

Lessons from the Past: Party Regulation in the Netherlands

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Introduction

Dutch professor on Constitutional Law and former Judge of the Court of Justice of the European Union, A.M. Donner, suggested in a contribution to the annual Dutch constitutional conference in 1982: *'Let us postpone as long as possible the official recognition of the party system (in the Netherlands), because in its nature Law just brings regulation, and he who regulates, restricts.'* The Dutch legislator has taken this statement into account, because hitherto the legislation on Dutch political parties has been very limited. Now and then the question arises whether it is desirable to embed the special constitutional position of these organizations in the Dutch Constitution, but these attempts have also been unsuccessful. Although Dutch public law does not pay much attention to political parties, they are very important in daily political practice in the Netherlands.

The aim of this paper is to give an overview of the different discussions in the past on regulating Dutch political parties. Furthermore the aim of this contribution is to see if lessons can be drawn from the past discussions on regulating political parties. First of all I will give an overview of the development of Dutch political parties. Special attention will be paid to the question how legal doctrine criticized these developments. Secondly an outline of the legal discussion is given. In this section one will notice that occasionally the question arises whether political parties need to have a provision in the Dutch Constitution. Thirdly an inventory is made of the current legal provisions concerning Dutch political parties. Although these legal provisions in Dutch public law are few and far between, there are provisions which are important if one wants to participate in Dutch politics. At the end of this contribution some final remarks and suggestions will be made.

The development of political parties in the Netherlands

The amendment of the Dutch Constitution of 1848 can be seen as one of the most important constitutional reforms in the Netherlands; most of these amendments still apply. One of the most important was probably the introduction of political ministerial responsibility.² Before 1848 it was the King who was fully in charge and could not be held responsible in parliament for his actions. After 1848 *'the King could [no longer] do no wrong'*, but ministers were held responsible for the actions of the King as well as for their own actions. The power of the Dutch parliament was born. Furthermore in 1866-1868 an important unwritten rule was vested in Dutch constitutional law. When a minister or the Cabinet loses the confidence of Parliament (especially of the Dutch Lower House (Second Chamber), the minister or Cabinet has to resign. Due to these developments the Netherlands became a parliamentary system.

Early steps towards party formation: the new 1848 electoral system

Although both rules (ministerial responsibility and the rule of confidence) can be seen as the most important constitutional rules which developed in the nineteenth century, in the constitutional amendment of 1848 two other changes were introduced into the Constitution which led to the early development of Dutch political parties. In the first place the fundamental right of freedom of association and assembly was guaranteed. This provision was further developed in 1855 in an Act on freedom of association and assembly. In the second place a modification of the Electoral system was achieved. Before 1848 (1815-1848) the 100 members of the Second Chamber of the Dutch States-General were elected by the representatives of the Dutch Provinces. In this period the King appointed the members of the First Chamber. After 1848 the system fundamentally changed. The members of the First Chamber were elected by the representatives of the Dutch Provinces. For the members of the Second Chamber general elections were introduced. Although this sounds very progressive, the right to vote for the members of the Dutch Lower House was granted to only certain groups of male taxpayers. Nevertheless, for the first time in the Kingdom of the Netherlands (since 1814) citizens were allowed to choose their representatives directly. These elections were organized on a majority system. The country was divided into 100 districts. The candidate who had the absolute majority was elected to the Second Chamber. This system of 'general' elections also led to the early development of political parties in the Netherlands. In the first few years after 1848 this development was

limited. The reasons for this can be found in the first place in the fact that the focus of (taxpaying) voters was limited to representatives of their own district (Elzinga 1982, P. 27). Furthermore certain provisions of the Penal Code still applied in the Netherlands, which, for instance, meant that political meetings could be forbidden by the Dutch government. This led in the period prior to 1848 to secret political meetings. The provisions of the Penal Code were no longer fully observed. Besides in 1848 the fundamental right of freedom of association was also introduced in the Netherlands. In the early period after 1848 one can see that certain so-called voting associations came to promote their candidates in the different voting districts. Moreover it was the liberals who bravely decided in 1846 to gather together in the '*Amstelsociëteit*' (Elzinga 1982, p. 24). After the constitutional amendment of 1848 other political movements followed.

Legal constitutional scholars in those days were very critical of these developments. J. de Bosch Kemper (1865, p. 177), a very well-known constitutional scholar, stated in his book '*Handleiding tot de kennis van het Nederlandse Staatsregt en Staatsbestuur*' that the voting associations were in his opinion oligarchies. Only a very few members attended the meetings of these associations, although important decisions, such as who would stand as candidate, were being made during those meetings. Furthermore he stated that the members of the boards of the different voting associations had too much influence on the members of parliament. In his opinion this influence was contrary to the fundamental parliamentary rule that members of parliament should not be bound by a mandate or instructions when voting.³ These critical views on these voting associations were very widespread (see e.g. Vissering 1864, p. 260; Olivier 1876, p. 45). Despite the critics the voting associations transformed themselves into more solid party organizations. This resulted in the development of the first political party in 1879, the Anti-Revolutionary Party founded by Abraham Kuyper, a member of the Second Chamber and prime minister (1901-1905). In the following years other political movements (socialists, liberals) followed. The critical view of these political organizations decreased a little. Some scholars stated that the rule that members of parliament should not be bound by a mandate or instructions when voting did not conflict with the existence of political parties. J.T. Buys (1883, p. 454), a well-known constitutional scholar and professor (Amsterdam and Leiden), at the end of the nineteenth century stated that voters were seeking sympathizers and therefore political parties fulfilled a valuable role in society. Another famous scholar and professor

of Constitutional Law (Vrije Universiteit, Amsterdam) at that time, A.F. de Savornin Lohman (1907, p. 397), demanded that there be a moral bond between voter(s) and representative(s). Nevertheless legal scholars were still suspicious of the new political organizations. Academic communis opinio was that these political organizations should not have too much influence in the relationship between the electorate and its representatives (De Beaufort 1904, p. 184).

The consolidation of Dutch political parties

In 1887 the Dutch Constitution was reformed again, which led to an even more consolidated organization of political parties. More citizens (men) were granted the right to vote. Beside taxpayers, other people who had certain signs of capability and prosperity (for instance PhDs) were also able to vote.⁴ The enlargement of the electorate was an important incentive for the formation of political parties.

In 1917 a major constitutional event led to the firm consolidation of political parties. Besides the recognition of the general right to vote for all men and women, a new electoral system was introduced in the Netherlands. The absolute majority (district) system for elections to the Second Chamber was abandoned and exchanged for a system of proportional representation. This system still exists to this day. The system of proportional representation creates a direct relationship between the number of votes cast and the number of seats allocated to the parties in parliament. Under this system of proportional representation groups of voters (political parties) present lists of candidates; these lists are linked to a nationwide list because the total number of votes obtained in the country is of crucial importance and decisive as regards the number of seats in parliament obtained. The country of the Netherlands has therefore since 1917 no longer been divided into electoral districts. The country as a whole can be seen as one district with nationwide electoral lists of candidates and leaders. The system of proportional representation de facto entailed the recognition of political parties in the Netherlands (Elzinga 1982, p. 31). Parties transformed themselves into real oligarchies with centralized organizations. The introduction of proportional representation resulted in the reinforcement and firm consolidation of political parties.

This consolidation also resulted in a new era of criticism from constitutional scholars of the functioning of political parties. In the interbellum period it was mainly A.A.H. Struycken and R. Kranenburg, both professors of Constitutional and Administrative Law in Amsterdam,

who dominated this debate. Although both stated that political parties could be seen as a precondition for a parliamentary democracy, both scholars also had strong criticisms of those organizations in the new electoral system. A.A.H. Struycken (1925, p. 21) criticized the emergence of centralization of political parties due to the new electoral system. Party leaders became too dominant in his opinion. R. Kranenburg (1928, p. 115) also feared that strong political parties would harm the common interest, which in his opinion should be dominant in a democracy. Despite this criticism, general opinion of political parties was positive in the period between 1917 and 1928. This changed however in the years to come. During 1928-1945 public opinion of the multi-party system changed in the Netherlands (Elzinga 1982, p.33-38). In this period confidence in democratic organizations, including political parties, decreased due to the economic crises and the emergence of national socialism. The Dutch cultural historian, J. Huizinga (1946, p. 42), expressed severe criticism of political parties, as is illustrated by his observation that “the party system shows daily that it is superfluous and inefficient.”

This criticism of the functioning of political parties found broad resonance. Even the prime minister in the 1930s, H. Colijn (1940, p.48) (Anti-Revolutionary Party), was not in favour of the increasing influence of political groups. Others were even more sceptical. They had especially strong feelings against anti-democratic political movements such as the Dutch National Socialistic Movement (*Nationaal Socialistische Beweging*, (NSB)). This Dutch fascist political party was very hostile to other political movements. In its opinion, political parties crippled strong leadership. The NSB never gained much influence in Dutch politics before World War II. After 1936 existing and new political movements challenged the National Socialistic Movement. A famous constitutional scholar in those days, C.W. van der Pot (professor of Constitutional Law, Groningen) (1940, p.205), wrote in the first edition of his leading handbook on Dutch constitutional law that one should not be too critical of the electoral system on proportional representation as introduced in 1917. In his opinion the objections to the functioning of political parties were grossly exaggerated. In particular, the constitutional provision which guarantees that a member of parliament cannot be bound by a mandate or instructions when casting his vote⁵ was, in C.W. van der Pot's opinion, very important to protect a Member of Parliament. Although political parties can be very influential in Dutch politics, in the end it is (the conscience of) a Member of Parliament who is decisive in a parliamentary vote.

During the war period (1940-1945) criticisms were made of the system of political parties. After the war a new national unity was to be brought about, without a diverse landscape of political parties. Despite the criticism of the party system, very quickly after the War the old political parties were re-established. This was proven by the fact that the main political movements were still present in Dutch society. Due to the fact that in the first period after 1945 the governments were very stable, political parties were accepted by Dutch society. Although they were accepted, they ought not to be given too many privileges in the opinion of constitutional scholars. A bottom-up approach was therefore much appreciated for those organizations. Political parties should evolve from the population itself. Political parties were seen as the hinge between the electorate and the representatives (Van Raalte 1958, p.5-9). This bottom-up approach in which political parties were seen as civil organizations became the dominant doctrine after 1945. The state should not have too much influence on political parties, let alone regulate those organizations.

Proposals for the regulation of political parties

Since 1848 many attempts have been made to regulate political parties in one way or the other. These attempts can be divided into four questions: first, whether a special provision for political parties in the Dutch constitution is desirable or not; second, whether the organization of political parties should be regulated; third, whether there should be a legal provision to ban political parties; and, finally, whether there should be a law which regulated the finances of political parties. Due to the fact that political parties were for long very controversial, all proposals were of a defensive or even repressive nature. The influence of political parties in public decision-making should be restricted. In this section we will discuss the proposals that have been made to regulate certain topics concerning Dutch political parties such as (1) limiting the influence of political parties in nominating candidates; (2) a legal provision on the banning of certain political parties; (3) a provision for political parties in the Dutch Constitution; and finally (4) a (special) Act for political parties.

Early proposals: the nomination of candidates

It was J. de Bosch Kemper (1865, p.178) (Member of the Second Chamber (Liberal) and social scientist) who in 1865 formulated probably the first proposal for a legal provision to restrict the influence of political parties

on the nomination of political candidates. In his opinion political parties had too much influence in putting their favourites on the nomination list; he proposed legally to guarantee every voter the right to nominate his own (political) candidate. In 1918 A.A.H. Struycken (1917-1918, p. 401-404) strongly recommended introducing a certain provision in the Electoral Act on political parties concerning their role with regard to the nomination of candidates. In contrast to De Bosch Kemper, in Struycken's opinion this competence of political parties should be legally formulated in the Electoral Act. Others dramatically went even further; he proposed abolishing all general elections (Harthoorn 1929, p. 150). Instead of those elections, each citizen should join (obligatorily) a political party. The general board of the political party should provide for parliamentary candidates who were elected by the members of the political party itself.

In 1926 and 1931 both N.J.C.M. Kappeyne van de Copello (lawyer and public prosecutor Amsterdam) (1926) and N. Kolff (constitutional lawyer) (1931) agreed with A.A.H. Struycken (professor of Constitutional Law Amsterdam) that political parties had too much influence on the nomination of candidates for parliament. From their point of view this influence of political parties was contradictory to the equal right of each Dutch citizen to elect the members of the general representative bodies. Only a small minority of the electorate were members of a political party. Why should only they decide who would be nominated as candidates for a representative body, especially both Chambers of the States-General. To restrict the influence of political parties on the nomination of candidates, Kappeyne van de Copello proposed a system in which each member of a political party could nominate himself; during a general election voters could state their preference by voting for these candidates, which would be presented on an alphabetical list of candidates rather than by party. Kolff was not in favour of the system proposed by Kappeyne van de Copello. He was not convinced that the influence of political parties on this issue would diminish. He promoted a system in which some form of regulation concerning the democratic structure of a political party was introduced. In his opinion it was allowable for the state to intervene if a political party misused the freedom of the organization of political parties due to the fact that these organizations were of public interest. Furthermore Kolff (1931, p. 165-168) was in favour of introducing some form of deposit if a party wanted to participate in general elections. The reason behind this measure was to prevent a fragmented landscape of political parties.

In the 1930s the emphasis of the debate on regulating political parties shifted towards the question how anti-democratic political parties should

be prevented from rising or banned from the political process. In his inaugural speech in 1936, Professor Van den Bergh (1936, p. 1-22), professor of Constitutional Law (Amsterdam), paid special attention on this issue. Van den Bergh recognized that a liberal democracy in principle should not impose restrictions on the freedom of political association. Nevertheless he considered the banning of an anti-democratic political party to be justified if such party violated the principles of spiritual freedom and equality in law. In his opinion the High Court in the Netherlands (*Hoge Raad*) should answer the question whether or not a ban on a political party is justified. Furthermore another related question came up in this period; is it possible to end the membership of parliament of a politician who has strong revolutionary opinions? Although in 1934 a special (independent) Commission of the government (State Commission) concluded that such a provision in the Dutch constitution would be desirable, the amendment of Constitution never took place due to the fact that a two-thirds majority was lacking in the Second Chamber (Elzinga 1982, p. 42).

A provision for political parties in the Dutch Constitution?

After World War II the question arose whether a special provision in the Dutch Constitution or a special Act of Parliament should be made in which political parties were regulated. Shortly after 1945, a multitude of questions was raised concerning the need to change the constitutional system. The ideas of Kappeynne van de Copello and Kolff, which have already been discussed, were further elaborated in a report of a Commission on the 'League of the Constitutional State' (*Genootschap van den Rechtsstaat*) (Kappeynne van de Copello 1946). The constitutional problems in the Netherlands in the interbellum period were, in the Commission's opinion, caused by too great a diversity of political parties which were an obstacle to the efficient formation of a government. Furthermore these political parties, in the Commission's view, had too much influence and power in politics as well as in society as a whole. According to the Commission strong political leadership was lacking in the 1918-1940 period. At the end of its report the Commission suggested new radical ideas concerning the regulation of political parties. The Act on associations and assemblies (of 1855) should be amended in such a way that political parties were recognized by law as organizations. Furthermore one-issue parties should be banned, according to the Commission. Also, the statutes and practice of political parties should be periodically reviewed. What should be reviewed in particular was the question whether political parties complied with the Constitution and other Acts of Parliament. If not, a political party

could lose its seats in parliament. Besides political parties which had fewer than 50,000 members should not have the right to participate in general elections. Finally a provision was proposed legally to end the situation in which a representative could be held accountable for his (parliamentary) actions towards the political party he belonged to.

Not only were legal scholars engaged in questions concerning the regulation of political parties. Political parties themselves were also participating in this discussion. Anti-revolutionary and Christian-Historical political movements were basically against any form of regulation concerning political organizations. The former Dutch Catholic Party (Katholieke Volkspartij (KVP)) however was convinced about regulating the banning of certain anti-democratic political parties. It also proposed a legal provision guaranteeing the transparency of the proceedings of political parties (J.J. de Jong 1957, p. 40). In 1950 C.H. Rutten (1950, p. 17-25) summarized the ideas of the Dutch Catholics as follows:

'Given the very specific and partly public character of political parties and the fact that they can employ constructive as well as destructive activities in terms of our Constitution, legislation on political parties must be considered necessary.'

The Social Democrats had a different approach towards the discussion on political parties. In their opinion it was not the increasing political influence of political parties that was a reason to regulate those organizations, but the fundamental function of the party system should be the motivation to do so (Van der Goes 1945, p. 62-65). M. Van der Goes Naters, a leading party member of the Dutch Social Democrats, felt that a strong party system was essential for a 'healthy' structure of the State'. In his opinion the disadvantageous side of the functioning of political parties was not a reason to eliminate the party system as a whole. His answer was to give political parties public status in an Act on political parties, in which transparency and supervision would be included. In this Act all kind of provisions would be regulated; supervision by the Civil courts would be noteworthy and for disciplinary measures concerning conflicts with Members of Parliament a special Honorary Court should be established. In 1950 a special Commission of the Scientific Bureau of the Social Democrats (*Wiarda Beckmannstichting*) (1950, p. 674-700) came to the same conclusions, although that Commission above all emphasized that a political party should be obliged to have an internal democratic structure. In the Commission's opinion such an obligation would be the

best provision for discouraging political parties with anti-democratic purposes.

These different ideas on the regulation of political parties from legal scholars as well as from political parties themselves led to special attention being given to this topic in the different State Commissions which were constituted in the 1950s. Firstly the State Commission on Constitutional reform (1950 p. 55), so named by its Chairman Van Schaik,⁶ proposed in its final report in 1950 to include a special provision on political parties in the Dutch Constitution. More specific this provision was to read that *'In the interest of a pure political will shaping, regulations can be made on political parties in an Act of Parliament.'*

The Commission explained its proposal as follows: Given the very important position which political parties in the Dutch constitutional state have, the Commission saw it as an anomaly that the Constitution took no notice of their existence. The Commission wanted to fill this gap by amending the Constitution in such a way that a new provision was added, in which is stipulated that in a Act of Parliament regulations could be made in the interests of *pure political will shaping*. Furthermore the parliamentary debate on such a provision should lead to formal consideration by the legislator of this issue.

In 1958 however another State Commission on the subject of the Electoral system and the regulation of political parties (1958, p. 21-29) came to a negative conclusion on the question whether special legal provisions on political parties were necessary. A legal provision on banning political parties was considered inappropriate. Furthermore regulations on the transparency of party funding (subsidy) were also not necessary because the Commission had not noticed any form of abuse on this issue. Besides the Commission also did not want to take any legal measures concerning the internal organization structure of political parties. The nomination of candidates for Parliament should not be regulated because political parties, in the eyes of the Commission, did not have a monopoly on nominating candidates. The Commission (State Commission on the subject of the Electoral system and the regulation of political parties 1958, p. 21-29) concluded therefore that introducing legislation relating to political parties was altogether not sufficiently justified.

In 1966 a draft proposal on a new Dutch Constitution was made by several leading constitutional scholars (Ministerie van Binnenlands Zaken 1966). They came to the same conclusion as the State Commission on the Electoral system and the regulation of political parties of 1958. A minority of another State Commission on the (Dutch) Constitution and

the Electoral Law (1971) proposed a Constitutional provision on political parties. However the majority of this Commission concluded that such a provision would not be of much help because it could not be achieved and furthermore was not desirable. The (majority of the) Commission had serious objections to a general Act concerning political parties because such an Act could lead to a limitation on the freedom of political association and the risk that the rights of political minorities would not be sufficiently guaranteed (Van den Brink 1959 and Boukema 1968).

During the Parliamentary debate on the Constitutional reform of the Dutch Constitution of 1983, Members of the Social Democrat group (Partij van de Arbeid, the Dutch Labour Party) in particular insisted on guaranteeing the functioning of political parties in the Constitution with the aim of securing free political will (Dutch Parliamentary Documents, *Handelingen der Tweede Kamer*, 1979-1980, *Kamerstukken*, nr. 14 222, nr. 11, p. 4.). The Minister of Internal relations refused to do so. In his opinion the special nature of public interference with political parties was already sufficiently insured by the adoption of the fundamental right of association and assembly in the (new) Constitution. Therefore a specific Constitutional guarantee for political parties was not necessary, according to the minister (Dutch Parliamentary Documents, *Handelingen der Tweede Kamer*, 1979-1980, *Kamerstukken*, nr. 14 222, nr. 11, p. 5).

Although since 1983 several important (State) Commissions have written reports on constitutional reform in the Netherlands, no fundamental amendments have been proposed to the regulation on political parties.⁷ An exception is the subject of the funding of political parties. Since 1999 a special Act on State funding of political parties has been passed (see below). In 2009 a new State Commission on the Dutch Constitution was set up. Although the former government initially gave the Commission the task of also examining whether a special constitutional provision on political parties is or is not necessary, in the final instructions this question was deleted.

Recently new political parties have arisen in the Netherlands and have won seats in the Second Chamber. After the *Lijst Pim Fortuyn* (LPF), which in the general elections of 2002 won 26 seats in the Second Chamber, in 2010 the *Partij van de Vrijheid* (Party for Freedom - PVV) was the winner during the June elections. The PVV, with Geert Wilders as its leader, in the 2010 elections won 24 seats and in the last elections (2012) 15 seats in the Lower House for the Second Chamber. The structure of this political party can be characterized as non-democratic. The party has only two members; namely Geert Wilders himself and the Foundation

Friends of Geert Wilders. It is not possible to become a member of the PVV. A supporter can only make a donation to it. Although Wilders does not do anything illegal, in the recent discussion one may note criticism of this clever use of a loophole in current Dutch legislation.⁸ In my opinion it might be considered to modify the Dutch Civil Code or the Electoral Act such that a political party must allow supporters of the party to become members. While such an amendment infringes the right of freedom of association of the party itself, it would at the same time guarantee individuals the right to become a member of the political party they support. Furthermore a membership organization would enable the creation of an internal system of checks and balances, by which members of the general assembly of the party can hold the leadership accountable.

In conclusion, since 1848 several attempts have been made to regulate political parties in the Netherlands. In the period after World War II the discussion focussed on the question whether these organizations should be regulated in the Dutch Constitution or in a special Act on political parties. None of these attempts have resulted in legislation. Dutch political parties are mainly dominated by civil law and their own statutes.

Existing regulations on political parties

It thus may seem that few, if any, legal provisions for parties exists in the Netherlands. This proposition does however not reflect reality. Although Dutch regulation on political parties may seem scarce, there are Acts of Parliament which impose certain rules and privileges on political parties (Drexhage & Nehmelman 2010). In a (negative) sense article 67, par. 3 of the Dutch Constitution can be seen as an important rule for political parties not to intervene in the mandate of individual members of parliament. This article reads that “*The members shall not be bound by a mandate or instructions when casting their votes.*”

This constitutional provision is indeed very important in constitutional theory; in Dutch political practice one often sees that political parties are still very dominant over individual Members of Parliament (MP). Nevertheless in the end it is the free conscience as guaranteed in art. 67, par 3 Dutch Constitution that will ‘protect’ the MP.

Besides this Constitutional provision the Dutch Electoral Law also contains certain important provisions in which the term “political groups” is used. If a political party wants to put forward certain candidates for a general election under a certain party name on the electoral list, the Dutch

Electoral Law requires (Article G1 (Dutch) Electoral Act). The party to have organized itself as a full legal association as mentioned in the Civil Code (Article 27, Book 2 Civil Code). All Dutch political parties can be characterized as such. This means that a political party is also bound by a considerable number of legal provisions regarding (fully legal civil) associations. Although a political association can also itself define many rules in party statutes, certain rules in the Civil Code are obligatory. These rules are, for instance, to have an executive board, a general assembly, to set out explicitly the purpose of the association in the statutes etcetera (Article 27, Book 2, Civil Code).

It is important to stress the general provision mentioned in article 20, Book 2, Dutch Civil Code. This article enacts a general provision dissolving and banning a legal entity, including a political association, if its activities conflict with *public order*. By court ruling a political association can be dissolved and be proscribed if it undertakes activities which are contrary to public order. The legislator has left much room for interpretation of the concept of *public order* to the judiciary. So far only one political party has been dissolved and proscribed; in 1997 the Dutch High Court proscribed the *CentrumPartij*'86 (CP'86), an extreme nationalistic political party (Hoge Raad 30 September 1997, *Ars Aequi* 1998, p. 113-119, annotated by Y. Buruma).⁹

Besides the general legal provisions in the Dutch Civil Code, a small number of public provisions have also been made. Firstly the abovementioned Electoral Law has certain articles which especially concern political parties¹⁰ A political party can, as mentioned above, put forward candidates for general elections if the party has organized itself as a full legal association as mentioned in the Civil Code. If a political party does so, other provisions of the Electoral Law become applicable. For instance the Electoral Commission can deny political parties to use certain names or acronyms on their candidate lists. Moreover, it is not necessary to participate in the general elections as a political party; a natural person can do so as well, although this never happens. If one wants to stand for election to the Second Chamber, one has to pay a deposit of € 11,250.00. This amount will be paid back if one obtains 75 per cent of the electoral threshold (usually around 45,000 votes) (Article H12 Electoral Act).

On 1 May 2013 a new Act of Parliament concerning the way political parties are financed came into force (Act on Financing of Political Parties) (Dutch Parliamentary Documents, *Kamerstukken II*, 2010-2011, 32 752, *Stb.* 2013, 93. See also Koole in this volume). Dutch political parties have received substantial amounts of subsidy from the Dutch government since

1999, which was regulated in the Act on Subsidising Political Parties. This Act on state funding for political parties provides rules for the funding only of parties which have seats in parliament. The funds are earmarked to be used for certain aims such as scientific research, organizing a youth section of the political party etcetera. Only article 18 of this old Act is stipulated that amounts of € 4537,80 given to a political party from a legal person had to be made publically transparent, but no sanction was provided in the Act. The new Act of Parliament (2013) not only regulates the public subsidies political parties may receive, but also includes stronger provisions and sanctions concerning the transparency of party funding. It stipulates, for example, that certain amounts of private money (above € 4,500) must be made transparent to the public. This new Act was passed after the international organization Groups of States against Corruption (GRECO) of the Council of Europe strongly recommended the passing of new legislation on this topic.

Finally the Dutch Media Act has certain clauses guaranteeing the (free) use of public broadcasting. Political parties are given a certain public broadcasting time to promote their political statements (Greco, Third Evaluation Round, Interim Compliance Report on the Netherlands “Transparency of Party Funding” 2013).

Increasing influence of the ECtHR and the Dutch judiciary

Although the Dutch legislator has always been very careful not to intervene severely in the organization of the structure of political parties, in the last decade the increasing influence of the judiciary in questions concerning political parties has been noticeable. Not only has the Dutch judiciary been confronted with difficult questions on the freedom of political association, but the European Court on Human Rights (ECtHR) has also lately increasingly been involved in difficult cases on political freedom as guaranteed in article 11 of the European Convention on Human Rights.¹¹ It is obvious that the judiciary will become involved in questions concerning political parties if the legislator only regulates certain basic provisions, with vague terms such as *public order*, concerning such organizations. The legislator leaves it to the judges to fill in these vague terms. Nevertheless one has to consider that judicial interpretation can have far-reaching consequences. In the end the judiciary is asked to give an opinion on the concept of democracy. Courts have to formulate their vision of democracy. Is this concept only a formal one in which the

will of the majority is decisive and every citizen must have the right to gain political power? In this concept pluralism is of great value. On the other hand a Court may choose a more substantive definition of democracy. Not only is the rule of the majority and the freedom to gain political power then decisive, but other elements of the Constitutional state, for instance equality, are important as well.

Case Law: Refah Partisi and SGP

Two recent cases; one from the ECtHR and one from the High Court of the Netherlands, are illustrative of the increasing influence of the (inter)national judiciary. One of the most important ECtHR cases on this issue is the *Refah Partisi* (Welfare party) case in which the Court had to decide whether article 11 ECHR had been violated by the Turkish State (*Refah Partisi (The Welfare party) a.o. v. Turkey*, ECtHR, Case No. 41344/98 (Grand Chamber)).¹² The Supreme Court of Turkey had banned the Welfare Party for violating the principle of secularism in the Turkish Constitution. Although the popularity of the Welfare Party was considerable, the ban was upheld by the European Court.

The Dutch judiciary has recently also been confronted with a difficult case concerning the limiting of the political freedom of a political party. It all started in a civil case in which a few Dutch 'pro women' NGOs (*Clara Wichmann a.o.*) requested – in the interests of all Dutch women – that the (State of the) Netherlands take action against the SGP, a small fundamentalist theocratic political party, with two seats in the Second Chamber (Oomen, Guijt & Ploeg 2010). The SGP did not grant passive voting rights to women. Therefore women could not be candidates for the SGP. However the Netherlands was a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 7 of which guaranteed amongst others that *States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies and ... (c) to participate in non-governmental organizations and associations concerned with the public and political life of the country*. After several lower court decisions the SGP lodged an administrative appeal against the withholding of the state subsidy to the Dutch Council of State, which ruled in favour of the political party. In weighing the fundamental rights at stake, the administrative court argued that the right to political participation is of more value in this situation than the violation of the principle of non-

discrimination against women. In the same month however the Appeal Division of the Civil Court in The Hague ruled that the Dutch State should take measures against the SGP to end the discrimination. The Court stated that the right to equality had been violated in its essence. The High Court of the Netherlands (*Hoge Raad*) followed this conclusion. It stated that the Dutch State should take effective measures to ensure that the SGP would grant passive voting rights to women as guaranteed in article 4 of the Dutch Constitution. The High Court stated that these measures should infringe as little as possible the fundamental political rights of the SGP (Ten Napel 2011). On 10 July 2012 the European Court of Human Rights (ECHR) declared the complaint of the Dutch political party *Staatkundig Gereformeerde Partij* against the Netherlands inadmissible (SGP v. the Netherlands, Application, ECtHR 10 July 2012, no. 58369/10). The Court held that it had to refrain from stating any view as to what, if anything, the respondent Government should do to put a stop to the present situation. It indicated that it could not dictate action in a decision on admissibility; it was, in any case, an issue well outside the scope of the present application. The Court concluded that the application was manifestly ill-founded and had to be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. For these reasons, the Court unanimously declared the SGP's application inadmissible (Van den Brink & Hans-Martien ten Napel 2013).

An old idea as guarantee for political parties

The *Refah Partisi* case and the SGP case have been criticized by many (legal) scholars Ten Napel & Karim Theissen 2009, p. 363-392; Hoge Raad 2010, p. 492-504). Both cases illustrate that in recent years the judiciary has been filling out the concept of democracy in such a way that political parties have to accept that the free shaping of the political will also has its limitations, such as the principle of non-discrimination or the Turkish principle of secularism. Reviewing these cases makes one ask whether the time has come to include a specific Constitutional provision to guarantee the free shaping of the political will of political parties. Such a reform of the Constitution was, as we have seen, proposed as early as in 1950 by the Dutch State Commission Van Schaik. This Constitutional provision would provide for a special guarantee for political parties besides the already existing right to freedom of association. The advantage would be that the State (legislator, administration and judiciary) would have to be even more careful to restrict political parties than it already is. If the State (for instance the judiciary) wants to infringe the free shaping of

the political will, it has to make it explicit why in a certain case such an infringement is necessary.

Conclusion

In this contribution I have tried to give a short overview of the past discussions concerning the evolution and regulation of political parties in the Netherlands. As of 2011 legislation on Dutch political parties is (still) very scarce. Scholars as well as politicians have been very cautious about regulating these organizations. Also most State Commissions concluded not to opt for a special provision for political parties in the Dutch Constitution or in a separate Act of Parliament. An exception was State Commissioner Van Schaik who in his final report in 1950 proposed to introduce a special clause in the Constitution in which *the free shaping of the political will* was secured. However the discussion after 1950 on regulating political parties was dominated by the statement as summarized in 1983 by A.M. Donner.

I began this paper with the quotation from Donner in which he stated: *'Let us postpone as long as possible the official recognition of the party system (in the Netherlands), because in its nature Law just brings regulation, and he who regulates, restricts.'* Due to the dominance of A.M. Donner in Dutch constitutional Law in the 1955-1985 period, his statement is still valid. However in my opinion one must place Donner's quotation in the era he lived in. Times have changed, also in the evolution of the system of political parties. Since 2002 new political parties have arisen in the Netherlands, and nowadays a political party, the PVV, with 15 seats (of the 150 seats) in the Second Chamber of the States-General does not have an internal democratic structure. In my opinion, regulating the right of an individual to become a member of the political party he supports should be seriously considered. Even though this is an infringement of the right of association of the political party, the importance of becoming a member of a political party is of such high value that it should prevail over the right of the political party itself. The internal democratic structure of a political party is the best guarantee of a sound system of checks and balance.

Furthermore I have argued for securing the freedom of the political will in the Dutch Constitution as proposed by State Commissioner van Schaik in 1950. Important recent judicial cases have shown that the balance between the freedom of association and contradictory fundamental rights is, in my opinion, not always well considered. A specific constitutional

provision in which the individual as well as (political) association has, within certain limits, the fundamental right freely to shape its own political will would ensure that all public authorities, particularly the judiciary, must explicitly come up with a balance between this and other fundamental rights.

Finally, I would no longer postpone the official constitutional recognition of the political party system in the Netherlands. On certain elements special regulation is much needed. Although in its nature Law just brings about regulation, he who regulates not only restricts but also guarantees.

Notes

- 1 Professor of Public Institutional Law, Utrecht University, the Netherlands.
- 2 Article 42, section 2 of the Dutch Constitution reads as follows: *The Ministers, and not the King, shall be responsible for acts of government.*
- 3 This rule still applies in the Dutch Constitution, see article 67, par. 3, Dutch Constitution.
- 4 This provision was called the ‘Caoutchouc-provision’ because it was not clear who were defined by it. Caoutchouc is a sort of rubber.
- 5 Nowadays this rule is guaranteed in article 67, par. 3, Dutch Constitution.
- 6 Van Schaik was at that time vice-Prime Minister of the Netherlands (he was a member van Dutch Catholic Party (KVP)). *Staatscommissie ter herziening van de grondwet*, 1950.
- 7 State Commission on the relation electorate and policymaking (Staatscommissie van advies inzake de relatie kiezers-beleidsvorming (State Commission Biesheuvel)), Final report in 1985 and the Special Commission on certain constitutional issues of the Second Chamber of the State-General, Bijzondere Commissie Vraagpunten van de Tweede Kamer (Commissie-Deetman).
- 8 The critics came from another Member of Parliament of Wilders’ own PVV namely Hero Brinkman, <http://www.elsevier.nl/web/Nieuws/Politiek/268001/Wilders-Positie-Hero-Brinkman-staat-niet-ter-discussie.htm?rss=true> (last seen on 4th September 2014).
- 9 Dutch High Court, Hoge Raad 30 September 1997, *Ars Aequi* 1998, p. 113-119, annotated by Y. Buruma.
- 10 The Electoral Law itself does not speak of political parties but political groups, e.g. Chapter G, Dutch Electoral Act.

11 Article 11 – Freedom of assembly and association

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

12 See also Bale in this volume.

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