COVID-19 in the Netherlands: of Changing Tides and Constitutional Constants

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> *"When I first addressed the nation on Covid-19 nearly nine months ago, I very much hoped that it would also be the last time. And for a long while, this appeared to be the case. But today, unfortunately, I have to address you again."*

These were the first words of Dutch Prime Minister Mark Rutte, addressing the nation shortly before Christmas, announcing a second lockdown that started on 15 December and has not yet come to an end. In their previous blogpost dating from May 2020, Buyse and De Lange rightly stated that speeches like this are a rare phenomenon in the Netherlands. This speech, however, was already the second nationally televised address of the Prime Minister in a year time. It came at a time of great concern. Ever since the first positive case was detected on February 27th 2020, Covid-19 had constantly dominated every aspect of daily life and governance in the Netherlands. In December 2020 it still did, with increasing intensity, and under growing public protest against the measures taken by the Government.

Along with Covid, the Government's response, and the growing public unrest, came a continuing string of constitutional questions and developments, that is unlikely to diminish anytime soon. Building on the abovementioned Verfassungsblog post, we will discuss the main constitutional Covid-19 highlights, largely chronologically. Throughout we will pay particular attention to three recurring and interrelated themes: the evolving role of Parliament in shaping the political and legal response to Covid-19, the relevance and varying intensity of judicial control in pandemic times, and the omnipresence of fundamental rights concerns.

How It All Began…Expertise-Driven, Executive-led, Decentralized Responses

Ever since March, when the pandemic erupted, the Government has relied heavily on the advice of experts. The 'Outbreak Management Team', consisting of epidemiological experts and doctors, play a dominant role in the Dutch response to Covid-19. These experts advised far reaching measures and Government went along without flinching. Schools were closed, visitors were no longer allowed in health care facilities, demonstrations and meetings on religious grounds were limited, and public gatherings were prohibited. Without a formal state of emergency being declared, these measures

severely limited fundamental rights protected by the Dutch Constitution, such as the freedom to provide educational services (Article 23), the right to privacy (Article 10), the right to demonstration (Article 9) and the freedom of religion (Article 6).

At this point, a first constitutional peculiarity enters the stage. The Dutch Constitution has a 'formalist' system for limiting fundamental rights. It merely requires that fundamental rights must be restricted by 'Acts of Parliament', which are (according to Article 81 of Constitution) made by Government and Parliament together ('the legislature'). No substantive requirements – such as proportionality demands or legitimate aims – must be complied with. In brief: if the legislature approves, limitations are allowed. One should thus expect Parliament to have played a significant role in the coming about of the lockdown measures. Remarkably, however, the corona measures were not imposed on the basis of an Act of Parliament, but were laid down in decentralised emergency regulations (*noodverordeningen).* These lower regulations can be adopted by the Heads of our Security Regions under the instruction of the Minister of Health.

Contrary to Acts of Parliament – which must be approved by the democratically elected representatives in both Houses of Parliament – there is little democratic involvement in the making of *noodverordeningen*. It is no surprise that this executive-led, decentralised response gave rise to serious criticism. Not only amongst politicians and legal scholars, but questions were also raised by the Government's most important advisory body, the Council of State. The preferred approach was to introduce a Bill in Parliament containing the corona-measures, so that national democratic involvement would be ensured when fundamental rights were infringed. It took a long time, however, before a sturdy legal basis was created. A draft Bill was introduced in summer when Parliament was already on recess. Consequently, parliamentary debate on the Bill took place in autumn and it took until December before the Temporary Corona Act (TCA) entered into force.

The Temporary Corona Act: Parliamentary Oversight and Intervention

Why did it take so long before the TCA came about? Drafting the TCA proved to be somewhat of a legislative conundrum. The TCA had to enable flexible, yet effective measures and at the same time guarantee parliamentary involvement and fundamental rights protection. While paying due regard to effectiveness and flexibility, incorporating the latter demands proved to be no easy task. Because of this, the initial draft Bill was greeted with great mockery, particularly because of concerns about the lack of involvement of Parliament. The proposal encompassed a so-called 'catch-all clause' which would give the Minister of Public Health the authority to take all measures necessary to tackle the virus when unforeseen circumstances would pop up. No prior approval of Parliament was necessary. Scholars jokingly characterized this as a ministerial 'blank cheque'. Other points of criticism concerned the proposed duration of the TCA (a six months-period), the absence of proportionality and subsidiarity demands, and the rather 'Draconian' fines that would be imposed for violations of the Act, with penalties up to 400 euros and resulting in a criminal record.

After a slow start, however, Parliament woke and took up its ordinary task of scrutinising Government and its role as co-legislator. The draft TCA was heavily amended during parliamentary debate, providing a good example of parliamentary involvement in the shaping of Covid-19 measures. The TCA would now be in force for a three months-period unless Parliament and Government would decide differently. Also, the 'catch-all clause' was removed, and proportionality and subsidiarity demands were introduced. Finally, fines were lowered to a maximum of 95 euros and would no longer result in a criminal record. One objection remained though: the position of the Senate. The TCA still gives the Minister of Public Health the discretionary competence to make specific ministerial regulations, with drastic consequences. While approval of the House of Representatives is necessary, no prior consent of the Senate is required. Because of this diminished parliamentary oversight, some scholars remain critical and have even called the TCA 'a mere authorization act' for the Minister.

Of Masks, Curfews and Courts

As time went by and the pandemic remained ever-present, judicial control of the measures taken by the political branches became increasingly relevant. Early legal complaints were aimed at striking down virtually all corona measures. These were rightly dismissed without much ado. The same goes for more serious legal challenges against specific Covid-19 measures, such as the obligation to wear a mask in public places. This obligation was initially only imposed by the cities of Amsterdam and Rotterdam and was formally laid down in decentralised emergency regulations (*noodverordeningen)*. Opponents criticised this legal basis on constitutional grounds. Since fundamental rights were breached an Act of Parliament was necessary. The District Court of Amsterdam, however, refused to step in.

This was different in January 2021 when a court ruling on the nationwide curfew, put into motion a constitutional rollercoaster of the first order. In response to the rise of the more infectious 'UK variant' of the virus, the Government decided to introduce a night-time curfew in January, prohibiting all Dutch citizens from leaving their homes from 9pm till 4.30am. This far-reaching measure led to riots in multiple Dutch cities. On a more sophisticated level, it was questioned whether the curfew had a correct legal basis. The curfew was not established by a new Act of Parliament, but by already existing legislation (the Wet buitengewone bevoegdheden burgerlijk gezag, 'Wbbbg'). The Wbbbg allowed the Government to adopt emergency measures in extraordinary circumstances. The question, however, was whether the Covid-situation at that time was sufficiently extraordinary to justify sidestepping the 'ordinary route' of enacting a new Act of Parliament.

In summary proceedings, the District Court of the Hague held that this was not the case. The legal route taken by the Government was only suited in situations of utmost urgency, such as the collapse of a dike. The Covid-19 situation did not meet that standard of urgency. In support of this conclusion, the District Court referred to the fact that the Government had considered the possibility of introducing a curfew weeks before. On top of that, it also found time to consult the House of Representatives before the curfew was

introduced. And even though both Houses of Parliament had a say on the question whether the curfew would continue to apply, the District Court held that this *ex post* involvement could not be accorded similar weight as a formal legislative process. In stark contrast with earlier reluctant Covid-jurisprudence, the District Court issued a mandatory order to withdraw the curfew immediately. In doing so it made the global headlines.

The Government responded to this judicial blow-back through a mix of legal and political means. Straight after the judgment, the Prime Minister announced that the Government would lodge an appeal and – as a back-up plan – would start drafting a new Act of Parliament to put the curfew on a direct statutory footing. In an interim decision issued the very same day, minutes before 9pm, the Court of Appeal held that the curfew would be kept in place until it had reached a decision on the merits. In that decision, the Court of Appeal was far more deferential than the District Court. It disagreed with the restrictive interpretation of the notion of acuteness by the District Court. The Government's continuous reliance on expert advice paid off: the Court of Appeal gave leeway to the Government on grounds of expertise in deciding whether the Covid-19 situation at that time was urgent and acute. The Court of Appeal upheld the curfew. Its judgment, however, was of limited practical relevance. Since the legislative process had been put into motion with expedience, at the time of the judgment the curfew was already given a firm statutory basis in an Act of Parliament.

While practically not much had changed, the judgment of the District Court did have a beneficial effect from the perspective of democratic legitimacy: it secured stronger formal parliamentary involvement with regard to one of the most far-reaching Covid-19 measures. The curfew saga also shows that while judicial restraint in times of crisis is a firmly established Dutch constitutional constant, political branches should not take the approval of the courts for granted.

Looking Back: From Pragmatism to Democratic Influence

The Dutch attitude towards constitutional matters has always been somewhat pragmatic. This is reflected in the Government's approach in the corona crisis. Constitutional pragmatism, however, has its democratic downsides. It took long, too long before the democratic legitimacy of far-reaching measures was secured through the TCA. And while the role of the Parliament increased over time, at crucial points Government chose legal routes that formally sidestepped the representatives of the Dutch people. This becomes all the more relevant now that public support for the measures taken by Government is slowly decreasing. Moreover, the approach taken by the Government raised concerns about its commitment to the Constitution, as deviations from the Constitution were prevalent without there being a formal state of emergency.

While the Government's continuous reliance on expert-advice has been applauded, early objections were raised because of the perceived one-sided medical and epidemiological focus of the Outbreak Management Team. After all, Covid-19 has become a fundamental rights crisis in a broad sense, which requires a multi-faceted perspective. The Government finds itself in a tough spot in this regard: it must balance the right to health of

its citizens to their civil and political rights and other social and economic rights. While financial relief was given to companies and employees that were severely hit by the economic consequences of the first and second lockdown, Covid-19 has had and will have disproportionate impact on the most vulnerable. One of the key challenges for the future will be to address the multi-faceted nature of the fundamental rights consequences of the pandemic.

Looking Forward: From Vaccines to Freedom

If the past year taught us anything, it is that predicting should be discouraged. Nevertheless, one thing can surely be expected: the 're-opening' of society will become another constitutional litmus test. Obviously, vaccination appears a way out. However, the Dutch vaccination scheme got off to a slow start and with the current vaccination rate it will take months before all citizens are vaccinated. This raises an important question. What to do with citizens that are vaccinated, while others are not? Should they be granted more freedom than others? The National Health Council has lined up the pros and cons for these ethical questions, but so far there is no political agreement. Obviously, the national elections that were held in March 2021 did not help to soften contrasts: strategies for vaccination and the opening of society appeared popular themes for parties to play off against each other.

The most recent question in this regard relates to a Bill that is currently pending, which would allow people who can present a recent negative Covid-19 test result to access certain non-essential facilities (such as hotels, bars and gyms) and higher education facilities. The objections of advisory bodies, for a change, did not relate to the role of Parliament and questions of democratic influence. Yet, fundamental rights challenges remain omnipresent, as the right to privacy and physical integrity are at play. If the creation of this Act takes as much time and effort as the creation of the TCA, legal scholars can buckle up and prepare for a fair share of legal turbulence again. While the epidemiological tides are slowly changing, pressing constitutional Covid-19 issues are here to stay.

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