Constitutional Law / Droit constitutionnel

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THE NETHERLANDS / PAYS-BAS

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CONSTITUTIONAL ADJUDICATION

DESPITE the constitutionally entrenched prohibition of judicial review of the compatibility of Acts of Parliament with the Dutch Constitution (*Grondwet*) and in the absence of a constitutional court, Dutch courts exercise constitutional jurisdiction in broad sense on numerous occasions. The year 2019 was a particularly rich year from the perspective of constitutional adjudication in the Netherlands. Some highlights are discussed below.

Climate Change and Constitutional Law: The Urgenda *Case before the Supreme Court*

The year 2019 went out with a constitutional bang. As announced in the previous chronicle, the Supreme Court issued its judgment in the seminal *Urgenda* case on the 20th of December[1]. The highest

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[1] Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda v. the State of the Netherlands*), published in English.

Dutch court upheld the judgment of the Court of Appeal of The Hague, which held that the Dutch government is obliged under Articles 2 and 8 of the European Convention on Human Rights to intensify its ambitions with regard to CO2-reduction in the short run. By 2020 the Dutch State should achieve a reduction percentage of 25% compared to 1990 levels. The full reasoning of the Court of Appeal has been discussed elaborately in the chronicle on 2018[2]. Below, I will focus on the approach of the Supreme Court towards the most pressing and explicit constitutional issues arising in the judgment[3]. These are (*1*) the review of Dutch climate policy based on Articles 2 and 8 of the ECHR, (*2*) the objection of the Dutch State that the reduction order issued by the Court would amount to an order to create legislation and (*3*) that deciding the case as the Court of Appeal did would force the Supreme Court out of the judicial domain and into the waters of high politics.

The Supreme Court held that Articles 2 and 8 of the ECHR oblige the Dutch State to increase its CO2 reduction target[4]. The 20% CO2 reduction compared to 1990 levels envisaged by the State was not

[2] See M.J. VETZO (2019) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2018, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, pp. 438-544. The judgment hit the headlines of major global newspapers and news shows. See *e.g.* 'In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action' (*New York Times* 20 December 2019), 'Netherlands climate change: Court orders bigger cuts in emissions' (*BBC* 20 December 2019) and 'Dutch supreme court upholds landmark ruling demanding climate action' (*The Guardian* 20 December 2019).

[3] The judgment was discussed extensively in legal academic circles. See *e.g.* L. BURGERS / A. NOLLKAEMPER (2020) The State of the Netherlands v. Urgenda, *International Legal Materials*, pp. 811-848; I. LEIJTEN (2020) Human Rights v. Insufficient Climate Action: The Urgenda case, *Netherlands Quarterly of Human Rights*, pp. 112-118; C.W. BACKES / G.A. VAN DER VEEN (2020) Urgenda: the Final Judgment of the Dutch Supreme Court, *Journal for European Environmental & Planning Law*, pp. 307-321.

[4] Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda v. the State of the Netherlands*), paras. 5.1-5.3.4. The cases cited below are those cited by the Supreme Court throughout its reasoning.

deemed sufficient. This application of positive obligations was based on an extensive interpretation of the case law of the European Court of Human Rights, which had not yet been confronted with questions on the ECHR compatibility of the climate policy of one of its Contracting States. One by one, the Supreme Court gives short shrift to the ECHR-related objections of the State.

The Court first determines the scope of both Article 2 and Article 8. Under the case law of the ECtHR, Article 2 protects the right to life. More specifically, it encompasses a positive obligation on the part of the State to take appropriate steps to safeguard the lives of those within its jurisdiction[5]. This obligation extends, *inter alia*, to situations of hazardous industrial activities and situations involving natural disasters. In cases of a 'real and immediate risk' that directly threatens the persons involved, Article 2 applies[6]. Article 8 ECHR contains the positive obligation to take measures to protect individuals against possible serious damage to their environment[7]. These obligations do not apply only to short-term risks or dangers[8]. Both obligations overlap when it comes to activities that are hazardous to the environment[9]. As said, the European Court of Human Rights has not yet decided a case on the application of Articles 2 and 8 to a situation of the scale and impact of *Urgenda*. The objections of the Dutch State, therefore, largely came down to the claim that precedents from ECtHR case law cannot be applied in the present situation. The Supreme Court firmly disagrees. The protection

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[5] *E.g.* ECtHR 17 July 2014, no. 47848/08 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Romania*), para. 130.

[6] *E.g.* ECtHR 30 November 2004, no. 48939/99 (*Öneryildiz/Turkey*), paras 98-101 and ECtHR 20 March 2008, no. 15339/02 (*Budayeva et al./Russia*), paras. 147-158.

[7] *Cf.* the cases mentioned in the ECtHR, Guide on Article 8 of the European Convention on Human Rights (version dated 31 August 2019), nos. 119-127, 420-435 and 438-439.

[8] *E.g.* with regard to Article 8 ECtHR 10 November 2004, no. 46117/99 (*Taşkin et al./Turkey*), paras. 107 and 111-114.

[9] ECtHR 20 March 2008, no. 15339/02 (*Budayeva et al./Russia*), para. 133 and ECtHR 24 July 2014, no. 60908/11 (*Brincat et al./Malta*), para. 102.

afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole[10] and they apply equally where the materialisation of the danger is uncertain. The Supreme Court comes to the conclusion that despite the global nature of the dangers posed by climate change, the Netherlands is obliged to do 'its part' in combatting it[11].

What this obligation entails in concrete terms, was the next question to be answered by the Supreme Court. As a general rule, the Court establishes that it should exercise restraint in this regard. The political branches of government – which envisaged a CO2 reduction target of 20% by 1990 – are in the drivers' seat of Dutch climate policy. Nevertheless, the Court can review whether the Dutch efforts in this area are not below what is minimally required for the Netherlands to do its share in combatting climate change. The main tool used by the Court to translate the general ECHR-obligation into a more concrete standard, is the high degree of international consensus on the urgent need for industrialised countries to reduce greenhouse emission by at least 25-40% by 2020 compared to 1990 levels. This obligation also applies to the Netherlands individually[12]. The Supreme Court then shifts towards a more procedural review of the policy adhered to by the Dutch state. The State has not explained that and why – in spite of international and scientific consensus to the contrary – a policy aimed at 20% reduction by 2020 can still be considered a responsible contribution to prevent dangerous climate change. In light of the above, the Supreme Court decides that the Court of Appeal was allowed to rule that the State should in any event adhere to the target of at least 25% reduction by 2020. Based on a careful and elaborate reasoning, the Supreme Court is able to jump from the generally worded rights granted by the ECHR to a very concrete minimum percentage of CO2 reduc-

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[10] See *e.g.* on Article 2 ECtHR 12 January 2012, no. 36146/05 (*Gorovenky and Bugara/Ukraine*), para. 32 and ECtHR 26 July 2011, no. 9718/03 (*Stoicescu/Romania*), para. 59.

[11] Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda v. the State of the Netherlands*), paras. 5.7.1-5.7.8.

[12] *Ibid*, para. 7.1-7.3.6.

tion that is to be achieved by the Dutch State before the end of 2020.

The only other arguments that were standing in the way of victory for Urgenda, were of an outright constitutional nature. The first argument entailed that by imposing a higher CO2 reduction percentage than envisaged by the political branches, the Supreme Court would effectively be issuing an order to create legislation. Achieving a significantly higher CO2 reduction without taking legislative measures, so the argument goes, would be practically impossible. And judicial orders of that kind are not allowed under Dutch constitutional law[13]. To prevent its CO2 reduction order from amounting to an order to legislate, the Court interprets its previous case law on the matter rather narrowly. In *Urgenda* the Supreme Court decides that courts are only not permitted to issue an order to create legislation with a particular, specific content. As the State is given full discretion to decide which measures are to be taken, the CO2 reduction order does not violate the prohibition on issuing orders to create legislation[14]. The second (quite predictable) constitutional argument of the State concerned the demarcation of the line between law and politics. This argument entailed that it would not be for the courts to make the political considerations that are necessary for a decision on the reduction of greenhouse gas emissions. The rejection of that argument by the Supreme Court comes equally unexpected. The Court, so it decides, is merely enforcing the legal limits to political decision-making as it is obliged to do under the Dutch Constitution. Those limits include the ECHR and Dutch Courts are to apply the provisions thereof by virtue of their constitutional man-

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[13] As established by the Supreme Court in Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*) and confirmed in Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (*SGP*), paras. 4.6.1-4.6.2, and Supreme Court 7 March 2014, ECLI:NL:HR:2014:523 (*State/Norma et al.*).

[14] Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda v. the State of the Netherlands*), paras. 8.2.1-8.2.7.

date. After all, the protection of human rights is an essential component of a democratic state under the rule of law[15].

The Supreme Court judgment of 20 December 2019 marks the end of a legal struggle that took off with the judgment of the District Court of the Hague in 2015[16]. While fierce at first, the constitutional scholarly responses to the *Urgenda* proceedings have toned down somewhat in later years. Legal claims with significant financial and governmental implications on issues of an extremely polycentric nature apparently are no longer strange to the Dutch constitutional system. Whatever one may think of the reasoning of the Court, *Urgenda* constitutes a hallmark constitutional ruling that will leave its traces in the Dutch constitutional order for years to come. Despite the emphasis on the exceptional nature of the procedure, the *Urgenda* judgments issued by the District Court and Court of Appeal in The Hague and the Supreme Court will most likely feature in future constitutionally and politically significant rulings.

Repatriating the Families of Islamic State Combatants

The first traces of the impact of *Urgenda* can be detected in a case that was decided a month before the judgment of the Supreme Court. Over the past few years, a number of Dutch men and women, together with their children, decided to join the forces of Islamic State (IS) in Syria and Iraq. After the fall of the caliphate the women and their children were detained within Syrian-Kurdish run camps. Dutch government policy entailed that no active effort would be made to bring back the mothers and their children to their home country, even though the former are formally accused of criminal offences because of their activities on the side of IS. 23 women brought a claim to the District Court of The Hague that it would be unlawful not to repatriate them to their home country. Given the

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[15] *Ibid*, paras. 8.3.1-8.3.5.

[16] As discussed elaborately in the 2015 chronicle. 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*, pp. 510-514.

harsh living conditions in the camps and the deteriorating security situation in the region, the policy of the Dutch government was unlawful, because it would violate its obligations under human rights treaties and would amount to an unlawful act on the part of the State. In summary proceedings the presiding judge of the District Court held that refusal to bring back the children indeed amounted to a violation of their rights[17]. In the absence of jurisdiction of the Dutch State in Iraq and Syria, the relevant provisions of the International Convention on the Rights of the Child and the ECHR could not be relied upon directly. However, as the District of The Hague reasoned in its decision in *Urgenda* in first instance, those provisions can apply indirectly. They can have a so called 'reflex effect'. When applying and interpreting open standards of national law – such as the notion of 'duty of care' under Dutch civil law, which was the legal basis relied upon by the mothers in court – judges take into account international obligations. So, even though they are not directly applicable they assist the court when applying generic ('vague') norms and standards. The District Court did so in this case. In view of these rights, given the deteriorating circumstances in the camps and in light of the fact that the children could not be blamed for the fact that their parents decided to take them to Syria and Iraq, the District Court held that the State had a duty to make every effort to repatriate the children. The same duty did not apply with regard to the mothers. They can be held responsible for their own choice to travel to Syria and Iraq, despite the efforts of the state to prevent them from doing so. Moreover, once they arrived they joined the ranks of IS, a terrorist organisation. The duty of the care of the state therefore does not apply to them. The Dutch state filed appeal proceedings as the judgment largely opposed its recently formulated policy in the area of foreign affairs. No less than eleven days later, the Court of Appeal issued its judgment[18]. The Court of Appeal quashed the judgment of the District Court.

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[17] District Court of the Hague, 11 November 2019, ECLI:NL:RBDHA:2019:11909 (*IS Repatriation*).

[18] Court of Appeal of the Hague, 22 November 2019, ECLI:NL:GHDHA:2019:3208 (*IS Repatriation*).

Even though it agreed that the fundamental rights of the children have a reflex effect on the interpretation of the duty of care of the State[19], its institutional position *vis-à-vis* the political branches required the Court of Appeal to approach the matter with utmost caution. The repatriation of the children (and their mothers) is a matter of national security and foreign policy. The actions and decisions of the state in this area depend strongly on political considerations, which are not limited to the sole interests of the claimants in this case. For this reason, the Court of Appeal reviewed government policy only marginally through a reasonableness test. The Court could only interfere if the state could not reasonably have made the decision not to repatriate the families. As the District Court did not apply such a marginal type of review, the decision in first instance was quashed. The Court of Appeal held that government policy on this matter met the reasonableness threshold and as a consequence the State is no longer required to repatriate the children, nor their mothers. Appeal in cassation has been lodged before the Supreme Court which will decide on the matter in 2020.

Automatic Loss of (Union) Citizenship

Citizenship can be regarded as one of the central themes of constitutional law, both at the domestic and the European Union level. An important judgment on this topic was issued by the Court of Justice of the European Union in response to preliminary question by a Dutch court. In 2003 the Dutch nationality act (*Rijkswet op het Nederlanderschap*) was changed. If Dutch citizens lived abroad for a period of more than ten years and have acquired the nationality of another state, they would lose their Dutch citizenship. To be a Dutch citizen entails being an EU citizen (see Article 20 of the Treaty on the Functioning of the European Union), and – given the additional character of the latter – loss of Dutch citizenship entails

[19] The Court of Appeal noted explicitly that the absence of jurisdiction made this case fundamentally different from the *Urgenda* case. See Court of Appeal of the Hague, 22 November 2019, ECLI:NL:GHDHA:2019:3208 (*IS Repatriation*), para. 6.5.

loss of citizenship of the European Union and the rights based upon thereupon. In a steady line of cases the Court of Justice of the European Union held that loss of Union citizenship does not come about easily. In its seminal *Rotmann* judgment the Court of Justice held that prior to revocation of national citizenship, a proportionality test should be applied where this implies loss of Union citizenship[20]. In a case concerning the application of the Dutch nationality act, the Administrative Jurisdiction Division of the Council of State asked preliminary questions to the CJEU with regard to this proportionality test[21]. In its judgment in *Tjebbes* the Court of Justice held that national legislation should allow for the possibility to review the proportionality of the consequences of loss of Union citizenship for each person individually. Automatic loss of citizenship without the possibility of individual proportionality review is not compatible with Union law[22]. Now that the CJEU has played its part, the Administrative Jurisdiction Division will decide on the matter in 2020.

Repealing the Advisory Referendum Act: A Matter of Constitutional Adjudication

In the 2018 chronicle on Dutch constitutional law it was announced that the repeal of the Advisory Referendum Act (ARA) in July 2018 meant the definitive end of advisory referenda in the Netherlands[23]. However, not everyone agreed with that proposition. The public interest group More Democracy (*Meer Democratie)* launched a final legal challenge before the courts in order to – at least – have a referendum organised on the question whether the

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[20] CJEU 2 March 2010, case C-315/08, ECLI:EU:C:2010:104 (*Rottmann*).

[21] Administrative Jurisdiction Division of the Council of State, 19 April 2017, ECLI:NL:RVS:2017:1098 (*Tjebbes*).

[22] CJEU 12 March 2019, case C-221/17, ECLI:EU:C:2010:104 (*Tjebbes*).

[23] M.J. VETZO (2019) Chronicle / Chronique, Constitutional Law / Droit constitutionnel 2018, The Netherlands / Pays-Bas, *European Review of Public Law / Revue Européenne de Droit Public*, p. 551.

ARA should be repealed. In a remarkably constitutionally oriented reasoning, the Administrative Jurisdiction Division of the Council of State explicitly reiterated that the constitutional maxim '*lex posterior derogat legi priori*' applied and held that – within the boundaries of the Constitution – the legislature is free to repeal any Act of Parliament whatsoever. As the repeal of the ARA also did not violate the principle of legal certainty, nor Article 10 ECHR, it can now be said with certainty that advisory referenda are part of Dutch constitutional history.

Constitutional Law and Politics I: Provincial Councils Elections and the Composition of the Senate

Two important elections took place in the Netherlands in 2019. In March the Dutch electorate headed to the polls to elect members of the Provincial Council, *i.e.* representatives of the 'parliaments' of the Provinces, the tier of government between the municipalities and the central government. Provincial politics, however, does not take centre stage in the debates running up to these elections. National politics does. This largely has to do with the fact that soon after the provincial election, the Provincial Councils have the special task of electing the members of the Senate. The elections are therefore more national in nature, then would appear at first sight, as they have turned into 'midterm' elections in which the electorate gets the opportunity to show its (dis)approval for the governing coalition parties.

The 2019 Provincial Councils saw the remarkable rise of *Forum voor Democratie* (Forum for Democracy, hereinafter: FvD). The conservative right-wing party, led by Member of Parliament Thierry Baudet, won no less than 12 of the 75 seats, making it the largest party in the Senate. The biggest party in the Lower House, the conservative VVD (led by Prime Minister Mark Rutte), equally obtained 12 Senate seats. The loss of seats by the coalition parties (next to the VVD, consisting of the Liberal Democrats (D66), the centre-left Christian Union (*ChristenUnie*) and the Christian Democrats (CDA)) was fairly limited. While Prime Minister Rutte is

still going strong after nearly ten years in office his coalition did lose its majority in the Senate. This makes it more difficult to push through its legislative agenda in the two years to come.

CONSTITUTIONAL LAW AND POLITICS II: EUROPEAN PARLIAMENT ELECTIONS

The election to the European Parliament was held between 23 and 26 May 2019. The Dutch electorate voted on 23 May and was confronted, for the second time, with so-called *Spitzenkandidaten*. According to the EU Treaties, the president of the European Commission is formally nominated by the European Council. Since the entry into force of the Treaty of Lisbon, however, Article 17 of the TEU reads that in doing so the European Council has to 'take into account' the elections to the European Parliament. This amendment brought about a link between the outcome of the European Parliament elections and the Commission presidency and contributed to the 'parliamentarisation' of the Union's institutional structure. As a consequence, each major political group in Parliament now nominates prior to the elections their candidate for Commission President, a *Spitzenkandidat* ('lead candidate'). The *Spitzenkandidaten* procedure highlights that the European electorate, by voting for national parties and candidates to fill the seats granted to their respective states, also has a say in the composition of the EU's executive branch.

The Dutchman, and then acting Vice President of the European Commission, Frans Timmermans was elected as the lead candidate of the Party of European Socialists, and as the party leader of the Dutch Labour Party. The latter had suffered a tremendous loss in the 2017 Lower House elections (losing 29 seats and ending up as the seventh largest party in Parliament). Probably due to Timmermans' presence, the Labour Party won the European Parliament elections, obtaining six seats. The Party for Freedom (PVV), the second largest party in the Lower House, dramatically lost four of its seats, initially leaving it without any MEPs. However, as of yet the party led by Geert Wilders is still present in Brussels (and Strasbourg), thanks to the slow progress of Brexit ne-

gotiations. In February 2018, the European Parliament voted to decrease the number of MEPs from 751 to 705, if the United Kingdom were to withdraw from the EU before the elections to the European Parliament. The withdrawal, as we all know, did not occur before that date. And so the UK participated in the European Parliament elections, as if they would not be on the brink of leaving the Union. When the UK did leave, however, three of its seats were allocated to the Netherlands. One of those seats was filled by the PVV, ensuring the Party's presence in the Parliament of the organisation it so deeply despises.

The large win of the Labour Party diametrically opposed a tendency at the wider European level. The Party of European Socialists lost 31 seats. The largely conservative European People's Party (EPP) led by Manfred Weber equally lost seats, but remained the largest party in the European Parliament. In light of the foregoing, it would appear that the European Council would nominate Weber to the office of President of the European Commission. Things, however, turned out different. Following a three day long negotiation between the respective leaders of the member states, Ursula von der Leyen (a former German secretary of Defence, also belonging to the EPP) was proposed to the European Parliament as Commission President. The French President Macron was particularly unhappy with Manfred Weber and the *Spitzenkandidaten* system in general. He took the lead in a revolt against the *Spitzenkandidaten* system and prevented Weber from being elected. Von der Leyen came up as the ideal compromise candidate and so not only Frans Timmermans's dream of becoming the daily leader of the Union, but also Weber's did not become reality. Moreover, the events as they unfolded cast doubt on the tenability of the *Spitzenkandidaten* idea and the future of the EU's slow move towards parliamentarism. From a constitutional perspective, they shine a light on the malleability of constitutional conventions and the value of constitutional

practice in regulating the relationships between the institutions of the Union[24].

CONSTITUTIONAL REFORM AND CONSTITUTIONALLY RELEVANT LEGISLATION

The previous chronicle discusses some of the proposals of the State Commission on the parliamentary system. This commission was assigned the task of advising the government on the future readiness of Dutch parliamentary democracy. In 2019 the Cabinet responded to these recommendations, by using a 'differentiated approach'. Some of proposals were welcomed warmly. This concerns, for instance, modifications to the Dutch electoral system, in order to intensify the regional ties between Members of Parliament and the electorate or the intensification of education on citizenship. Other proposals will be subjected to further research and inquiry. This category includes recommendations that comprise the core of the report of the State Commission, such as the lowering of the voting age from 18 to 16 and the introduction of the right to amend Bills in the Senate. The same counts for establishing a constitutional court. In its report, the State Commission recommended to introduce the possibility to review the constitutionality of Acts of Parliament. Whereas earlier proposals opted for a system of diffuse review (in which all courts can exercise this review power), the State Commission proposed a Constitutional Court which is designated with this particular type of review. The Cabinet acknowledges the benefits of this system, as it improves the legal protection offered by the Constitution, would increase its normative character and strengthens the position of the national, constitutional order *vis-à-vis* the European and international domains. It also sees some crucial disadvantages, such as the possible disturbance of the balance of powers between the court and the political branches. The proposal thus requires further research. We therefore have to wait a little longer before we

[24] See also J.H. REESTMAN / L.F.M. BESSELINK, Spitzenkandidaten and the European Union's system of government, *European Constitutional Law Review*, pp. 609-618.

know whether the Netherlands will not only have substantive constitutional adjudication (which is ever present, as appears from the first section of this chronicle), but also a formally designated constitutional court. Other proposals were simply rejected. The Cabinet did, *inter alia*, not agree with the recommendations of the Commission that allow for bigger influence of the electorate on the process of Cabinet formation. The essence of these proposals entailed that the Dutch voters would not only vote for the elections of the Lower House, but – by separate ballot – also for the *formateur* (the person who is responsible for putting together a new Cabinet after the elections). In line with generally prevailing opinions in constitutional scholarship, the Cabinet does not believe this to be a viable proposal that fits within the logic of the Dutch system of government.

Another proposal that will be subjected to further inquiry by the Cabinet concerns introducing a corrective referendum. With the repeal of the Advisory Referendum Act, the Netherlands does no longer know of the possibility of organising referenda. The Cabinet doubts whether this type of direct democracy fits within the Dutch system of representative government. The introduction of corrective referenda, however, does not necessarily depend on willingness of the Cabinet to adopt the recommendation of the State Commission. Before the Cabinet responded to the report of the Commission, a MP of the Socialist Party proposed a Bill to introduce the possibility of corrective referenda. Earlier on, in November 2017, a Bill with a largely similar content was voted down by the Lower House. The year 2020 will therefore be a defining year for direct democracy in the Netherlands.

Another proposal that would bring about constitutional reform did not make it to the finish line in 2019. More than a decade ago, the Lower House passed a Bill containing an amendment to the Constitution, that would introduce a system of qualified majority voting in Parliament in order to ratify amendments to the EU Treaties. The Senate, however, rejected this Eurosceptic bill. It largely agreed with the State Commission, which was also asked to advise on the matter, that the bill would not live up to its purpose of keeping in check large-scale Union reform without substantial parliamentary support. The proposed amendment equally applied to small changes

to the EU treaties (and thus would be over-inclusive), whereas it would not cover considerably more important decisions made at the Union level (such as association agreements with third states). The fate of the Bill once again highlighted that amending the Constitution in the Netherlands is no business for impatient politicians. The proposal was under discussion in Parliament for no less than thirteen years before the Senate voted it down.

Those who adopt a more favourable attitude towards the EU can only hope that a Bill introduced in May 2019 will not suffer the same fate. The Brexit tragedy constituted the prime reason for two MPs of the pro-European liberal democrats (*D66*) to introduce an amendment to Article 90 of the Constitution. This Article would give a constitutional basis to the Dutch membership of the European Union and would require a two-third majority vote, before termination of EU membership can be initiated. The Bill was introduced in 2019 and will probably be subjected to a first vote in 2020.

Brexit also brought about the coming into being of a constitutionally significant piece of legislation. In order to enable the government to respond quickly to the possibility of a no-deal-Brexit, a Brexit Bill was introduced that would give government the possibility to derogate from Acts of Parliament in order to solve the problems caused by a rough exit from the UK. Through the introduction of – what is known by our North Sea neighbours as – a Henry VIII clause, government could derogate from Acts of Parliament through Orders in Council or ministerial orders. The Lower House passed the Bill, but amended it, in order to ensure that derogation from the Constitution would not be possible. Despite strong constitutional objections, the Brexit Bill passed into law in April 2019.

ABSTRACTS / RÉSUMÉS

Some remarkable instances of constitutional adjudication took place in the constitutional year 2019 in the Netherlands. The Supreme Court upheld the CO2 reduction order issued by the Court of Appeal of the Hague. The judgment can be considered a landmark ruling, in which the Supreme Court defines the respective domains of courts and the political branches and that of law and politics. Other noteworthy judgments relate to the re-

patriation of the families of IS combatants and the repeal of the Advisory Referendum Act. The elections to the Provincial Councils resulted in a new composition of the Senate, in which the coalition parties no longer have a majority of seats. The European Parliament elections of May 2019 saw the revival of the Dutch Labour Party and cast doubts on the future of the *Spitzenkandidaten* procedure. The Cabinet responded to the recommendations of the State Commission on the Parliamentary System. A large number of proposals, such as the establishment of a Constitutional Court, are subjected to further discussion and research by the Cabinet. Newly pending amendments to the Constitution, concern the introduction of corrective referenda and the constitutionalisation of Dutch EU Membership.

Quelques exemples remarquables de décisions constitutionnelles ont eu lieu en 2019 aux Pays-Bas. La Cour suprême a confirmé l'ordonnance de réduction des émissions de CO2 prononcée par la Cour d'appel de La Haye. Cet arrêt peut être considéré comme un jalon par lequel la Cour suprême définit les domaines respectifs des tribunaux et des branches politiques et celui du droit et de la politique. D'autres arrêts notables concernent le rapatriement des familles des combattants de Daesh et l'abrogation de la loi sur le référendum consultatif. Les élections aux conseils provinciaux ont recomposé le Sénat, où les partis de la coalition n'ont plus la majorité des sièges. Les élections au Parlement européen de mai 2019 ont vu le renouveau du Parti travailliste néerlandais et ont jeté un doute sur l'avenir de la procédure des *Spitzenkandidaten*. Le Conseil des ministres a donné suite aux recommandations de la Commission d'Etat sur le système parlementaire. Il discute et examine un grand nombre de propositions, telles que l'établissement d'une Cour constitutionnelle. De nouvelles modifications de la Constitution sont en attente, concernant l'introduction de référendums correctifs et la constitutionnalisation de l'appartenance des Pays-Bas à l'UE.

F. Vogin