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Goossens, Jurgen; Leenknegt, Gert-Jan; van Oirsouw, Charlotte; van Vugt, Eva

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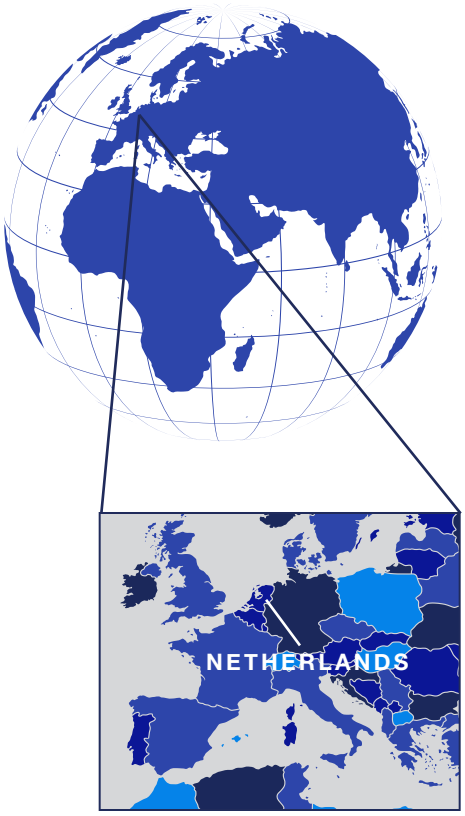

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Jurgen Goossens, Associate Professor of Constitutional and Administrative law
Tilburg University, Department of Public Law and Governance

Gert-Jan Leenknegt, Associate Professor of Constitutional Law
Tilburg University, Department of Public Law and Governance

Charlotte van Oirsouw, PhD Candidate
Tilburg University, Department of Public Law and Governance

Eva van Vugt, Assistant Professor of Constitutional Law
Utrecht University, Department for Constitutional and Administrative Law and Jurisprudence

I. INTRODUCTION

This report first addresses four major constitutional developments in part II: 1. the 'childcare benefits scandal' which resulted in the resignation of government Rutte III; 2. the impact of COVID-19 measures on constitutional rights, freedoms and democratic scrutiny; 3. the 'dikastocracy' debate on the role of the judiciary and 4. proposals for constitutional amendment following the advice of the State Commission on the Parliamentary System. Because Article 120 of the Dutch Constitution 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 2020 in the Netherlands with a constitutional impact that is relevant to an international audience. Part III discusses these judgments as follows: 1. the judgement in the case the State v. Wilders, concerning the freedom of expression of politicians; 2. the judgment of the Court of Appeal to forbid and dissolve the Hells Angels Motor Cycle Club to protect democracy; 3. the Supreme Court judgment in the case of female foreign ISIS fighters v. the State, which invoked a question of separation of powers, and 4. a ruling of the District Court on the algorithmic risk model 'System Risk Indication'(SyRI). We conclude in part IV by looking ahead towards 2021.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. 'Childcare benefits scandal' and the resignation of government Rutte III

The use of technology by the Dutch government received a lot of attention in public debate and academic literature. Complexity and opacity result in tensions with public values, principles of the rule of law and principles of good administration. The two most important examples are the use of the algorithmic risk model SyRI (see below III.4) and the algorithms used by the Dutch Tax Authority in the so-called 'childcare benefits scandal' (*kindertoeslagenaffaire* in Dutch).

Following reports in 2013 that Eastern European gangs were committing fraud with childcare benefits, the authorities decided to tighten fraud policy and started hunting fraudsters down. However, when it became clear that amidst fraud investigations the Dutch Tax Authority had falsely accused about 26.000 families of childcare benefit fraud, the nation was shocked. Moreover, an investigation of the Dutch Data Protection Authority demonstrated that discriminatory algorithms were used that were based on variables such as dual nationality. The automated system identified people with dual nationalities as being potential fraudsters and thus discriminated on the basis of nationali-

ty, without providing sufficient accountability mechanisms or 'human' compassion.

Childcare benefit payments were thus wrongfully stopped, and families were unjustifiably ordered to repay the full amount they had received in years before, which led to severe financial and personal problems. These include divorces, people losing their homes and in one case suicide. In March 2020, government officials have apologized for the scandal and earmarked €500 million to compensate affected parents, which amounts to approximately €30,000 per family. Nonetheless, after a damaging report of a parliamentary investigatory commission of 17 December 2020,[1] Lodewijk Asscher, leader of the labor party PvdA and Minister of Social Affairs in the previous government, stepped down on 14 January 2021 as he had been made aware of a growing number of complaints but did not undertake any measures to respond. One day later, the government of Prime Minister Mark Rutte resigned in order to avoid the risk of losing a no-confidence vote in Parliament. The government Rutte III thus became a caretaker government, ahead of the general election of the House of Representatives planned on 17 March 2021.

The parliamentary report 'Unprecendented injustice' concluded that due to an overheated political reaction to fight fraud fundamental principles of the rule of law had been violated. Childcare benefits were reclaimed from parents identified as 'wilful fraudsters', although they only made trivial administrative errors such as a missing a signature on paperwork or wrongly filling in a form without malicious intent. According to the report, these victims were helpless against the powerful institutions of the State and did not receive the protection they deserved. The report recommended that everyone in the apparatus of the State should ask how such a thing could be prevented from happening again. On a regular basis, parents unsuccessfully appealed to the administrative judge and ultimately to the Council of State, for instance in cases that the court rejected an appeal to moderation or the principle of proportionality.[2] The report argues that the Council of State as a result actually strengthened the stringent "all-or-nothing" interpretation of the law by the Tax Authority so that the discretion to invoke the principle of proportionality was gradually reduced.

Only as of 23 October 2019, the Council of State revoked the stringent "all-or-nothing" interpretation of the law.[3] It is clear that the system of the State, with its checks and balances, failed to offer the necessary protection against unjustified action of government officials. The President of the Administrative Jurisdiction Division of the Council of State already stated that the court could have contributed earlier to the necessary correction of the system failure of the legislator and the law's application by the Tax Authority.[4] Nonetheless, the pivotal role and responsibility of the legislator cannot be denied.

2. Impact of COVID-19 measures on democratic scrutiny, constitutional rights and freedoms

In order to prevent the spread of the COVID-19 virus in 2020, the Dutch government took measures that affected various constitutional rights and freedoms. These measures affected among others the right to assembly and demonstration, the freedom of movement, the freedom to manifest one's religion and beliefs, the freedom of education and the right to respect for one's privacy as protected under the Dutch Constitution.

Although the Dutch system for restricting constitutional rights and freedoms requires that any restriction is sufficiently specific and based on an Act of Parliament, the Minister of Health, Welfare and Sports instead qualified the COVID-19 virus as *a severe danger to public health* under the Public Health Act. In conjunction with the Security Regions Act, a construction came into effect that transferred the authority of mayors to issue emergency decrees under Article 176 of the Municipal Act to the presidents of 25 safety regions. As a result, these presidents could issue emergency decrees under the instruction of the Minister that restricted the constitutional rights and freedoms of citizens.

This construction received a lot of criticism. The Dutch Constitution requires that measures aiming to restrict the exercise of constitutional rights are always based on an Act of Parliament that is specifically designed for that purpose, but Article 176 of the Municipality Act only provides for a general competence to issue emergency decrees. Besides, Article 176 of the Municipality Act allows for deviation of laws, but not for deviation from the constitution itself.

This construction was also criticized for its limited democratic scrutiny, as there are no representative bodies institutionalized at the level of the security region. Where municipal councils normally monitor the issuance of emergency decrees by mayors, they are unable to do so once the competence transfers from the mayor to the president of a security region. Even though, the Minister was in theory accountable for emergency decrees issued under his instruction, in practice he was not held accountable in Parliament.[5]

[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 8 March 2021

[2] See, e.g., ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5679; ABRvS 9 July 2014, ECLI:NL:RVS:2014:2473

[3] ABRvS, ECLI:NL:RVS:2019:3535; ABRvS 23 October 2019, ECLI:NL:RVS:2019:3536, (23 October 2019)

[4] 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", 101 NJB 98, (2021)

[5] Hansko Broeksteeg, "Verantwoording in tijden van Corona", (2020), 11 (3) TvCR 248; Geerten Boogaard, Michiel van Emmerik, Gert Jan Geertjes, Luc Verhey & Jerfi Uzman, "Kroniek van het Constitutioneel Recht, Constitutie in tijden van Corona" (2020) 35 NJB 2398

In response to this criticism, the Advisory Division of the Dutch Council of State held that in times of an immediate and life-threatening crisis where the State has a responsibility to protect the right to life, a restriction on constitutional rights and freedoms requires less specificity than compared to normal circumstances. However, the acceptability of such a construction decreases as time passes by.[6] For that reason, a proposal for the 'Temporary COVID-19 Measures Act' was made and entered into force on December 1st, 2020. This Act replaced the emergency decrees and provided a proper legal basis for the restriction of constitutional rights and freedoms. It also established more detailed requirements for proportionality and subsidiarity for restrictions on constitutional rights and freedoms. Furthermore, the Act contains a responsibility for the presidents of safety regions to report information to and answer questions from municipal councils within the safety region. In addition, the Act requires government to present ministerial decrees for specific measures to the House of Representatives, such as the Decree on Face Mask Obligations. Ministerial decrees enacted in emergency cases obtain immediate legal effect, but the House of Representatives has one week to confirm them. If a majority of this House disagrees, the regulation terminates ipso iure. Parliament will assess every three months whether the Act remains in force after hearing the Advisory Division of the Council of State.[7]

3. 'Dikastocracy' debate on the role of the judiciary

The year 2020 witnessed a political debate in the Netherlands on whether the judiciary is overstepping its powers by actively interfering in matters of public policy that are meant to be decided upon by a democratically elected legislature. In the Netherlands, courts are not entrusted with the power to review the constitutionality of acts of parliament and traditionally tend to exercise great restraint when societal interests are at stake. Since the balancing of those interests is intrinsically political in nature, this is considered a task that should be reserved for a political institution like Parliament. However, this so-called primacy of politics is challenged as civil courts are increasingly confronted with cases in which (groups of) citizens ask the court to interfere with government policies that often count on the support of Parliament.

The prime example of such a case is the *Urgenda* climate case, which was discussed elaborately in the 2019 Global Review of Constitutional Law. In short, a Dutch foundation called Urgenda lodged a number of claims against the State including that the State would act unlawfully should it fail to reduce or have reduced the annual emission of greenhouse gasses in the Netherlands by 40% or at least 25% by the end of 2020 when compared to emissions in 1990. The District Court ordered the State to limit the annual emission of greenhouse gasses in the Netherlands by at least 25% by the end of 2020. This order was upheld in appeal and also by the Supreme Court in December 2019.[8] Another example is the case of female foreign ISIS fighters (see below III.3). In addition, administrative courts had to decide on several other controversial societal issues, such as the emission of nitrogen by farmers and the childcare benefits scandal (see above II.1).

In reaction to these court cases, right-wing politicians from a young political party called *Forum voor Democratie* argued that the Netherlands was becoming a '*dikastocracy',* a word that stems from the Greek term δικαστής (*judges*) and κρατειν (*governing*) and hence refers to a system of government by judges. Their main claim was that the judiciary was seizing power over the other institutions of government. The VVD, the largest party in Parliament, subsequently initiated a parliamentary hearing with experts on this matter. This hearing took place on 9 March 2020 and a majority of the participating experts were of the opinion that the judge had indeed regularly overstepped its power by entering in the political domain. This was considered problematic, because judges are not democratically elected and therefore allegedly lack the legitimacy to make these 'political' decisions.

At the same time, some argued that not the courts, but government and Parliament were to blame for this constitutional development. The argument was that the judiciary had been confronted with politically sensitive issues, because government and Parliament had been neglecting their legislative responsibility. Consequently, the judiciary was called upon to keep the government and Parliament in check. This put the judiciary in a position where it could be accused of overstepping its powers, which in the end could harm its independent position within the constellation of state powers. Instead of thus simply labelling judicial 'activism' as wrong and undemocratic, it might be more useful to assess the changing role of the judiciary within the *trias politica* because of the withdrawal of the parliamentary legislature in the administrative state.

4. Advice of the State Commission: proposals for constitutional amendment

In 2020, the report of the State Commission on the Parliamentary System of the Netherlands,[9] published in December 2018, resulted in several proposals to amend the Constitution. It is important to note that the Dutch Constitution has a rigid character: amendment requires two readings in both Houses of Parliament, with an intervening election for the House of Representatives, and a two-third majority vote in the second reading.[10]

[6] *Kamerstukken II* 2020/21, 25295, nr. 213

[7] Jan-Peter Loof, 'Constitutionele Consternatie over de Coronawet', (*De Nederlandse Grondwet,* 26 October 2020) <https://www.denederlandsegrondwet.nl/id/vld59z2vkvlu/nieuws/constitutionele_consternatie_over_de> accessed 4 March 2021

[8] Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2006

[9] Full report available at <https://www.staatscommissieparlementairstelsel.nl/documenten/rapporten/samenvattingen/072019/18/download-the-english-translation-of-the-final-report-of-the-state-commission> accessed 8 March 2021

[10] Article 137 of the Dutch Constitution

On 17 July 2020, the government proposed two amendments to the Constitution, based on the report of the State Commission. One concerned the second reading of the amendment procedure itself.[11] Because amendments to the Constitution need a two-third majority in both Houses of Parliament in the second reading to pass, only twenty-six senators out of 225 members of Parliament (150 in the House of Representatives, and 75 senators) can block any amendment of the Constitution. A relatively small minority of members of the indirectly elected Senate can therefore reject a proposal that was adopted by two thirds of the members of the directly elected House of Representatives. According to the government, this veto power of the Senate does not sufficiently reflect the less political role of the Senate in the Dutch parliamentary system. Furthermore, it could lead to an undesired juxtaposition of both Houses of Parliament and political stalemate. The government proposed the second reading to take place in a joint session of both Houses of Parliament, while retaining the requirement of a two-third majority. This should create a more balanced role for both Houses in the amendment procedure. A theoretical consequence would be that only the 150 votes of the House of Representatives members could be sufficient in the final stage of the amendment procedure.

A second amendment bill concerns the term of the Senate.[12] Currently it is elected every four years by the members of the Provincial Councils (i.e. the provincial representative organs), shortly after the provincial elections. The amendment bill proposes that members of the Senate are elected for six years instead of four, and that half of the seats are contested every three years. Interestingly, the State Commission pondered this option in its report, but advised against it. Nonetheless, the government decided to propose such an amendment. It argues that it is necessary to clarify the role of the Senate in relation to the House of Representatives and the government. It argues that in order to function as a *chambre de réflexio*n the Senate needs to be distinct from the House of Representatives, both in terms of the method of election, and the term of its members. In the proposed system, shifting voter preferences are would be reflected less directly in the composition of the Senate.

Both proposals received the consent of the House of Representatives in the first reading on 8 December 2020. The report of the State Commission also fueled a private members' bill to amend the Constitution in order to introduce a binding legislative referendum.[13] In January 2021, the first reading was completed. After the elections of March 2021, it will be tabled for the second reading.

Twelve other constitutional amendments are currently pending.[14] The most noteworthy proposals concern the insertion of a general provision protecting the principles of democracy and rule of law, the insertion of a provision protecting the right to a fair trial, and a proposal to streamline the amendment procedure of the Constitution. The latter proposes that the House of Representatives that is elected after an amendment bill has been adopted in the first reading must commence and complete the second reading, or the bill will be deemed rejected.

III. CONSTITUTIONAL CASES

1. Outlaw motorcycle gangs: militant democracy

In recent years, the social and economic impact of organized crime in the Netherlands has considerably increased. Especially the so-called outlaw motorcycle gangs (OMG's), who serve as vehicles for various criminal activities that not only penetrate the licit economy but also undermine public trust in authorities and the rule of law in general. They have thus become a target for legislative, judicial and administrative actions.

Section 2:20 of the Dutch Civil Code enables civil courts to forbid and dissolve organizations – 'legal persons' to be precise – whose actions violate the public order. Traditionally, courts have applied this provision rather reluctantly. After several unsuccessful attempts by the public prosecutor, Dutch courts decided to dissolve motorcycle club Bandidos Holland in 2017, Satudarah MC in 2018 and Hells Angels Motorcycle Club Holland in May 2019. On 15 December 2020 the Court of Appeal upheld the 2019 decision of the District Court to dissolve Hells Angels.[15] It confirmed the interpretation of section 2:20 by the District Court that the public order is violated when an organization fosters a culture that facilitates and glorifies criminal activities and the use of violence.

2. State v. Wilders: "political cases" and freedom of expression of politicians

In Autumn 2020, the Court of Appeal in The Hague convicted Geert Wilders, a Member of Parliament and leader of the right-wing nationalist party PVV, for group defamation of Moroccan people living in the Netherlands.[16] During an electoral campaign, Wilders had asked the audience whether they wanted more or less Moroccans living in the Netherlands. When the audience responded with 'less', he said: 'Then we are going to arrange that'. From a constitutional point of view, this case is interesting for two reasons.

Firstly, Wilders argued that his prosecution concerned a 'political case' because of the involvement of the Ministry of Justice and Security. The Court acknowledged that there were political aspects to this case but found

[11] *Kamerstukken II* 2010/20, 35 533

[12] *Kamerstukken II* 2010/20, 35 532

[13] *Kamerstukken II* 2018/19, 35 129

[14] For an overview of all pending proposals to amend the Constitution, see <https://www.denederlandsegrondwet.nl/id/vi58ivmh0vx5/grondwetgeving_in_behandeling#p1> accessed 8 March 2021

[15] Hof Arnhem-Leeuwarden 15 December 2020, ECLI:NL:GHARL:2020:10406

[16] Hof Den Haag 4 September 2020, ECLI:NL:GHDHA:2020:1606

no indications for prosecution based on political motives. Neither did the Court find a violation of the constitutional principle of separation of powers, because it merely reviewed the facts in light of the Dutch Criminal Code and not the entire PVV or its program.

Secondly, the Court addressed the boundaries of freedom of expression of politicians under Article 10 of the ECHR. Although Article 120 of the Dutch Constitution prohibits judges from reviewing whether the application of the Criminal Code is compatible with the Article 7 of the Dutch Constitution (freedom of expression), Article 93 and 94 of the Constitution acknowledge the direct applicability of international law that is binding on all persons, granting it precedence over national law. Consequently, fundamental rights protection is mainly based on the European Convention on Human Rights (ECHR) in the Netherlands. The Court ruled that conviction was permitted under Article 10 of the ECHR. Even though Wilders made his statements in a political context the Court argued that conviction was necessary because Wilders had a special responsibility as a politician to avoid expressions that potentially feed intolerance and undermine the respect for equality of all human beings, which are foundational to democratic and pluralistic societies.

3. Female foreign ISIS fighters v. the State: judicial restraint

A group of women from the Netherlands who had joined jihadist forces in Syria but were now detained in Kurdish camps under appalling conditions filed a lawsuit in 2019, claiming that the State was obliged to repatriate both them and their children.[17] The State rejected repatriation due to reasons of national security and international relations and given the safety risks involved in repatriation. The District Court, however, ordered the State to make efforts to repatriate the children. Moreover, in the case that repatriation of the children without their mothers would appear impossible, the State should also try to repatriate the women.[18] The State appealled against this decision, claiming that the government enjoys wide discretion in deciding upon matters of national security and foreign policy. In light of the separation of powers, the State argued that the Court should have exercised restraint when reviewing the decision of the government not to repatriate the foreign fighters and their children. The Court of Appeal in the end quashed the decision of the District Court and ruled that, considering the interests of the State and the fact that the women voluntarily left the territory of the Netherlands to take part in jihadist activities in an actual warzone, the State could have reasonably reached its decision to not repatriate them and their children.[19] The Supreme Court upheld this judgment in June 2020.

4. SyRI: algorithmic risk model

On 5 February 2020, the District Court in The Hague ruled on a landmark case about the use of algorithms and personal data in the so-called 'System Risk Indication' (*Systeem Risico Indicatie*) or 'SyRI'.[20] Despite objections from the Dutch Data Protection Authority, SyRI opaquely linked citizens' personal data from various government databases to generate risk profiles that warrant further fraud investigation in poor neighbourhoods.[21] Civil society interest groups and some concerned citizens filed a lawsuit arguing that the use of SyRI by the State to detect social benefits, allowances, and tax fraud violated higher law. The Court decided that the SyRI legislation violated the right to respect for private and family life as embedded in Article 8 of the ECHR and was declared to have no binding effect.[22] Pursuant to Article 8 of the ECHR, the Netherlands has a special responsibility when it applies new technologies. It must strike a fair balance between the benefits of using new technologies such as SyRI and its interference with the right to a private life. However, after analysing the objectives of the SyRI legislation; namely preventing and combating fraud in the interest of economic welfare in relation to the interference with private life, the Court ruled that in its current state the SyRI legislation did not comply with Article 8 (2) of the ECHR, as the use of SyRI was insufficiently transparent and verifiable (cfr. 'black box') and the legislator thus did not strike a fair balance.

IV. LOOKING AHEAD

On 15 January 2021 the government Rutte III offered its resignation because of the childcare benefits scandal (see above II.1), two months before the elections of the House of Representatives on 17 March. The formation of a new cabinet after elections usually takes at least several months. In the meantime, the caretaker government and Parliament will only deal with pressing issues and matters declared controversial by Parliament will remain on hold. It remains to be seen to what extent this hampers the ability of the government to effectively tackle the COVID-19 crisis.

This situation also directly affects proposed constitutional amendments that have not yet passed the first reading. Shortly after the cabinet offered its resignation, the Senate declared both amendment bills that affect the role of the Senate itself to be controversial. Consequently, these bills will not be debated until a new cabinet is formed. The second reading will therefore require another election for the House of Representatives, scheduled for 2025.

[17] Hoge Raad 26 June 2020, ECLI:NL:HR:2020:1148
[18] Rechtbank Den Haag 11 November 2019, ECLI:NL:RBDHA:2019:11909
[19] Hof Den Haag 11 November 2019, ECLI:NL:GHDHA:2019:3208
[20] Rechtbank Den Haag 5 February 2020, ECLI:NL:RBDHA:2020:1878
[21] 'Landmark ruling by Dutch court stops government attempts to spy on the poor – UN expert' (*United Nations Human Rights Office of the High Commissioner,* 5 February 2020) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25522&LangID=E> accessed 4 March 2021
[22] See extensively: Sonja Bekker, 'Fundamental Rights in Digital Welfare States: The Case of SyRI in the Netherlands', in Otto Spijkers, Wouter G. Werner, and Ramses A. Wessel (eds.), *Netherlands Yearbook of International Law* 2019 (T.M.C. Asser Press 2021)