issued by the District Court of the Hague. The judgment gives rise to several constitutionally controversial questions concerning the relationship between courts and the political branches of state. Other noteworthy judgments relate to the question of which norms of international law rank supreme over conflicting domestic provisions and the separation of state and church in the Netherlands. Also, Brexit reached the Dutch courts in 2018 and raised issues of a constitutional nature (at least in first instance). From a legislative perspective, the repeal of the Advisory Referendum Act stands out, as does the referendum on the Intelligence and Security Services Act 2017. The definitive withdrawal of a proposal to introduce constitutional review, marks the provisional end of the debate on this issue, whereas the constitutional debate on introducing a system of elected mayors is likely to emerge in the next few years. Other constitutional issues were firmly put on the agenda by the final report of the State Commission on the Parliamentary System, which contained numerous recommendations to make Dutch democracy future-proof.

L'année 2018 a été riche en événements pour le droit constitutionnel néerlandais. La Cour d'appel de La Haye a rendu son arrêt dans l'affaire *Urgenda* et a confirmé l'ordonnance de réduction des émissions de gaz à effet de serre rendue par le tribunal de district de La Haye. L'arrêt soulève plusieurs questions constitutionnellement controversées concernant les relations entre les tribunaux et les branches politiques de l'Etat. D'autres jugements dignes d'être mentionnés portent sur la question de savoir quelles normes du droit international priment sur les dispositions nationales contradictoires, et sur la séparation de l'Eglise et de l'Etat aux Pays-Bas. Le Brexit a également été porté devant les tribunaux néerlandais en 2018 et a soulevé des questions de nature constitutionnelle (du moins en première instance). D'un point de vue législatif, ce qui ressort, c'est l'abrogation de la loi sur le référendum consultatif et le référendum sur la loi de 2017 sur les services de renseignement et de sécurité. Le retrait définitif d'une proposition de révision constitutionnelle marque la fin provisoire du débat sur cette question, alors que le débat constitutionnel sur l'introduction d'un système d'élection des maires devrait émerger dans les prochaines années. D'autres questions constitutionnelles ont été fermement mises à l'ordre du jour par le rapport final de la Commission d'Etat sur le système parlementaire, qui contenait de nombreuses recommandations visant à rendre la démocratie néerlandaise durable.

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