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Voermans, W.J.M.

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VOTING FOR EUROPE: LESSONS FROM DUTCH REFERENDUMS?

Contribution to the fifth Dutch-Japanese Law Symposium 13 & 14 September 2008,
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By Wim Voermans¹



Abstract

This article discusses the events before and after the Dutch 'no' to the Treaty Establishing a Constitution for Europe. It analyses the manifold causes and considers the consequences. The paper argues that the Dutch 'no' is – in a sense – a protest against the process of integration by stealth, i.e. the forging of constitutional law of a Union without directly consulting nor involving the population. At the end of the contribution the question is raised whether Dutch politicians or the Dutch government have taken the lessons of the referendum to heart. The recent debate leading up to the ratification of the Treaty of Lisbon raises some doubts in this respect.

¹ Wim Voermans is professor of constitutional and administrative law at Leiden University, president of the Dutch Association for Legislation and the vice-president of the European Association for Legislation. Address and contact details Faculty of Law, Leiden University Steenschuur 25, P.O. Box 9520 2300 RA Leiden, The Netherlands. Email: w.j.m.voermans@law.leidenuniv.nl, personal website at: http://www.law.leidenuniv.nl/org/publiekrecht/sbrecht/wim_voermans.jsp

The Netherlands and national referendums: *an awkward relationship*

The Netherlands and referendums: it just won't work. We can by now – 2008 - no longer say that we have not tried it. In the past four years there have been plenty of experiments with this instrument of popular will and administrative reform in the Netherlands, resulting as a preliminary outcome into disillusionment for politics, administration and society as a whole. After referendums on the European Constitution and fiascos with direct elections of mayors in Utrecht and Eindhoven² the Netherlands seems to have grown tired of referendums. The reason for this is that national referendums do not fit in with our form of representative democracy, with our political culture,³ so it is alleged. Plebiscites are also risky since they sometimes (or always, as some will have it) reduce complex issues to simple yes or no questions, which give wind to the sails of demagogues, or offer an opportunity to opposition parties. And, especially, they destabilise fragile coalitions in a rapidly changing political landscape as is the current situation in the Netherlands. However, it is argued against this that referendums more than ever form a useful correction to the decisions of representative bodies, as is for instance witnessed by the success of local referendums in the Netherlands and the favourable experiences in other countries.⁴ In this contribution to our Dutch-Japanese Law lectures I will not dwell to once again weigh all the pros and cons of referendums. There is a lot of literature around in which the advantages and disadvantages of plebiscites are compared and it is difficult to add new insights to that. And furthermore, if it were at all possible to weigh the arguments for and against (which in my view is actually not possible),⁵ it

² On 23 January 2008 the electoral threshold of 30% was not achieved in the mayorial elections in Eindhoven. After a similar experience in Utrecht in 2007 this was the signal for the Minister of the Interior and Kingdom Relations to stop (the financing of) direct elections of mayors with immediate effect.

³ Already in 1921 the Royal Committee - Ruys de Beerenbrouck held that 'It would be a dangerous experiment to graft this plant of foreign soil on our constitution.' Proceedings of the Dutch House of Representatives (Second Chamber), I, 1921-1922, p. 590.

⁴ B.F. Steur (2005), *De keuze om te kiezen* (The choice to choose), Elsevier overheid, The Hague 2005, in particular chapter 10.

⁵ Referendums are something of a faith article, in science as well as in law. Just as with the question of whether or not the Netherlands must allow Constitutional Review (not possible in the Dutch Constitution at present and heatedly debated), the arguments pro and contra which science can find and weigh more or less balance each other. And then the political weighing enters the picture: you must have an opinion on it. It is striking however that much research has been carried out into the pros and cons of referendums in a general, constitutional sense (see for instance P. Gilhuis, *Het referendum. Een rechtsvergelijkende studie* (The referendum. A comparative law study), Alphen aan den Rijn, 1981, and Council for Public Administration, *Burgers betrokken, betrokken burgers* (Citizens involved, involved citizens), The Hague 2004), but much less 'street-level' research into in particular

will probably not lead to anything new. What is interesting to consider however is to review the Dutch case of the constitutional referendum of 2005 on the European Constitution. The Dutch electorate voted the EU constitution down. Not only is the run up to this referendum interesting, the aftermath – i.e. the period between the ‘no’ until the new Treaty of Lisbon – is equally instructive for a number of reasons. First of all the history of the lapsed constitutional referendum of 2005 gives a good insight into the dynamics of national referendums and the experiences of voters. It is also a nice example since, while ordinary national referendums in the Netherlands are often controversial, holding a referendum on a Constitution is by many almost taken for granted. Since 1848 the Dutch Constitution contains a revision procedure with features of a referendum.⁶ The intention is to sound out the population separately about a proposal to revise the Constitution. Because of the custom to let this consultation coincide with periodic elections, the revision proposals often stay in the background, snowed under by other topics. In this way it could happen that in 1983 a major revision of the Constitution was implemented, without leading to a noteworthy discussion during the election contest in 1981.⁷ Below we will look at the run-up to the constitutional referendum of 2005, the referendum itself and its final outcome – the Treaty of Lisbon - in 2007 and on that basis ask two questions. Has the constitutional referendum in the Netherlands taught us anything about the desirability of referendums (and is there anything to be learnt from it beyond the Dutch context) and, secondly, what has the referendum taught us – Dutch scholars and observers - about national attitudes towards the EU and the manner in which the Netherlands takes part in decision-making at European level?

The run-up to the referendum of June 2005: a messy period

Prelude: 2002-2004

The preparation for the referendum on the – so called - Proposal for a Treaty establishing a Constitution for Europe (hereinafter European Constitution) was messy. For many Dutch voter this Constitution appeared completely out of the blue. The first they seemed to hear of it was at the moment that the proposal for the European

the citizen's experience of referendums. Do citizens indeed feel more involved with the administration in case of referendums, what do voters think of the question which was asked, how does their satisfaction experience work about the referendums held and to be held, etc.?

⁶ See the procedure of Sections 137 to 141 of the Dutch Constitution.

⁷ The elections were held on 26 May 1981. No less than 34 proposals for revision of the Constitution were at issue at the time.

Constitution was adopted - with a great deal of ceremony and symbolism - on 29 October 2004 in Rome by the heads of government. The discussion about the concept, fundamentals and content of that Constitution had largely passed the Netherlands by;⁸ in the period in which the European Convention, chaired by Giscard d'Estaing,⁹ worked on drafts of the Constitution (2002-2003), the public discussion in the Netherlands was dominated by the aftermath of the murder of Pim Fortuyn (May 2002) and the trials and tribulations of the tumultuous Balkenende-I government (July 2002-January 2003). It was a turbulent period in which the sudden advent of a new populist, right wing movement of the 'Lijst Pim Fortuyn' (LPF) made clear that the traditional political parties had (or seemed to have) lost touch with their electorate. Almost hidden from view by a bizarre series of incidents and mini-crises within the LPF camp in the cabinet, already in 2003 a change of generations and course took place within two main parties that of the Social Democrats (PvdA) and Liberal-conservatives (VVD). The second Balkenende administration, which after the early elections in January 2003 took office in May of that year, had clearly not yet got over the fright of that unstable earlier period. That partly played into the game of coalition partner D'66 (Democrats) which put forward the time-honoured medicine of administrative reform for closing 'gaps' between citizens and politics (elected mayor, different electoral law, referendums). Horrors for many liberals within the VVD, which in earlier cabinets had meanwhile however already learned to live with the wishes of D'66. A special product of the cooperation of D'66 (Democrats) and VVD (Liberal-conservatives) in the purple governments (1994-2002) was the Temporary Referendum Act, an Act which made it possible on strict conditions to organise a consultative or corrective referendum on Acts which had before been adopted by Parliament. That Temporary Referendum Act was an experiment which lasted from 2002 to 2005. It is typical of the political climate in the Netherlands that in all those years not a single referendum was organised under that temporary Act; there were very few initiatives and the initiatives that were taken did not make the threshold. At the end of 2004 the expiry date of the Temporary Referendum Act was reached and the Act quietly departed from political life,¹⁰ with for that matter still an interesting little sequel.

⁸ For that assessment see also Council of State (2006), *Annual Report 2006*, The Hague 2007, p. 24.

⁹ See the European Convention, Draft-Treaty establishing a Constitution for Europe, CONV 850/03, 18 July 2003.

¹⁰ An attempt by a few members of Parliament to strip the Temporary Referendum Act of its temporary nature failed. See the Bill of the MPs Dubbelboer and Duyvendak for undoing the temporary nature, *Parliamentary Papers II* 2003/04, 29 551, no. 4.

The decision to hold the referendum

After the signing of the proposal for the European Constitution in Rome 2004 the government actually got ready to ratify the treaty as soon as possible in the Netherlands via the normal parliamentary procedure.¹¹ Although the entire proposal had taken the Netherlands somewhat by surprise, there had until that moment not yet been much public discussion about its content. The Netherlands is and was reputed to be a loyal and euro-enthusiastic member state of which more than three quarters of the population had been for many years positive about the European cooperation.¹² There was hardly any euro-critical tradition in the Netherlands.¹³ What is good for Europe, is automatically also good for the Netherlands, so the motto seemed to be for a long time. For many years the policy targets of the EU also largely coincided with the spearheads of Dutch policy. Working on the creation of a common market served in particular the open economy of the Netherlands. That may also explain why in the Dutch parliament there is little attention for European dossiers¹⁴ – it is not necessary to put much energy into something which is very technical and yet runs rather smoothly. Taking in addition into account that since 1918 discussions about the Constitution have virtually died out in the public debate in the Netherlands, then the sum total which the government arrived at in 2004 results in the assumption of a total lack of interest of the population for the European Constitution. The recent history also pointed in that direction. The ratification discussions about important constitutional EU treaties such as the Treaties of Maastricht, Amsterdam and Nice often petered out like a damp squib in the Lower House.

That background probably explains why the government reacted relatively quietly – or less kindly stated – half-heartedly and indirectly to initiatives to subject the European Constitution to a referendum. The first signs in that direction were already discernible in 2002 when a motion by Timmermans et al. (the current state secretary for European Affairs) was passed in which it was asked to organise a referendum about the result of the European convention, the later European Constitu-

¹¹ According to the ratification procedure provided for in Section 91 of the Constitution and the Ratification and Publication of Treaties (Kingdom) Act of 1994.

¹² Source: the Eurobarometer, a continuous form of public opinion polls since 1973 about which the European Commission annually reports to the member states of the EU.

¹³ See about this also Theo A. J. Toonen, Bernard Steunenberg and Wim Voermans (2005), *Saying No to a European Constitution: Dutch Revolt, Enigma or Pragmatism?* *Journal for Comparative Government and European Policy*, vol. 3, no. 4, 2005, p. 594-619.

¹⁴ The Council of State consistently asks attention for this in the annual reports 2005 and 2006. See also N.Y. Del Grosso (2000), *Parlement en Europese integratie* (Parliament and European integration), PhD-thesis RU Groningen, Deventer 2000.

tion.¹⁵ In May 2003 that initiative was taken over by a number of enthusiastic young members of parliament (Farah Karimi, Boris van der Ham and Niesco Dubbelboer) who brought a private member's bill to subject the approval of the European Constitution to a consultative referendum.¹⁶ The proposal of the three MPs stealthily evaded as it were the political radar of the parties – most of them in favour of a parliamentary ratification – and in 2004 the three managed to enlist ever more support for their initiative. Various factors contributed to the growing support for the constitutional referendum. In the first place, there is – completely un-Dutch – for the first time widely-felt criticism on parts of EU policy. The common euro currency – introduced as of 2001 – is, quite suddenly, perceived as a source of price increases, the non-compliance by large member states with the financial arrangements in the so-called stability pact stings, there are concerns about enlargement of the Union with 10 new member states, in particular controversial after the intended enlargement with Turkey and there further is opposition led by the government against the - in Dutch eyes - too high contributions to the financing of the EU.

In addition there are substantive arguments in favour of the private member's bill: it is elementary in a democracy that the population is directly consulted and involved on the matter of constitutions and constitutional standards. In a true democracy this cannot merely be left to a people's representation.¹⁷ However there now existed of course the problem that earlier treaties including fundamental rules about the relationship between EU member states and institutions and Europe and its citizens were also only ratified by parliament and that some of the most fundamental EU standards of constitutional law have been established by the Court of Justice in Luxembourg, without the population ever having been consulted about them.¹⁸ In its opinion on the private member's bill the Dutch Council of State discusses this issue. The Council holds:

¹⁵ Motion Timmermans et al. *Parliamentary Papers II* 2002/03, 21 501-20, no. 197.

¹⁶ See the private member's bill of Karimi, Dubbelboer and Van der Ham on holding a consultative referendum on the Constitutional Treaty for the European Union (Act on consultative referendum on the European Constitution), *Parliamentary Papers II* 28 885.

¹⁷ In the explanatory note to their bill the initiators Karimi, Dubbelboer and Van der Ham quote the formidable French President Charles De Gaulle who once stated that: 'Europe will be *born* (italics WV) on the day on which the different peoples fundamentally decide to join. It will not suffice for members of parliament to vote for ratification. It will require popular referendums, preferably held on the same day in all the countries involved.'

¹⁸ For instance, in the early sixties of the previous century the European the autonomous legal order was proclaimed by the Court of Justice and the Court also independently established the priority of European law over the national law of the member states, EC Court of Justice 5 February 1963, 26/62,

"The private member's bill first of all raises the question why it is desirable to ask the opinion of the citizens about this amendment to the constitutional European treaties, while no referendum was held in the Netherlands on the founding treaties and earlier important amendments to those treaties – the Council especially has in mind the treaties of Maastricht, Amsterdam and Nice. The Council is of the opinion that the answer to this question can be found in the nature of the European Constitution. However, the difference in significance between the treaty at issue here and the other treaties mentioned, is not so much fundamental as gradual. Already for considerable time the European Communities and the Union have a constitution, and the content of the European Constitution is not completely new; it consists for a large part of a recodification of existing treaties. The Council points out though that in the European Constitution the (somewhat expanded) Charter of fundamental rights is included; by doing so these fundamental rights also get a binding character, and the courts will be able to test statutory provisions against them. Fundamental rights are an essential element of a Constitution in a democracy based on the rule of law. Furthermore, with the adoption of the Treaty establishing a Constitution for Europe a single European "Constitution" comes into effect, in which the (changed) institutional relations and the decision-making for what currently is still indicated as the first, the second and the third pillars will have been regulated in a single coherent fashion. For that reason it would be possible to a certain extent to compare approval of the treaty with a constitutional revision."¹⁹

The Council is very cautious with making a statement on the question whether a referendum on the European Constitution must be held, but it can actually agree with the reasoning of the initiators that approval of that European Constitution is comparable with a constitutional revision, which in the Netherlands must be submitted to the population in a referendum-like fashion. This opinion of the Council has in 2004 much influence on the political relations. It is interpreted as the blessing of the Council of State on the constitutional referendum. This also undermines the last obstacle to the referendum. Early in 2004 there is still a right-wing majority of CDA (Christian Democrats), VVD (Liberal-conservatives) and the small Christian parties in both houses of Parliament against holding a referendum. In September 2003 the government party VVD relatively unexpectedly swings round after parliamentary party leader Van Aartsen has let it slip that he will face a constitutional ref-

ECR 1963, p. 1-59 (Van Gend en Loos) and EC Court of Justice 15 July 1964, 6/64, ECR 1964, 1209-1259 (Costa/ENEL).

¹⁹ Opinion of the Council of State dated 14 July 2003, W04.03.0194/I, also published as *Parliamentary Papers II* 2002/03, 28 885, A.

erendum with an open mind.²⁰ On 25 November 2003 the bill for a constitutional referendum is passed by the Lower House (Dutch House of Representatives) and on 25 January 2005 – after a year of resistance – the Upper House (the Senate) also agrees.

The referendum

Until 25 January 2005 there is hardly any public discussion about the content of the European Constitution. That discussion must actually be forcefully set in motion. The government appoints a referendum committee, which is asked to independently start to prepare the referendum. That committee fixes the day of the referendum on 1 June 2005, two days after the French referendum. Afterwards that will turn out to be a bad mistake. Subsidies are distributed and leaflets printed. It all starts very half-heartedly. The government – also called the ‘cabinet’ - does not seem to be in a hurry: until early in April 2005 the prospects for a positive result are still relatively good. At that moment the polls show that a majority of the Dutch intends to vote in favour of the approval of the European Constitution (58%), and 42% against. At that moment 66% of those asked indicate that they will not vote in the referendum.²¹ Although at that moment the number of no-voters has already increased a little, these results are in line with the picture shown by earlier polls. In the house of representatives – the Lower House or Second Chamber - there is at that moment also a solid majority in favour of the European Constitution. Everything still points in the direction of a small victory of the ‘yes’-camp in the referendum, as one might read it from the lack of interest of the voter and at best the lukewarm discussion which – in combination - seems to go to result in a low turnout.

The opposition parties, however, pay closer attention to the early warning signs of popular discomfort with the EU Constitution. The radical left wing ‘Socialistische Partij’ (SP), the radical right wing Groep Wilders (Wilders), the orthodox Christian Union - Christen Unie (CU) and the populist Fortuyn party LPF jointly prepare well for the referendum and from February they very effectively start to mobilise the ‘no-vote’. In their campaigns the European Constitution is portrayed in an accessible way as an instrument of neo-liberal politics (SP), a threat to national autonomy and national identity and values (CU/SP/Wilders/LPF), an undemocratic,

²⁰ See Steur (2005), p. 135, about the way in which the initiators have ‘manipulated’ Van Aartsen in order to win him over.

²¹ Source: Nova broadcast (NOS) 12 April 2005; source of these figures Interview-NSS/NOVA.

expensive and inefficient little toy of the political establishment (SP/Wilders/LPF). The mantra from the 'yes-camp' (professing that the European Constitution will bring about a more efficient, more democratic and fairer Union) reaches much fewer hearts and minds. When some confidence inspiring opinion makers, such as Ronald Plasterk (present day Minister of Education, Science and Culture), also make a case for a 'no', cracks start to appear in the 'yes-front', which was so far somewhat artificially held together. Within the parties which have formally expressed themselves in the Lower House in favour of the European Constitution resistance is growing. The media sense the smouldering conflict and skilfully respond to it. From the end of April the control over the campaign is wrenched out of the hands of the government, and from that moment it can still only react. Subsequently one clumsiness is piled on another. A good example of the unease of the cabinet is a broadcast of the Dutch late night talk show of 'Barend and Van Dorp'. In it junior minister Nicolaï – the state secretary for European Affairs – is put through the mill about the European Constitution. To questions from the journalists whether the European Constitution implies new restrictions on Dutch sovereignty and autonomy he answers in the negative, as he also had already done in an earlier broadcast. The interviewers then confront him with the principle of priority of EU law from the proposed Article I-10 of the EU Treaty. Nicolaï – that evening not at his best – gives a somewhat evasive answer to the effect that the article in question must not be read so literally. With this he unintentionally contributes to the negative image of the Constitution, as dark machination of a usurping tier of government. It does not help when, some time later, the referendum committee adopts again another position than adopted by the state secretary about the question of the priority of EU law. It does not go well for the cabinet. Contrary to the opposing parties, at no moment it succeeds in adequately translating the message of the European Constitution politically. Members of the cabinet express themselves extremely awkwardly about the possible consequences of a 'no';²² too late in the day they yet try to get further information about the Constitution to the citizens (interpreted by the 'no-camp' as a subsidy for the 'yes-vote'). To make matters worse at a very late moment the cabinet forces their parties in Par-

²² Former Minister of Justice Donner predicts war and a possible Balkanisation of Europe if the 'no' would win; according to the than Minister of Economic Affairs, Brinkhorst, rejection in the Netherlands would mean that economically "the lights would go out" and later in 2005 the same minister judges that the European Constitution is actually too complicated to ask citizens to have an opinion about it; at the time opposition leader Wouter Bos – actually in favour of the EU Constitution – makes a blunder by recommending that after a 'no' the Netherlands must quickly again organise a referendum with the same question; and Minister of Foreign Affairs, Ben Bot, advised voters just to stay home when they feared that they did not understand the European Constitution.

liament - supporting the coalition - to start a campaign in favour of the Constitution, which the latter then do – sometimes with noticeable reluctance.

All this shows that the cabinet approaches the referendum as regular elections: the political top people and party leaders are only put forward in the campaign a few weeks before the elections. The situation for the 'yes-camp' becomes increasingly worse in the course of May 2005. The statement by the president of the Dutch central bank that at the introduction of the euro the guilder has been undervalued compared to the German mark and the failure of the Dutch candidate in the preliminary rounds of the Eurovision song festival in Kiev, which is dominated by East Europeans, further contribute to the decline of the popularity of everything that has to do with Europe. By the end of May 2005 it is clear that the European Constitution is beyond saving. In barely three months time a respectable majority of proponents in one of the most Europe-enthusiast countries has been turned into a majority of no-voters. When on 29 May the French vote in majority against the European Constitution in their referendum, the fate of the European Constitution in the Dutch referendum is also sealed.²³

The why of the 'no'

On 1 June 2005 61.54% of the voters say 'no' to the proposal to ratify the European Constitution, against 38.46% 'yes': a resounding victory for the 'no'-camp. And the turnout is high: 63.3% of the voters. The blow hits home. The European Union places the constitutional project on hold: a year of reflection must give insight into the why of the resistance against the European Constitution in France and the Netherlands.

Immediately after the outcome there is a lot of speculation about the reasons for the Dutch 'no'. That is, perhaps unlike for the French 'no', hard to read and indicate. No simple and unequivocal reasons for the 'no' can be given: a multitude of various reasons seems to have played a role. That also makes it hard for the Dutch government to determine its position after June 2005. The mystery of the 'no' only becomes greater when early in July 2005 the Eurobarometer – a continuous poll carried out by the EU – shows that the Dutch still, as of old, attach much value to the membership of the European Union (77% positive) and in majority are of the opin-

²³ For a good overview see the website 'Europa-nu' (Europe now) which can be found under http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vgvqpnqs5qbn?start_tab0=60 (last visited on 24 January 2008)

ion that all in all the Netherlands profits from the cooperation (67%).²⁴ With this the Netherlands is the country with the highest satisfaction score of the 25 member states.²⁵

Various investigations in 2005 and 2006 show that it was indeed a mix of reasons that has moved the no-voters. The investigations make clear that lack of information was for 32% of the voters the basis of the 'no', fear for loss of national sovereignty for 19%, 14% indicate that the negative role of the cabinet and the political parties from the yes-camp were a reason for a vote against, 13% find Europe too expensive, 8% of the voters are in general against the European integration, and 7% of the population fear negative effects of the cooperation for employment.²⁶ In addition still many other – smaller – causes may be indicated such as the (too large) speed of the European integration, the introduction of the euro, the Brussels bureaucracy, the impending accession of Turkey, but not a single one of them can be designated as one of the main causes.

Hence the investigation 'European times' of 2005²⁷ of the Social and Cultural Planning Office – which brought those data to the surface – arrives at the conclusion that none of these factors has been independently decisive. The own dynamics of the process of public opinion formation seems to have played a decisive role, and that has caused a cascade of developments. The Social and Cultural Planning Office further arrives at the – somewhat curious – conclusion that on balance the Dutch 'no' has little to do with the content of the Constitution or with the general feeling about Europe.²⁸

²⁴ See e.g. Eurobarometer 63.4 from 2005.

²⁵ The interviews underlying the Eurobarometer results were held between 9 May and 15 June 2005. In total 24,791 people were interviewed in the 25 member states. See for these figures the CPB Netherlands Bureau for Economic Policy Analysis and the Social and Cultural Planning Office (2005), *Europese tijden: de publieke opinie over Europa; arbeidstijden vergeleken en verklaard* (European times: the public opinion about Europe; working hours compared and explained), The Hague 2005, table 1.1. That table is based on the research of the Eurobarometer.

²⁶ Figures taken from the report 'European times' of the CPB Netherlands Bureau for Economic Policy Analysis and the Social and Cultural Planning Office (2005).

²⁷ See for these figures CPB Netherlands Bureau for Economic Policy Analysis and Social and Cultural Planning Office (2005), table 1.1. That table is again based on the polls of the Eurobarometer.

²⁸ See CPB Netherlands Bureau for Economic Policy Analysis and Social and Cultural Planning Office (2005), p. 37. Also other research, such as the investigation contracted out by Foreign Affairs '*Kom naar de camping!*' (Come to the camping) arrives at the conclusion that no decisive main reason, factor or main motive for the 'no' can be pointed at. On the basis of research in focus groups this latter report shows that an association process takes place in groups of – especially – more highly educated

Indirect causes

Apart from direct causes, the 'no' is perhaps also based on somewhat more indirect causes. The Netherlands does not have a constitutional referendum tradition. The last real constitutional referendum, whereby 'yes' or 'no' could be said against an *entire* constitution as a package was 207 years ago.²⁹ There was most certainly a culture shock in our coalition democracy which is governed by a constant search for consensus. A referendum has 'winners' and 'losers', which is of importance for voter behaviour: nobody likes to belong to the losers.

A second underlying reason is that citizens in the Netherlands have so far not really directly been involved in the constitutional modelling of the European Union. It has been especially the heads of government and the European Court of Justice which have had the lead in the modelling of constitutional law of the EU in the past 50 years. Majone calls this, catchingy, 'integration by stealth'.³⁰ The silence of parliament and citizens about the proceeding European integration ('permissive consensus')³¹ has for a long time – and possibly wrongly – been interpreted as long-time public support for the European project. Large constitutional treaties like the Treaty of Maastricht and the Treaty of Amsterdam have been adopted by the Netherlands by simple parliamentary ratification without any notable public discussion. The boomerang effect of that 'permissive consensus' now makes itself felt when the Dutch citizen – asked for the first time for his own opinion – is asked to agree 'en bloc' with the result of fifty years.

people. While more highly educated people at first more or less, in accordance with their social position, feel obliged to be in favour of the European Constitution, they put that pride aside during the ride to the referendum. Anker Solutions (2005), *Kom naar de camping!*; final report of the focus groups, Ministry of Foreign Affairs, September 2005.

²⁹ The first real constitutional referendum in the Netherlands was held on 8 August 1797. This consultation turned out negatively for the draft Constitution of the Batavian Republic put to the vote. A revised draft Constitution was again subjected to a referendum on 23 April 1798: however this time with a positive outcome for the 'yes'-camp. See for an illustrative and amusing overview of the course of the two referendums, Meine-Henk Klijnsma, *De Bataafse referenda* (The Batavian referendums), in: B.F. Steur, *De keuze om te kiezen*, Elsevier overheid; The Hague 2005, p. 27-34.

³⁰ G. Majone (2005), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press.

³¹ See Toonen, Steunenbergh, Voermans (2005), p. 611.

After the referendum

The reflection period 2005-2007

After the referendum of 2005 the debate subsided rather quickly. The plan to come to a broad public discussion about the European integration did never get off to a good start and perished eventually in the autumn of 2005. Like many others the cabinet wrestled with the question into which direction the Dutch 'no' actually pointed. Other countries too struggled in the first reflection period (June 2005-May 2006) with the question how to proceed with the wounded European Constitution. A dividing line became visible between the countries which had already ratified and the countries which – whether or not because of an unsuccessful referendum – had not yet ratified or had suspended the ratification. Good advice was scarce when early in 2006 it became clear that the ratification as of 1 November 2006 (the deadline for ratification agreed in 2004) was no longer feasible. In the Netherlands it was very quiet, apart from some sudden eruptions of activity whereby the cabinet was suspected of trying to avoid the consequences of the 'no' by a delay-cancellation strategy. On 19 May, just before the European Council meeting, the cabinet comes with a letter to the Lower House in which the results of the reflection period 2005-2006 are recalled. The cabinet indicates that it has used the reflection period especially for stimulating an open debate with citizens, experts and European partners about the future of the EU, but that it has not led to much. An effort will be made to extend the reflection period with another year.³² In June 2006 that position is taken over by the European Council. It is decided that the German EU Presidency (from January to June 2007) will submit a new 'road map'. The heads of government hope that changes of government in Germany, France and in due course the United Kingdom may be able to break the deadlock.

At that moment the cabinet is still wrestling with the question of how to deal with the outcome of the referendum. Especially with the prospect of elections at the end of November 2006 it is essential to hurry up in order that the room which the extended reflection period offers doesn't likewise melt away. State secretary Nicolaï thereupon decides to deploy a modern instrument. Via an internet survey called 'the Netherlands in Europe' the citizens themselves are asked for their opinion. In various respects the survey is special. It is a great success as regards response (more

³² Memo «Cabinet analysis of European reflection period», *Parliamentary Papers II* 2005/06, 30 3030, no. 20.

than 97,000 surveys are completed).³³ It is also striking that about two thirds of the questions have no relation with the content of the European Constitution or the institutional structure of the Union whatsoever, but lay a strong emphasis on questions of desirability of the enlargement of the Union (many countries are reviewed by name), asylum problems and security issues.³⁴ The survey asks almost nothing about fundamental rights and the way in which citizens might be more directly involved with the Union. Nevertheless, from that survey the cabinet later concludes that the Netherlands prefers not to include a catalogue of fundamental rights into a new treaty, prefers not to see any Union symbols there either, and as regards the decision-making has trust in a stricter subsidiarity test, with the possibility for national parliaments to stop European initiatives (yellow card procedure). What everybody in the Netherlands at the end of 2006 actually agrees on is that the name 'Constitution' for the original document has been a wrong choice.

That neither the survey, nor the reaction of the cabinet hardly discusses the question of more and more direct involvement of Dutch citizens is remarkable. The outcome of the referendum of 2005 is in no way read as a signal of dissatisfaction with the – indirect – Dutch way of looking after European business, but apparently as a failure of European communication towards Dutch citizens (no symbols, no 'Constitution', no 'superstate' – whatever that exactly may be – and suchlike) and a failure of European parts of European policy (enlargement, asylum policy, bureaucracy, powers of institutions, and suchlike). That is the more surprising since the Council of State,³⁵ the National Convention³⁶ and also European commentators³⁷ suspect the Dutch 'leak' precisely there. More and direct involvement of the Dutch

³³ There are however a few questions about the reliability. I myself completed the survey about ten times with different e-mail aliases, without the system noticing this.

³⁴ See Syp Winia, *Wat er niet deugt aan de Europa-enquête* (What is wrong with the Europe survey), Elsevier 2006, 22 May 2006

See http://www.elsevier.nl/nieuws/europese_unie/artikel/asp/artnr/99610/index.html.

³⁵ See Council of State (2005), *Annual Report 2005*, The Hague 2006, p. 83-89.

³⁶ The National Convention was a committee which in the Netherlands in 2005/2006 looked for ways to close the gap between politics and citizens. See the report '*Hart voor de publieke zaak*' (Heart for the public interest), The Hague 2006.

³⁷ Margot Wallström, vice-president of the European Commission noted in 2005 further to the investigations into the 'no' in France and the Netherlands: "Although ten countries have already ratified the Constitution, the French and Dutch referendums are a sharp warning. There are a number of reasons why the people said no and these reasons are not the same in the two countries. The economic and social climate played a big role, but it is clear that the dialogue between the citizens of the European Union and its institutions has to be improved. Europe needs a plan D: D for democracy and dialogue."

citizen, directly and via the Dutch parliament, is recommended in those studies and commentaries. The Dutch government, however, wouldn't hear of it.

On the road to the Lisbon Treaty

From the beginning of 2007 it becomes clear that continuing with the ratification on the basis of the old text is actually no longer an option for the European Constitution. The project has become controversial: it simply meets with too much opposition in too many member states. That placed at that moment the responsibility and burden on the German presidency to look for an alternative. That became a 'long and winding road' with confessional box procedures and 'sherpas'. Contrary to the Convention of 2002/2003 it was a rather untransparent process, a showcase of integration 'by stealth'. The Netherlands laboured for such points as the abolition of European symbols, of the name Constitution, the disappearance of the idea of super-state, no inclusion of a European catalogue of fundamental rights into the treaty, but actually inclusion of the Copenhagen criteria with in it the requirements for the accession of new member states, clearer demarcation of European powers, and better cooperation in the field of environment, security and energy. The traces of the 'no' were actually difficult to recognise in the contribution, but it worked. By the end of June 2007, after long and difficult negotiations, the heads of government succeeded in agreeing on an alternative treaty, the draft 'Reform Treaty' which amends the existing EU and EC Treaties and also changes its name.³⁸ Most of the Dutch demands are complied with, apart from the inclusion of the Copenhagen criteria. And although demands of other member states are also conformed to, the core of the European Constitution remains intact. Many of the changes made are essentially cosmetic in nature. For the Netherlands the outcome of the Reform Treaty, which was finally officially sealed in December with the conclusion of the Lisbon Treaty in Lisbon, is in essence not a bad result, although the question remains whether this result does justice to the outcome of the referendum of 1 June 2005.

³⁸ The EC Treaty will henceforth be called 'Treaty on the Functioning of the European Union'. For the further decisions see also the Conclusions of the Presidency of the Council of the European Union of 21 and 22 June 2007, CONCL 2, 11177/07.

No new referendum

Parallel to the discussion on the content of the new Reform, later Lisbon Treaty in the Netherlands the question was discussed whether a referendum must not again be held again. If the original European Constitution rejected it only seems logical to subject a successive, amending Treaty once again to a referendum. It provides the opportunity to the voters to assess whether the new result actually meets their wishes. Opinions, however, in 2007 differed about the question whether a referendum must again be held. On one side of the spectrum it was feared that a new 'no' will bring the Netherlands in an extremely awkward predicament within the Union. Certainly now that it was actually an established fact that in June 2005 many people voted 'no' for reasons lying outside the European Constitution itself. A complex matter as the European Constitution is actually not suitable for a referendum, some held. On the other side there were groups and parties which reasoned according to the logic of the new referendum. Certainly now that in 2005 the majority in parliament was in favour of the constitution, and a vast majority of the voters against, a new constitutional regulation of relations in Europe cannot go ahead by means of a simple parliamentary ratification. After the elections of November 2006 and the formation discussions early in 2007 it was clear that the coalition partners of the cabinet to be, the CDA, PvdA and orthodox Christians (Christen Unie), did not agree about the referendum question. The social democrats of the PvdA wanted a new referendum and the Christian democrats of the CDA were dead against it. When the coalition agreement of February 2007 was concluded, there was still no clarity about the Dutch position on the future of the European Constitution, or about an alternative. It was decided to opt for a Solomonic judgement: the Council of State would be asked for its opinion about the question whether a new treaty had a constitutional character or not. If yes, a new referendum round would be more obvious, if no, it would point more in the direction of an ordinary parliamentary ratification. Early in July 2007, still before the actual text of the Reform treaty text was available, the conclusions (i.e. the skeleton elements for the Reform Treaty that came out of the June 2007 EU summit) of the EU presidency were submitted for an opinion to the Dutch Council of State.

At the time I have opposed this method of asking for an opinion since I was and am of the opinion that such conduct would bring the Council of State in the position of a constitutional court. That is a position which the Council of State does not have in our Dutch constitutional system and must not want to have. And secondly the Council lacked an objective standard for determining when a treaty has or has

not a constitutional character.³⁹ In its opinion of September 2007 the Council of State states that the EU Lisbon Treaty, as foreseen at the European Council meeting in June, has no constitutional character.⁴⁰ The Council draws this conclusion from matters which are connected with the character of the adoption method and the content of the Lisbon Treaty. For instance in the Lisbon Treaty the parties to the treaty have no ambition to negotiate a constitution, it lacks the characteristic element of the fundamental rights, as well as constitutional symbols and a fundamental change in the division of powers between Union and member states. Moreover the Lisbon Treaty does not repeal the earlier treaties, as the European Constitution did. The Council disregards actually rather easily, to my taste, that the Lisbon Treaty constitutes as it were a whole with (in the words of the Council 'builds on') the previous treaties of Maastricht, Amsterdam and Nice. Together these treaties, with the case law of the Court of Justice, form the "constitution" of Europe: additions to constitutional treaties, so one might argue, may be called constitutional in nature. Nobody will dare to argue, I think, that the change in the voting proportions in the European Council, the permanent Presidency of the Council, the new role which the national parliaments get are no constitutional rules in nature. It comes across as somewhat artificial to suspect here in total (Lisbon Treaty which amends constitutional treaties) a different character than in the separate rules which are constitutional in nature.

The Council of State does not stop at the assessment of the constitutionality of the Lisbon Treaty, but still goes one step further: the Council expresses its opinion on the possibility of holding referendums on the approval of treaties. The Council judges that the Dutch Constitution contains a closed system of approval of treaties, in which parliamentary ratification is the basic principle. That means two things. In the first place, that as regards the approval of treaties there is no room for binding referendums and, in the second place, that for a consultative referendum about the ratification of a treaty as the (not constitutional) Lisbon Treaty a special justification must exist.

'The mere precedent' (of an earlier referendum on the European Constitution) 'is', according to the Council, 'insufficient for holding a referendum. That would essentially create a structural referendum facility (in fact for the ratification of treaties) which does not fit in with the closed system of the (Dutch WV) Constitution.'⁴¹

³⁹ W. Voermans, *Raad van State heeft geen maatlat* (Council of State has no yardstick), *de Volkskrant* 19 July 2007.

⁴⁰ Opinion of 12 September 2007, number WO2.07.0254/B.

⁴¹ See section 4.2 of the opinion.

The Council considers that a heavy burden of proof exists for a consultative referendum in respect of the approval of a treaty like the Lisbon Treaty. For instance, the character of a treaty must be looked at, and the question must be asked whether an ad-hoc referendum is an appropriate and suitable instrument for involving citizens in decision-making. Referendums must not degenerate into a means of legitimisation for administrators for the benefit of their own judgement. The question must also be considered whether a clear, unambiguous choice can be formulated and it is of interest whether after a non-binding referendum the legislator has in fact still room for taking a different decision about the Ratification Act at hand. Van Praag, a Dutch scholar of political science, has pointed out that with this latter element, which more or less examines the question of the desirability of referendums, the Council interferes with a political issue.⁴² That is somewhat exaggerated in my view. What the Council does here is exploring the constitutional room for referendums in case of approval decisions, which is in essence interpreting the Dutch Constitution, something which the Council has more than once appeared to be capable of. With the qualification of the constitutional character of the Lisbon Treaty the Council rather gets on a slippery slope: we have in the Netherlands neither in positive law, nor in dogmatics a concept of constitutionality which the Council can lean on.

For the Dutch cabinet and parliament, however, the opinion of the Council of State was the signal to aim for a parliamentary route of approval of the Lisbon Treaty. In the fall of 2007 it was decided that there was to be no new referendum on the Reform Treaty, later Lisbon Treaty, and – in the end - on 9 July 2008 the Treaty was ratified by both houses of the Dutch Parliament. All's well that ends well...or is it?

Conclusion: the learning, the lesson

What can we learn from the history of the first constitutional referendum in the Netherlands after 207 years? In the first place that at national level in the Netherlands consultative referendums just do not want to turn out all right. Once – in the 1990's - the crown jewel of the administrative reform in the Netherlands, it now seems to have collapsed under a series of bitter experiences. It is at this moment difficult to predict whether there is a future for national referendums. But it is clear

⁴² P. van Praag, *De dubbele agenda van de Raad van State* (The double agenda of the Council of State), *Nederlands Juristenblad*, 9 November 2007.

that referendums and fragile coalitions in a changing political landscape scarcely go together in the Low Countries.

A second lesson is a constitutional one and is twofold. Within the Dutch constitutional system there is – theoretically speaking - room for referendums on the ratification of treaties with a constitutional character, albeit that that room is small (after all there is a closed system of ratification) and – even so – such a referendum would require a special justification. One could, justifiable, reverse this reasoning of the Dutch Council of State and hold that in the Netherlands a constitutional rule exists which in the case of a treaty with constitutional features dictates to examine whether there is reason to consider a referendum on the ratification.

The third – and final - lesson is that administrators and politicians are as it seems obstinate and hard of hearing. Nothing of the analysis put forward from various sides, that the ‘no’ is a protest against the manner of European integration whereby the Dutch citizen is insufficiently directly involved, has insufficient grip, can be found in the solution. The manner in which the Lisbon Treaty has been concluded is a textbook example of continuing to build Europe according to the method of ‘integration by stealth’. As all research shows, that method European decision making without a more or less direct popular say in the matter rubs many Dutch up the wrong way. Other member states have actually taken criticism on this point to heart. There it has been recognised that for the support of the Community acquis not only consensus in Brussels is needed, but especially a substantive national parliamentary debate on intended EU policy at a moment that it still can be changed. Instruments as parliamentary scrutiny reserves are at present very popular in the European Union.⁴³ At this point the Dutch government has not progressed much further than a very laborious ‘orange card procedure’ which gives an all but theoretical possibility to stop a proposal of the Commission. Examining if we can get further with involving the citizen in the European integration would do more justice to the ‘no’ of 2005 than keeping the latter – frightened – out of the European kitchen.⁴⁴ That is indeed waiting resignedly for the return of the thrown boomerang.

⁴³ W. Voermans (2007), *Invloed van nationale parlementen op Europese wetgeving: hoe doen de burendat?* (Influence of national parliaments on European legislation: how are our neighbors doing that?), *RegelMaat*: quarterly magazine for legislation, 4 ; p. 150-162.

⁴⁴ The Dutch government did leave nothing to chance during the debate on the bill ratifying the Lisbon Treaty. Initiatives of MPs to empower and involve the Dutch Parliament in European affairs beyond the current level – e.g. by way of some form of scrutiny reserve - were effectively side railed. The end result is that the Dutch Parliament, after the ratification of the Lisbon Treaty has less power and less influence over European decision making than it did before. A very strange outcome indeed.