The Netherlands

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I. INTRODUCTION

This report first addresses two major constitutional developments. The first one is related to the government formation and the second one follows up on our analysis of the 'Childcare allowance scandal' as discussed in our previous report of 2020. Because Article 120 of the Constitution of the Netherlands forbids the constitutional review of Acts of Parliament by the judiciary, this report does not include 'traditional' constitutional case law of decisions rendered by a Constitutional Court. There were nevertheless judgments rendered in 2021 in the Netherlands with a constitutional impact that is relevant to an international audience. This report highlights and discusses two judgments, namely the Supreme Court decision in the case of the State v. Wilders, concerning the freedom of expression of politicians, and the climate case against Shell. We conclude by looking ahead towards 2022.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Government formation 2021

1.1. General aspects

On March 17, 2021, the general elections for the Lower House of Parliament took place. Government-Rutte III had already tendered its resignation on January 15, in response to the Childcare allowance scandal (see 2.). The formation of a new government started the day after the elections and took until January 10, 2022, resulting in the longest formation in the Netherlands to date (299 days).

Neither the Constitution of the Netherlands nor any Act of Parliament contain rules on the formation process. The Rules of Procedure of the Lower House (articles 11.1-11.3) state that the newly elected Lower House shall debate the election results, after which it decides on the appointment of an '*informateur*' (a person who investigates possible coalitions) or a '*formateur*' (a person who forms a new government based on an intended coalition). These persons report to the

Lower House regularly. Finally, the Lower House may declare certain political issues to be 'controversial', meaning the caretaker government may not make crucial decisions on those matters. The only *constitutional* rule regarding the formation process – an unwritten rule of Dutch constitutional law – is the rule of confidence, which is at the core of the Dutch parliamentary system: a new government needs the confidence of a majority in the Lower House (and, preferably, also in the Upper House).

The 2021 formation was especially complicated because of the fragmentation and polarization of the Lower House. The Netherlands has a proportional election system for both Houses of Parliament (article 53, paragraph 1 of the Constitution) and no electoral threshold. In March 2021, 17 parties acquired at least one of the 150 seats, which was a post-WWII record. Three right-wing or populist parties (PVV, FvD, JA21) won a total of 26 seats; 16 seats went to three left-wing parties (SP, PvdD, Bij1). The 'middle ground' was divided between 11 parties. Currently, there are 20 fractions, due to several split offs.

Another reason why the formation process took so long was because personal relations between the leaders of several parties had been damaged severely in the early stages of the process. Some rather revealing personal notes of one of the '*informateurs*', insinuating that a critical MP of one of the previous coalition parties should be given a 'function elsewhere', unintentionally became public, leading to a heated debate in the Lower House. After that, it took months to restore trust among the political leaders. The lengthy process finally resulted in the old coalition being rebuilt. All that time, the government functioned under a caretaker status. Nonetheless, this government had the COVID-19 crisis to deal with, necessitating many far-reaching legislative and executive decisions. Furthermore, it had to prepare a new budget for 2022, and tackle urgent issues such as climate change and the housing crisis. Therefore, the government functioned mostly as a fully 'missionary' government. It is important to note that several of the resigning ministers, including the PM, were at the same time involved in the negotiations to form a new government.

There were many complaints in the Lower House, and among the public, about the lack of transparency during the formation process. Again, there are no constitutional or other binding rules on this topic. Traditionally, negotiations take place behind closed doors, with regular reports from the '*informateur(s)*' to the Lower House. In the election campaigns, several parties promised a new and more open style of governance and more transparency. Despite these promises, the formation process seemed even more secretive and less transparent than before.

1.2. Specific issues

a) Appointing elected MP's as state secretaries in a resigning government

During the lengthy formation, some members of the care-taking government, both ministers and state secretaries, quit while the negotiations for the new coalition were still far from concluded. To fill these vacancies in the meantime, three members of the Lower House were appointed as state secretary in the caretaker government *without* abandoning their seat in Parliament. Other members of the Lower House wondered whether this was constitutional. After all, for obvious reasons of separation of powers, Article 57, paragraph 2 of the Constitution states that members of Parliament cannot be ministers or state secretaries at the same time.

Article 57, paragraph 3, however, formulates an exception to this rule. According to this provision, a minister (or state secretary) who has tendered his resignation can combine his ministership (or state-secretaryship) with a membership of Parliament, until a decision is taken on his resignation. The idea behind this exception is as follows. In the Netherlands, it is standard practice that a Prime Minister tenders the resignation on behalf of the entire government. However, the resignation of these ministers and state secretaries can only be effectuated when a new government is formed, which obviously takes time. In the meantime, these resigning ministers and state secretaries usually remain in their post but might also candidate themselves for the parliamentary elections and obtain a seat in the Lower House. In that scenario, Article 57, paragraph 3 allows them to combine both functions until a new government is formed.

The question was whether the three members of the Lower House that were appointed as state secretaries in the caretaker government fell under the exception of Article 57, paragraph 3. These members had not been part of the caretaker government when it tendered its resignation on January 15. On the contrary, they were members of the Lower House at that time and were re-elected on March 17. For that reason, some scholars argued that the exception was not applicable to this case. The resigning Prime Minister nevertheless argued that the exception of Article 57, paragraph 3 applied to resigning members as well as to new members of a care-taker government, since the resigning status of a care-taker government also extended to ministers and state secretaries that were appointed in that government after the resignation is tendered. Hence, in his view the situation was constitutional.

A majority of the Lower House remained in doubt, however, and asked the Council of State for constitutional advice on the matter. Due to the nature of the matter (the Lower House membership), the Council of State argued that neither the text nor the history of the Constitution gave a clear answer to whether MPs appointed as state secretary in a care-taker government ought to quit their Lower House membership. The Council of State therefore said that the Lower House had to decide for itself whether the situation was constitutionally permissible.

The three state secretaries in question immediately ended their parliamentary membership after the Council of State published its advice. A few days later, the Lower House adopted a resolution that stated that Article 57, paragraph 3 ought to be strictly interpreted, meaning that a member of the Lower House can never have a double function after that member is installed in the Lower House without a double function, and that no exception on Article 57, paragraph 1 exists, other than the situation in which a resigning minister or state secretary is elected as MP.

b) Dismissal of a state secretary by the prime minister for publicly criticizing the government's COVID-19 policy

The tensions between the members of the caretaker government reached a climax in September, when one of the resigning state secretaries publicly criticized the government's COVID-19 policy. This action violated the constitutional principle of the 'unity of the Crown', which entails that the government speaks with a single voice. Any disagreement between ministers and state secretaries (and the King, for that matter) should be kept behind closed doors, and all ministers and state secretaries must support and loyally execute government decisions once these have been taken. This follows from the collective ministerial responsibility, laid down in Article 42, paragraph 2 of the Constitution.

The Prime Minister therefore dismissed the state secretary in question on September 25, 2021, through a Royal Decree. A Royal Decree is a decision of government, signed by the King and countersigned by at least one of the ministers (article 46, paragraph 1 of the Constitution). A problem here was that the Prime Minister only consulted the most directly involved ministers on the matter, and not the Council of Ministers as a whole. This situation is a violation of the Rules of Procedure of the Council of Ministers, which state that the dismissal of a minister or state secretary requires the deliberation and decision of the Council (Article 4, paragraph 2, sub k). In that sense, the dismissal was taken irregularly. The validity of the Royal Decree, however, is not affected by this procedural flaw.

2. Childcare allowance scandal: follow-up

Government-Rutte III tendered its resignation on January 15, 2021, following the parliamentary investigatory commission's damaging report called 'Unprecedented injustice'.[1] Childcare allowance payments were wrongfully stopped, and families were unjustifiably ordered to repay the full amount of childcare allowances they had received in the years before, which led to severe financial and personal problems. The parliamentary report concluded that due to an overheated political reaction to fight fraud, fundamental principles of Rule of Law had been violated. According to the report, the victims were helpless against the powerful institutions of the State and did not receive the protection they deserved by the Tax Authority, the Ministry of Social Affairs, the government, the Council of State, and Parliament. The report also severely criticized the provision of information, among others of the Tax Authority to the ministers, the Lower House, the involved parents, the judiciary, and the media. The report recommended that everyone in the apparatus of the State should ask themselves how such a situation can be prevented from happening again, as the checks and balances failed to offer the necessary protection. As a result, 2021 brought about important debates on this topic, as well as several reports.

The President of the Administrative Jurisdiction Division of the Council of State stated that it could have contributed earlier to the necessary correction of the system failure of the legislator and the strict application of the law by the Tax Authority.[2] In a reflection report of the Administrative Jurisdiction Division published on November 19, 2021 it repeated that the court could and should have corrected the strict line sooner in view of proportionality and that it should have offered all parents involved better legal protection.[3] Moreover, at the request of the Lower House, the European Commission for Democracy through Law, the so-called Venice Commission, published an opinion on the legal protection of citizens. The Commission regards The Netherlands as a well-functioning state with strong democratic institutions and safeguards for Rule of Law. The Commission confirms that the shortcomings in individual rights protection were serious and systemic and involved all branches of government. Nonetheless, Rule of Law mechanisms in the Netherlands eventually did work, although it took too long. Therefore, the Commission formulated several proposals 'as food for thought' related to legislative power (e.g., the inclusion of hardship or proportionality clauses in future legislation), executive power (e.g., the improvement of the information flows and access to information), and judicial power (e.g., considering amending Article 120 of the Constitution containing a prohibition of constitutional review of Acts of Parliament by the judiciary or the introduction of other mechanisms of constitutional review). Nonetheless, the Commission concluded that it is confident the ongoing reforms and further reforms will lead to an improvement of the situation avoiding a repetition of problems.

It should be mentioned that the settlement of the promised compensation scheme proves to be arduous. The National ombudsperson, for instance, formulated strong criticism about the complexity of the system of the recovery operation, carried out mainly by the newly established Executive Organization Recovery Allowances.[4] He observed a parallel between the mistakes made by the government in the childcare allowances scandal and the way of solving those same problems. The operation is complex and slow at the expense of the parents and children involved. Finally, on December 15, 2021, the coalition agreement of Rutte IV announced a fundamental reform of the current childcare allowances system to avoid a repetition of the past. It is the intention that the allowance will be paid directly to childcare institutions so that parents will no longer be faced with repayments. The first steps were announced to be taken by the new State Secretary for Allowances and Customs.

III. CONSTITUTIONAL CASES

1. State v. Wilders Sequel: Wilders II and the freedom of expression of politicians

In our previous report of 2020, we discussed the conviction of politician and member of the Lower House Wilders for group defamation in *State v. Wilders* before the Court of Appeal of The Hague.[5] Although the Court did not impose any penalties, Wilders appealed to this conviction before the Supreme Court[6] and got irreversibly convicted for group defamation of the Moroccan people living in the Netherlands. The Supreme Court agreed with the Court of Appeal that the statement was disproportionately hurtful and that the right to freedom of expression of Article 10 ECHR did not prevent a conviction.[7]

The judgment of the Supreme Court is interesting from a constitutional perspective for two reasons. Firstly, the Supreme Court repeated the reasoning of the Appeals Court, stating that while politicians should be able to raise issues for the purpose of the public good, even when it may concern hurtful or shocking statements, politicians still bear the responsibility to refrain from making statements that conflict with the principles of democracy and Rule of Law. This includes statements that may directly or indirectly incite intolerance.[8] The Supreme Court furthermore stated that the necessity-test of Article 10 paragraph 2 ECHR should be understood in light of Article 17 ECHR, which prohibits the abuse of rights laid down in the Convention and becomes relevant where it concerns statements that are intolerant to the extent that they violate human dignity.
This demonstrates that the freedom of speech of politicians can be restricted when it is used to make statements that are unnecessarily hurtful. *Wilders II* thereby pulls Articles 137c and 137d of the Dutch Criminal Code into the sphere of a resilient democracy, making these provisions instruments that also defend a liberal and democratic state.[9]

2. Shell: climate change

In the Netherlands, civil courts are increasingly confronted with cases in which citizens and NGO's ask courts to interfere with government policies usually based on the support of Parliament. This challenges the primacy of politics and judicial restraint when societal interests are at stake. The prime example of such a case is the Urgenda climate case, which was elaborately discussed in our report of 2019. Building on the argumentation in the Urgenda case, a new climate case, this time not against the State but against the Royal Dutch Shell (RDS), revolves around the question whether a *private company* violated a standard of care interpreted in view of human rights obligations by failing to take adequate action to curb CO2 emissions contributing to climate change.[10] In 2019, seven Dutch NGO's and more than 17.000 individual claimants filed a class-action lawsuit against RDS before the District Court of The Hague. In a groundbreaking judgment of May 26, 2021, the Court ordered RDS to reduce the global CO2 emissions of the Shell group, including its suppliers and its customers, by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. The Court founds this obligation for RDS in the unwritten *standard of care* in Dutch tort law, which is an open norm that courts may interpret in light of changing social norms and standards, established consensus and internationally accepted standards. It is based on Article 6:162 of the Dutch Civil Code and the tortious act when acting in conflict with a legal obligation or 'what is customary in society according to unwritten law'. The latter concerns the standard of care.

As one of the largest producers and suppliers of fossil fuels in the world, the Shell group substantially contributes to global warming and dangerous climate change. The Court argues that this leads to serious human rights risks, more concretely concerning the right to life and the right to respect for private and family life as embedded in Articles 2 and 8 ECHR. Even though the claimants could not invoke these fundamental rights directly against Shell, the Court incorporates them in the interpretation of the standard of care applicable to RDS. According to the Court, it is an individual responsibility of companies to respect human rights, notwithstanding the action or inaction of states. For RDS it concerns an "*obligation of result*" regarding the Shell group's CO2 emissions, while regarding its suppliers and customers RDS has a "*significant best-efforts obligation*" via the Shell group corporate policy.

The Court holds that even though RDS is currently not in breach of its reduction obligation, the Shell group's policy is intangible, undefined, non-binding and it does not contain an emissions reduction target for 2030. As a result, the Court holds that there is a danger of imminent breach of the reduction obligation. On July 20, 2022, Shell appealed to the decision, but it must immediately begin to comply with the provisionally enforceable judgment. A fine, periodic penalty or civil damages could be imposed in the future if RDS would fail to comply with the judgment's obligation to reduce CO2 emissions. Even though the amount of climate cases around the globe is increasing, this judgment is said to be the first of its kind where a court imposed a duty on a company to prevent dangerous climate change.[11] This judgment could generate a substantial impact to companies in a comparable situation, and it may serve as an inspiration to other courts in comparable cases.

3. COVID-19: parliamentary involvement and cases on constitutional rights and freedoms

The report of 2020 ended with the entry into force of the 'Temporary COVID-19 Measures Act' (hereafter: TCMA).[12] The question was raised whether the TCMA had to be kept in force. Nonetheless, the TCMA has been extended three times and has undergone several amendments. One interesting amendment concerned the enhancement of parliamentary involvement in the creation of ministerial decrees regarding new COVID-19 measures or the downscaling thereof. As a result, the Lower House can decide to disagree with the ministerial decree leading to an expiration of the ministerial decree, unless it concerns urgent circumstances requiring immediate action. Under the latter circumstances, the ministerial decree enters into force immediately.[13]

Furthermore, the Public Health Act was amended several times after the entry into force of the TCMA to provide a legal basis for several COVID-19 related measures, such as the use of COVID-19 access permissions for events[14] or the obligation to present a negative test result upon entering the Netherlands when returning from a high-risk area[15].

Another impactful measure was the entry into force of a curfew on January 23, 2021. This curfew was not based on the TCMA, but on the Extraordinary Competences on Civil Authority Act (hereafter: ECCAA). The curfew entered into force with posterior agreement of the Lower House, which raised the question of whether the circumstances were of such a level of urgency that the application of the ECCAA was appropriate.[16] Stichting Viruswaarheid submitted this question before the District Court of The Hague, which ruled that the construction was unlawful, resulting in the deactivation of the cur-

few.[17] That same day, the Appeals Court of The Hague suspended the enforceability of the District Court's judgement.[18] Thereafter, the government prepared a new proposal for a curfew based on the TCMA, which entered into force six days after Court of Appeals' suspension.[19] The Court of Appeals later annulled the decision of the District Court, as it found that the legal basis of the curfew was appropriate due to the urgent circumstances and thereby met the criteria of proportionality and subsidiarity.[20]

IV. LOOKING AHEAD

Currently, the second reading of seven proposals to amend the Constitution is pending, in addition to the proposal to remove several transitional provisions, so-called additional articles, because they no longer serve a purpose. The proposed amendments concern the following proposals: 1° the introduction of a binding corrective referendum based on citizens' initiative on the national level; 2° the modernization of the secrecy of letters, telephone secrecy and telegraph secrecy to include all electronic communication; 3° the insertion of an unnumbered article before article 1 of The Constitution, i.e., a general provision, stating that the Constitution guarantees fundamental rights and the democratic constitutional state ('*rechtsstaat*'), 4° the amendment of the constitutional amendment procedure itself to ensure that only the Lower House that is elected after the publication of a Constitutional Revision Act in the first reading is authorized to initiate and complete the second reading (as already incorporated in the revised Rules of Procedure of the Lower House as of April 1, 2021), 5° granting the right to vote for a separate electoral college concerning the election of candidates for the Upper House to Dutch citizens living abroad, 6° the addition of disability and sexual orientation as grounds for non-discrimination, 7° the addition of a provision on the right to a fair trial. Finally, on March 16, 2022, local elections will be held.

1 Parliamentary Documents II 2020/21, 35510, no. 2, available at <https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf> accessed 23 February 2022.
2 Bart Jan van Ettekoven, 'Tussen wet en recht. Reactie van de voorzitter van de Afdeling bestuursrechtspraak van de Raad van State op het rapport Ongekend onrecht van de Parlementaire ondervragingscommissie Kinderopvangtoeslag' (2021) 101 *NJB* 98.
3 'Lessons from the childcare allowances cases. Reflection report of the Administrative Jurisdiction Divisionof the Council of State', November 2021, available at <https://www.raadvanstate.nl/publish/library/13/reflectierapport_lessen_uit_de_kinderopvangtoeslag-zaken.pdf> accessed 23 February 2022.
4 National Ombudsperson, 'Report: Complaint justified, but no solution', 11 October 2021, available at <https://www.nationaleombudsman.nl/system/files/bijlage/Monitor%20klachtbehandeling%20UHT.pdf> accessed 23 February 2022.
5 Court of Appeal The Hague, 4 September 2020, ECLI:NL:GHDHA:2020:1606.
6 Supreme Court 7 July 2021, ECLI:HR:2021:1036, nr. 20/03005 (Wilders II).
7 Ibid, at 3.9.
8 Ibid, at 3.9.2.
9 Gelijn Molier, Bastiaan Rijpkema & Jip Stam, 'Wilders II: Het onverdraagzaamheidscriterium toegepast door de Hoge Raad', 42 *NJB* 3094, (2021), at 1.
10 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, court-issued English version available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf> accessed 24 February 2022.
11 M. Dolmans, G. Bourguignon, Q. De Keersmaecker, M. J. Preston & E. O'Brien, "Dutch Court Orders Shell to Reduce CO2 Emissions in first climate change ruling against a company", *Pratt's Energy Law Report* 2021, p. 275, also available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company#_ftn5> accessed on 24 February 2022.
12 For a more complete overview, see: Geerten Boogaard, Michiel van Emmerik, Gert Jan Geertjes, Luc Verhey & Jerfi Uzman, 'Kroniek van het constitutioneel recht', 35 *NJB* 2599, (2021)
13 Article 58c (2) and (3) of the Act of 9 October 2008.
14 Act of 26 May 2021.
15 Act of 8 January 2021.
16 Parliamentary documents II 2020/21, 35722, nr. 4.
17 District Court The Hague 16 February 2021, ECLI:NL:RBDHA:2021:1100.
18 Court of Appeal The Hague16 February 2021, ECLI:NL:GHDHA:2021:252.
19 Act of 22 February 2021.
20 Court of Appeal The Hague 26 February 2021, ECLI:NL:GHDHA:2021:285.