

# Long Read: Abolishing the referendum? How and why the Netherlands is struggling so much with direct democracy.

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**Using controversial legal tricks, the Dutch government is trying to abolish the law for citizen-initiated referendums that has only been in place for 3 years. But the struggle is not over and the second national citizen-initiated referendum held this spring has won many new friends for direct democracy. In this long read Arjen Nijeboer and Thijs Vos are reporting about a unique and strange struggle of Dutch politicians against their own (direct) democracy.**

The Netherlands has had a highly complicated relation with direct democracy. On the one hand, the first parliamentary debate about introduction of direct democracy was already held in 1903 and many state commissions have advised positively about introducing citizen-initiated referendums. But as the Dutch constitution is so hard to change, and the center-right parties are very conservative institutionally, attempts to introduce a binding facultative referendum into the Constitution have failed three times already.

Until 2005 the Netherlands was one of five countries world-wide that never held a national referendum. The referendum on the European Constitution, held in May 2005, initially created a lot of enthusiasm among Dutch political elites for more direct democracy and the advocates in Parliament quickly introduced new law proposals introducing facultative referendums: one that would plug the binding facultative referendum into the constitution (which needed a two-third majority) and a non-binding version that could be introduced with a regular majority. Only the non-binding version was adopted and only after 9 years...

## **The first citizens' referendum**

This 'Consultative Referendum Law' (CRL) went into effect on July 1, 2015. It gives 300,000 citizens the right to trigger a referendum on most new laws and treaties adopted by Parliament. It would be used really soon. Just six days later on July 7, the Dutch Senate ratified the association treaty between the EU and the Ukraine (as well as two other association treaties between the EU and Georgia and Moldova, respectively).

Three organizations who wanted to organize referendums on European treaties for a long time, started gathering signatures for the first citizen-initiated referendum: the small Eurosceptic volunteer group Burgercomité EU ('Citizens' Committee EU'), the right-wing and Eurosceptic think tank Forum voor Democratie (which has now become a political party with 2 seats in Parliament and many more in the polls) and GeenStijl.nl ("No Style"), a satirical but extremely well-informed blog with the tagline "Biased, unfounded and needlessly offensive" and a cult following of 200,000 visitors a day.

The treaty was rejected by 61% of the voters, creating a hazardous situation in which the government had little room to maneuver. The referendum law stipulated that the rejected treaty should be either approved or rejected by parliament as soon as possible. The Dutch opposition – which controlled the senate – had promised that the referendum outcome had to be respected, whilst the government believed the result could also be honored by certain changes of the treaty. Simultaneously, amongst other EU-countries there was little support for renegotiating the treaty. This created a political Limbo for months, in which the referendum outcome was neither confirmed nor rejected. In the end, Rutte gained approval from his European colleagues for a legally binding interpretation of the treaty, but which did not change the treaty itself. Rutte claimed that this sufficiently addressed the concerns of Dutch voters, whilst opponents criticized him for ignoring the people.

An Idea By Frans Timmermans

Interestingly, it had been Frans Timmermans – today's the European Commission's First Vice President – who had suggested to prominent eurosceptics that they should request a referendum on the first European treaty that was passed by parliament. In March 2013, Burgerplatform-EU – a platform of several prominent eurosceptics – had used the national citizen's initiative (introduced in 2006) to formally put a proposal on the agenda of the main chamber of parliament, signed by 56,000 citizens (while 40,000 were required), asking for mandatory referendums on treaties that transferred sovereignty to the EU. As minister of foreign affairs, Timmermans defended the government's position. He remarked that there was no need for mandatory referendums, as eurosceptics could just use the consultative referendum to request a referendum on the first European treaty that was passed by the parliament. Timmermans could never have foreseen that this would be exactly what the initiators would do.

## **How D66 betrayed the referendum**

The last national elections on March 15, 2017, returned a large majority for parties who promised to support the young national referendum law. Together, these parties now occupy 90 of the 150 seats in the main chamber of Parliament. Especially the Social-

Liberal D66 party, known as the pro-referendum par excellence, was very outspoken about their promise to defend the young referendum law. Its election manifesto for the 2017 elections stated (p. 157):

“When a new instrument like the consultative referendum is used for the first time, then we embrace this and learn from it. We are not pleading for abolishing this renewal, like the other parties, who were notably absent during the campaign [for the EU-Ukraine treaty referendum].”

But nonetheless D66 came back on its promises and gave up the referendum during the government formation. The other coalition parties were either agnostic or against the referendum, but did not actively spoke out during the campaign to abolish the referendum. If journalistic reconstructions are to be believed, D66 did not even fight for the constitutional amendment that would introduce binding referendums and quickly gave up the consultative referendum as well.

The coalition agreement, presented on October 10, 2017, states (p. 8): *“Several years ago, the consultative referendum was introduced as a step towards the binding facultative referendum. Since then, the political support for the binding facultative referendum as the end goal has diminished and is out of reach. The national consultative referendum has, as an intermediate step, not brought what was expected of it, among others because of controversies over the way in which it can be requested as well as the different interpretations of the outcome. Therefore, the government wants to take a pause for a moment. The consultative referendum law will be abolished.”*

### **Government spin**

This statement is interesting in the light of political spin. The consultative referendum law proposal was introduced in Parliament in 2005 together with a law proposal amending the Dutch Constitution to allow for binding citizen-initiated referendums. Both law proposals were introduced by D66, the Social Democrats (PvdA) and the Greens (GroenLinks). The reason for this double proposal was that, already then, these 3 parties knew that the binding referendum proposal would probably not make it. For this, the Dutch Constitution has to be changed and the necessary two-third majority was and is nowhere in sight as both the conservative-liberals (VVD) and three christian parties (CDA, ChristenUnie and SGP) were and are against it. That’s why the initiators also proposed a non-binding version which could be introduced through a regular law that needs only a simple majority.

The three initiating parties, including D66, were always open and explicit about their strategy. As the then and current leader of D66 in the Senate, Thom de Graaf, put it: *“D66 understands (...) that the initiators see this consultative referendum as a separate instrument (...), not related to the binding referendum for which a constitutional change has now been presented. The fact that the initiators use this double approach is understandable: if the constitutional change is not adopted, which we do not hope, then there’s always the consultative referendum which does not require a Constitutional change.”*

In other words, the consultative referendum was never meant as just a bridge to the moment when the binding referendum would enter into force. Quite the contrary, the consultative referendum was meant as a permanent law exactly for the scenario that the binding referendum would not be adopted.

Secondly, the government says that the political support for the referendum has diminished and that is reason to abolish the referendum. But the citizens still support (even non-binding) referendums by a large majority (60 to 70%, according to academic studies), and by far most political scientists who write about referendums see a useful role for them in the Dutch political system. It is only among the political parties that support has diminished. In other words: the government parties say they do no longer support the referendum because the government parties do no longer support the referendum – a circular argument, noted by e.g. professor of political science Tom van der Meer. Third, the coalition agreement states that the referendum has not brought what was expected of it. But expected by whom? What exactly did the government expect? “Did they expect applause?”, asked professor of state law Wim Voermans rhetorically. Fourth, the government substantiates its wish to abolish the referendum by arguing that both that the way in which referendums are now requested, as well as the controversies over the interpretation of the outcome, is unsatisfactory. But first, any shortcomings of the current referendum law can be fixed by simple law changes and is not a reason to entirely abolish it at all.

The main reason for the current government attempt to abolish the referendum, including the 180 degrees turn of D66, seems to be the fact that politicians hated the outcome and aftermath of the first and – when the decision was made – only national referendum that was held on the basis of the Consultative Referendum Law. For three out of four parties – the Christian-democratic CDA, conservative-liberal VVD and especially the social liberal D66 – it also plays a role that they are strongly pro-EU, and the previous two Dutch referendums were seen as “anti-EU”.

### **A referendum on repealing the referendum?**

Although the formation of the third Rutte cabinet was the longest in history – it was installed on October 20, seven months after the elections – it acted very quickly on the abolishment of the referendum. Already on December 20, Interior Minister Kajsa Ollongren of D66 sent the repeal law proposal, necessary for repealing the referendum law, to Parliament.

There was one problem: a referendum could be requested on the repeal act itself. Several organizations had already declared that they would collect the necessary signatures to trigger such a referendum. Amongst them were Meer Democratie (More Democracy), a small NGO campaigning for binding referendums and democratic reform, and the organizations that initiated the previous referendum. A defeat in such referendum would be a major blow against the government’s attempts to abolish the referendum.

To circumvent a possible referendum on the repeal law, the government is using legal tricks. Article V of the repeal law states that the referendum law is not applicable to the repeal act and Article VI determines that the repeal law goes into effect retroactively, which would make it impossible to trigger a referendum. This is a dubious construction which has been criticized by many legal experts. During a hearing of the lower house, professor of state law Wim Voermans even called this procedure illegal.

It was not the first that such attempt was made. In 2002 the first Balkenende cabinet also had made such moves when it sought to abolish the temporary referendum law (active

in 2001-2005). The Council of State, the main advisory body of the government that is obliged to advise on all law proposals before they are sent to parliament, concluded that it was impossible: repeal laws were not amongst the excluded subject of the temporary referendum law, nor of the current referendum law. Indeed, in 2017 a spokesperson of the Council of State declared to the Volkskrant newspaper that it was unlikely that it would come to a different conclusion.

The Council of State normally takes several months to formulate its advice, but on behest of the government, they did so this time in several days. On December 20, it concluded that the repeal law was “legally effective”. The advice did not explain why the Council came to a different conclusion.

### **Council of State's controversial role**

Some have suggested that the appointed-for-life chief of the Council of State, former CDA politician and Professor of State Law Piet Hein Donner – known as the “viceroy of the Netherlands” as the formal chairman of the Council of State is the Dutch king Willem-Alexander – was probably happy to cooperate. Donner is known as a longtime and fierce opponent of direct democracy. During the presentation in April 2017 of the Council of State's Annual Report over 2016, Donner made media headlines with a frontal attack on referendums. The Annual Report itself stated (p. 21): *“The confusion between representative democracy and a ‘people’s democracy’ is also recognizable in the Netherlands. The first example that jumps in the eye, is the first successful attempt of the Law on Plebiscites [sic]. (...) Worries about the functioning of representative democracy are understandable. However, they can and should not lead to representative bodies giving the decision making over laws and regulations to other bodies or to the outcome of popular consultations. (...) A plebiscite [sic] transfers the responsibility to a body which is unauthorized: the voters who take part. That is even more the case when the people’s representatives declare beforehand that that they are bound by the outcome thereof. It is understandable that there are fears about damage to the level of trust in democracy when politicians hold a referendum but do not follow the valid outcome, but that only proves that this instrument does not fit well in our legal system. The Constitution explicitly gives the responsibility to law making bodies. This means that either the Constitution or the Law on Plebiscites [sic] should be changed.”*

This statement in the official Annual Report is remarkable for several reasons. The Council of State is not only supposed to be a politically neutral legal advisor to the government, but is also the highest administrative court in the Netherlands. It is considered inappropriate and unusual for the Council of State to make such controversial, politically loaded statements. It's no wonder Donner received sharp criticisms about his remarks. Patrick van Schie, the director of the scientific bureau of the VVD party who, contrary to the official party line, is a supporter of referendums, wrote for example the following in an opinion article in newspaper Trouw: *“Exactly because Donner is no fool, he can be blamed for knocking off the referendum as a form of ‘people’s democracy’. He uses this expression four times, so it’s no slip of the tongue. Without doubts, he knows that ‘people’s democracy’ is not a description of a democracy with as much influence of the citizens themselves. This phrase was used by communist regimes who wanted to give a*

*semblance of democracy to their repressive dictatorships. The fact that Donner uses this phrase against the instrument of the referendum does not testify to statesmanship, but to vulgar demagoguery. In doing so, he drags himself and his institution through the mud."*

### **The entire opposition opposed the repeal law**

The lower house debated and voted on repealing the referendum in mid-February. The entire opposition united to oppose the government's attempts to circumvent a referendum. This even included the SGP – a small orthodox-protestant party that favors theocracy over popular sovereignty –, but none of the D66 MPs. Amendments were put forward to remove the legal tricks from the repeal law and, thus, make it explicitly possible to request a referendum. The coalition parties maintained their iron party discipline and therefore were able to reject the amendments and pass the repeal act unchanged, though with only the smallest majority possible.

At the time of the vote, the Ukraine referendum had been the only experience with the non-binding citizen-initiated referendum. It totally shaped the debate on referendums. It would not remain so.

During the government formation a motley coalition of activists from various political backgrounds triggered a referendum on the new Intelligence and Security Law. Although everyone agreed that the old law (made in the 1990s) had to be updated, the law contained some controversial parts

The referendum took place on March 21, only a month after the lower house approved the repeal law. The referendum campaign was concurrent with the government's attempts to abolish the referendum. A tiny majority of Dutch citizens rejected the law. This was unexpected as the polls had consistently been predicting a "yes".

The referendum was widely seen as a success. Both supporters and opponents of direct democracy praised the nuanced and well-informed public debate and almost all newspaper editorials wrote that this popular vote had proved beyond doubt the value of the referendum for Dutch democracy. The law was modified and even Kajsa Ollongren, minister responsible for both the intelligence and security services and repealing the referendum, declared that the referendum outcome had resulted in an improvement of the law, though the cabinet quickly noted that it would not reconsider its' view on the referendum.

The success of this last referendum is a big problem for the Dutch government, as it has accentuated the benefits of the referendum. In press conferences and interviews in the aftermath of the referendum, Ollongren faced very difficult questions. She was hardly able to explain why the government would not reconsider its' position. She could only stammer that the problem of the Dutch referendum was in the word "consultative": the referendum was only an advice and Dutch voters would not understand if the government did not always comply with it.

### **The Government faces new challenges**

It was already clear for a longer time that the government had underestimated the level of resistance in Dutch society against abolishing the national referendum. But since last referendum the cabinet faces an even more difficult job in abolishing the referendum. Support for the referendum has grown, whilst its' own popularity is decreasing.

On February 17, nineteen prominent professors and assistant professors of political science and public administration published an op-ed in NRC in which they refuted most of the government's arguments: "[The government's] arguments are circular, one-sided or out of place." They concluded that: *"Blocking the possibility for a referendum on the repeal act would reveal a double gap between lawmakers and their voters. Not only a gap on concrete issues (support for referendums), but also on procedures (support for a referendum on referendums). The referendum is the method par excellence to bridge such gap."*

At the same time several newspapers spoke out against repealing the referendum in editorials and D66 now also faces opposition within its own ranks. Former D66 leader Jan Terlouw and former MP Boris van der Ham – one of three MPs that introduced the consultative referendum law – have called for a referendum on repealing the referendum. Van der Ham and critical D66 members have formed a new group "Opfrissing" (literally: "refreshment") that seeks to regenerate D66's agenda on democratic reforms.

### **A final decision this summer?**

Meer Democratie, a small NGO that campaigns for binding referendums and democratic reform, is trying to save the referendum by various means. One of which is through crowdfunded lawsuits against the government. After losing a first court case before the Administrative Court at the Council of State, the organization started a second court case before the Civil Court of The Hague. The court hearing will take place on June 20 at the Civil Court of The Hague and the verdict will probably be published several weeks after that. Meer Democratie's main demand is that the government respects the procedures that are established in the referendum law, and allows a referendum on the repeal act. The government also still has to gain approval from the Senate to repeal the referendum. The official role of the Senate – guarding the purity of state law and the quality of legislation – should make it more critical of the repeal law than the Second Chamber. On the other hand, there is tremendous pressure on the Senate members of the coalition parties to vote according to the party line. During an expert meeting in the Senate, all seven invited experts were unanimously critical of the governments' methods. The coalition has only a majority of a single seat. If only one senator is join in the opposition's calls against the government's legal tricks, they could force the minister to make changes that would make it possible to trigger a referendum on the repeal act. The fate of the Dutch referendum will probably be determined in the coming weeks. The government wants to get a vote in the Senate before the Summer break which starts on Wednesday, July 11th. This is strictly speaking possible, but then the government is counting on nothing going wrong and no more delays. Meer Democratie is calling on the Senate to postpone the vote until after the Court's final verdict, which will be published on August 1.

### **About the authors**

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