

The Netherlands: Of Rollercoasters and Elephants

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'Many people will have the feeling that we have been sitting in an ever-faster moving rollercoaster in the past weeks. One asks oneself: is this really happening? After all, the measures taken here and abroad are unheard of for countries in times of peace.'

This is how Dutch Prime Minister Mark Rutte addressed the nation on the COVID-19 pandemic in a televised [speech](#) on 16 March. Such addresses are an extreme rarity in the Netherlands, occurring less than once a decade. Throughout, Rutte rhetorically placed himself in the same situation as the other inhabitants of the country, emphasizing how 'we' all face the same challenge and have to get through this 'together'. He explained various possible scenarios of combating the virus and indicated that the government would rely on the views of (predominantly medical) experts – a view he has repeated many times since.

By contrast the speech does not refer in any way to a state of emergency – apart from obliquely in the quote above – nor to the constitution or in fact to any law in general. This framing of the speech was deliberate, as the government has very much relied on giving heavy-handed advice to the population and calling for responsible behaviour, with regulatory measures taking a backseat, at least in its communication.

Apart from the explicit and very visible reliance on experts – the director of the national health institute features in nearly every other press conference of the government – a second non-legal consideration seems to quite clearly guide the current government coalition: public opinion. Halfway through March, all schools were closed in spite of health expert finding this unnecessary. The direct reason for this decision seems to have been the growing calls in society for that measure. The same drive seems to have guided the announced partial re-opening of primary education as of the 10th of May. This double drive – expertise-based but with a visible concern for public opinion – seems to really guide the *communication* of the government, in which Mark Rutte constantly acts as explainer-in-chief of what he has dubbed an '[intelligent lockdown](#)', taking his audience step-by-step through the rationales of measures taken.

While this communication strategy may have been rather effective, even leading to initial praise and support of many opposition parties, the *tools* applied by the government and by local authorities to secure public health and enforce lockdown advice are more problematic. We will discuss a number of such legal issues related to the rule of law, democracy and fundamental rights here.

No Formal State of Emergency

The first thing to note is that the Dutch government has chosen not to formally deal with the situation as a state of emergency in the legal sense, neither under national constitutional law nor under international law.

Under international law, the Netherlands has in this crisis not formally derogated from the most relevant human rights treaties, the ECHR and the ICCPR, contrary to a number of other [European states](#). In fact, it has not even been a political issue at all. This is all the more remarkable, as international human rights have traditionally played a prominent role in Dutch legal practice. The Constitution provides for the precedence of key international human rights over domestic law. And since judges are not allowed to test laws against the Constitution, international treaties, in particular the ECHR, have for decades played this role of constitutional safeguards in the daily practice of Dutch court cases.

Under the [Dutch constitution](#), states of emergency have traditionally been linked to situations of war and large-scale natural disaster. Article 103 of the Constitution provides the basis for legislation that now embodies 'flexible crisis management' rather than distinct formal categories of emergency situations, although these can still be found in the statute on the coordination of the law concerning emergency situations (*Coördinatiewet uitzonderingstoestanden*).

There is a separate category of health emergency law laid down in the Public Health Act (*Wet publieke gezondheid*). This Act provides for quarantine measures and classifies categories of infectious diseases and the appropriate measures and powers that are available to deal with each of those. The decision-making powers with regard to quarantine and similar measures are largely a matter of municipal authorities. The assumption has been that infectious diseases would first have to be contained locally. Article 7 of the Act empowers the Minister of public health to instruct mayors with regard to the use of their powers.

In the early stages of the Corona crisis however, it soon became apparent that the municipal approach would not be sufficient, since large-scale infections in the southern provinces could very rapidly spread to the rest of the country, as had been demonstrated in Italy. The Minister of public health therefore used his powers under Article 7 of the Public Health Act to instruct mayors to issue emergency regulations. Now this is where the legal issues tend to become really complicated.

As a key step, the ministerial instructions were directed to the Security regions (*veiligheidsregio's*). These bodies – 25 in total – exist on the basis of the Security regions Act (*Wet veiligheidsregio's*) which dates from 2010. They are functional bodies with powers in the field of fire brigades, disaster and crisis management, and medical assistance (in the context of disasters and crises). Over the past decade, this Act has been revised at least a dozen times, which indicates that the Security regions are still in development. Importantly, the Chairman of the security regions (usually the mayor of a big city) can exercise emergency powers that normally would only be exercised by all municipal mayors (there are 355 of them) and are provided

in the Municipality Act (Articles 172-177). Article 39, para. 1 gives an exclusive power to the Chairman of the security region.

After the first signs of the seriousness of the current outbreak, the security regions started reacting with emergency regulations (*noodverordeningen*). Initially slightly different per region, the regulations were rapidly coordinated and harmonised to prevent 'waterbed effects' (people moving from one part of the country to another part with 'lighter' rules). On the same assumption national frontiers were more or less closed off so people could not move from Belgium and Germany to the Netherlands (and vice versa). The closing of the Dutch-German border took the form of 'advice' by Dutch police and customs officers telling potential tourists that the Netherlands had lost most of its attraction because tourist accommodations and restaurants and even 'coffeeshops' had closed down. The emergency regulations however do not have the status of advice, they are binding rules. Criminal sanctions are attached and enforcement can and will take place, and has indeed taken place.

A couple of constitutional oddities should be noted here:

Firstly, the municipal mayoral powers are intended to deal with large-scale unforeseen disruptions of the public order. Think of riots by hooligans in the context of football matches, or new year's eve riots that may explode into large-scale disruptions. Occasionally, the emergency powers have been used to prevent activities by motorcycle clubs or in order to evacuate people in case of a fire in a chemical plant or an explosion of a fireworks factory.

Secondly, these powers are intended to be strictly temporal, and *thirdly* they have to be notified immediately to the democratically elected municipal council which has to ratify them in order to remain valid. If ratification is refused (which to our knowledge has never happened) the emergency regulation will end immediately.

Fourthly, there is no power to deviate from any provision in the Constitution (*Grondwet*), including the fundamental rights in Chapter 1 of the Constitution. Importantly, freedom of movement has not been included in the constitutional catalogue of rights, and is protected in the Netherlands only on the basis of Article 2 of Protocol No. 4 ECHR.

The first problem with the current emergency regulations is their democratic legitimacy. There is no democratically elected body on the level of the security regions, so any kind of control there is impossible. Only municipal mayors may object, but they are not democratically elected in the Netherlands.

The second problem has to do with some of the content of the regulations. Although generally wise, and based on sound scientific advice, there are parts which would be better dealt with in primary legislation, and which invite further reflection. In due course there has to be a thorough evaluation of this form of emergency law. For now, we will very briefly point out only a few elements.

Some sections of the emergency regulations directly affect fundamental rights. There is a prohibition on 'meetings' (*samenkomsten*) of more than 30 people (and

more than 100 if the meeting is necessary for the continuation of activities by 'institutions, companies and other organisations', under the strict condition that social distancing will be applied). In the Netherlands, social distancing means a minimum of 1.5 metres from the next person. This prohibition is applicable to meetings in public but also – controversially – to meetings 'outside the public space'. The legal problem here is that municipal regulations emergency relations can only deal with public events, i.e. events in public spaces. The private sphere can be regulated by primary legislation, but so far that has not happened in the current context. The most controversial part is the prohibition on religious and secular meetings. Article 6 of the Constitution only allows for regulation based on primary legislation with regard to the exercise of freedom of religion and secular conviction *outside* buildings and closed spaces. Within these buildings and spaces, not even the primary legislator has any power. Some mayors, like Ahmed Aboutaleb of Rotterdam, have wisely 'advised' their citizens not to come together in churches, synagogues and mosques, and equally wisely, people have followed this advice. Enforcement within those buildings would run into legal problems. Of course, one could imagine that streets surrounding those buildings could be made forbidden territory, but even then that would preferably be done by government and parliament in primary legislation.

A second problem is the prohibition of educational activities, which is so broad that it is most likely in conflict with Article 23 of the Constitution on the freedom to provide educational services (although primary education will be allowed to partially resume as of 11 May). A third problem for further discussion would be the general prohibition – directed to care homes – to give access to visitors (with only minor exceptions). This has turned out to be very detrimental to large numbers of patients and their relatives, and its proportionality is controversial.

Since some of the defects of the emergency regulations have now partly been recognised, media have reported that primary legislation on some of these issues is now being considered by the government. This may help, but further developments in this area will have to be critically evaluated.

Very Light Oversight

Since the start of the crisis in the Netherlands halfway March, the key actors in rule of law oversight, the legislative and the judiciary, seem to have gone largely in self-imposed lockdown. The Second Chamber of Parliament – the most important legislative and political body in the Dutch constitutional setup – [rescinded](#) its weekly meetings from three days to only one. And these weekly debates were entirely dedicated to debating the government's anti-pandemic measures and to being updated by experts. The (part-time) Senate or First Chamber even stopped meeting physically altogether. It asked and received [advice](#) from the Dutch Council of State on 20 April to the effect that online meetings would be allowed under the Constitution, a novelty that has been [criticised](#).

Although questions by Parliament to the government may still be asked in written form as well as requests for information, this means that debates on any other government policy, including on key European summits on the pandemic and

its economic consequences, were not taking place. This does not mean that government stopped functioning – to the contrary, the governing coalition identified no less than 84 legislative proposals as so urgent that they could not wait until after the crisis. Only through pushbacks of the President of the Second Chamber was this list somewhat rescinded. And since halfway through April, committee meetings on specific issues were restarted in debating rooms in which physical distancing was possible. Although not by any means going as far as [Hungary](#), the Dutch Parliament, at least initially, has really hampered its own democratic oversight functionality.

The judiciary trod a similar path of self-lockdowns. As of 17 March, all court buildings [closed](#) and only urgent cases were allowed to proceed, including a number of criminal cases, bankruptcy proceedings, and urgent migration and family law matters. But the large majority of legal proceedings in the Netherlands became invisible, online, written proceedings handled by court registries and judges working from home, turning court buildings into almost as empty premises as schools or restaurants. Justice was barely seen to be done anymore. Again, only recently has it been decided to start re-opening court buildings and from 11 May onwards on-site proceedings will to a limited extent be enabled [again](#), mostly in the fields of criminal and family law. In only very few instances have Corona-related government measures been battled in judicial proceedings, mostly unsuccessfully so far.

In addition, oversight by the media, although full of lively and free debate on all current policy choices made, is made more difficult: the government [announced](#) at the end of April that dealing with requests under access to information legislation about COVID-19-related policies would be put on hold until at least 1 June.

The Elephant(s) in the Room

As the above shows, the Dutch authorities take a quasi-legal, quasi-rhetorical approach to shape their intelligent lockdown and try to tame the pandemic beast, with questionable constitutional practices as a result. While the reliance on medical and other expertise might be a welcome difference compared to some other countries featured in this blog series, overreliance on experts in communication may hide real political and legal choices that have been made. Almost a decade ago, Prime Minister Rutte [publicly](#) lauded his own pragmatic and technocratic approach to politics by stating that having a vision is like ‘an elephant that takes away your view’. In this crisis, the constitutional and other legal issues may be a bit too hidden behind the elephants of expediency and pragmatism.

