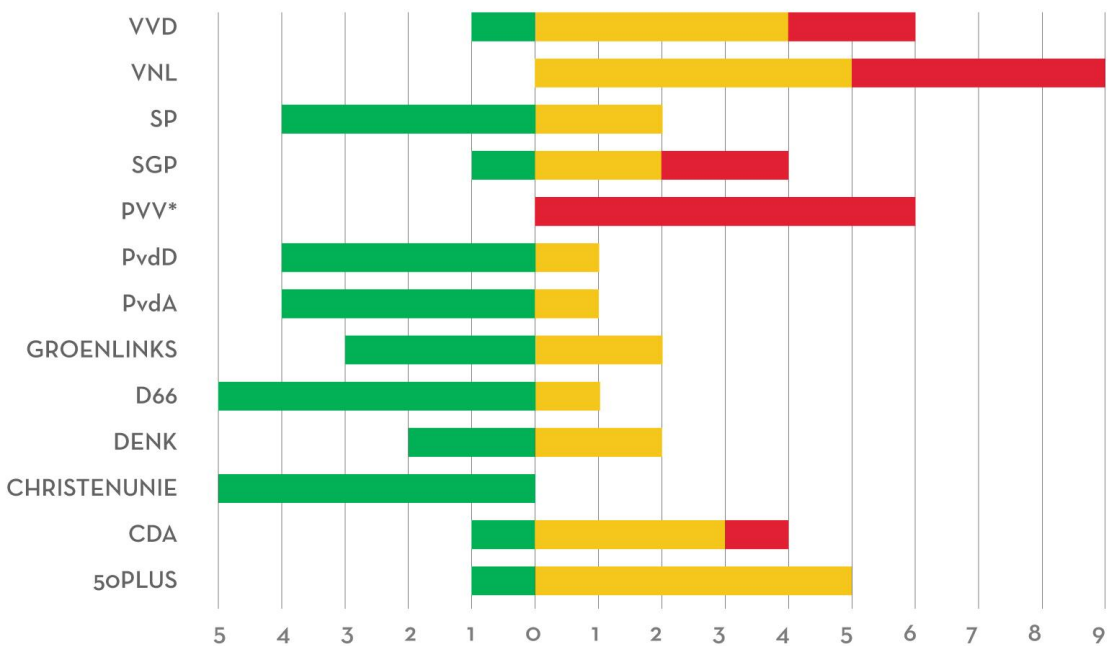


THE RULE OF LAW, A QUICK SCAN

THE PARTY PROGRAMMES  
FOR THE ELECTIONS  
**2017**  
CONSTITUTIONAL?

REPORT OF THE COMMITTEE CONSTITUTIONALITY  
IN ELECTION PROGRAMMES

IDENTIFICATION BY PARTY PROGRAMME 'CONSTITUTIONALITY'-2017



- Plans which can improve the rule of law.
- Plans which can affect the rule of law.
- Plans which are squarely in conflict with the rule of law.

\*In the report, the PVV gets red five times. In the Matrix, the PVV gets red six times in connection with the prohibition of the koran. This proposal conflicts with the freedom of speech.

SCORECARD PARTY PROGRAMMES 'RULE OF LAW'

THEMES	50+	CDA	CU	DENK	D66	GL	PvdA	PvdD	PVV*	SGP	SP	VNL	VVD
<b>Predictable government</b>													
Legal certainty													
Compliance with international law													
Democratic monitoring													
<b>Protection of fundamental rights</b>													
Equality of nationality, ethnic, religious													
Equality of age, disability, sexual													
Life, physical integrity, self-determination													
Privacy digital													
Privacy other													
Asylum law, prevention of statelessness													
Freedom of Speech													
<b>Effective access to court</b>													
Fair trial, legal protection													
Accessibility of justice													
Judicial supervision on the police and the judiciary													

- The committee has found one or more concrete plans, which (may) reinforce the rule of law.
- The committee has found one or more concrete plans, which (may) weaken the rule of law.
- The committee has found on or more concrete plans which conflict squarely with the rule of law.
- The committee has not found, (enough concrete) plans, which (may) significantly, positively or negatively, affect the current rule of law.

\* In the report, the PVV gets red five times. In the Matrix, the PVV gets red six times, in connection with the prohibition of the koran. This proposal is in conflict with freedom of speech.

If for each theme multiple colors have been applied, red shall count the most.

# **Review of election programmes 2017**

Report of the Committee Constitutionality in Election Programmes 2017  
established by the Dutch Bar Association

The Hague, February 14,  
2017

## **Chapter 1      The rule of law in election periods**

We may vote on March 15, 2017. On that day, the Dutch will choose a new Lower House of Parliament . The Lower House of Parliament is the most important part of the States-General, our parliament. The representatives whom we choose in the Lower House shall, during the next few years, determine who will govern us and by which laws. Voting on March 15, is therefore the perfect way to influence our administration and our laws. That is the very essence of democracy.

### **Why this report?**

The Netherlands is a democracy. The Netherlands is also a constitutional state. The purpose of the constitutional state is to protect citizens from abuse of power by the government. In a constitutional state, the government must , just like the citizens, adhere to the law. She cannot just reduce or take away the rights and freedoms of citizens in the country, even if she has been democratically elected. The police may not just enter someone's home or put someone in jail. In a democratic constitutional state, everyone has the right to express its opinion, within the limits of the law. What those limits exactly are in a particular case, only the independent and impartial judge may determine. A political majority should never just limit the rights of minorities.

28 parties will participate in the Lower House elections of 2017.<sup>1</sup> Many of these parties have written in an election programme what their plans are.<sup>2</sup> It is important that voters know what those plans mean for the constitutional foundation of our democracy. The constitutional state is never natural and strengthening thereof begins with awareness. This report serves that purpose.

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<sup>1</sup> On December 21, 2016, the Electoral Council had registered the names of 81 parties. On February 3, 2017, the Electoral Council announced that 28 parties will participate in the elections.

<sup>2</sup> The committee has used the most definitive versions of the programmes which were available in January 2016.

## Conception and operation

The committee has studied the programmes of the thirteen parties which, in December 2016, had two or more seats in the House.<sup>3</sup> Those are the programmes of the following parties:

- 50PLUS
- Christen Democratisch Appel (CDA)
- ChristenUnie
- DENK
- D66
- GroenLinks
- Partij van de Arbeid (PvdA)
- Partij voor de Dieren (PvdD)
- Partij voor de vrijheid (PVV)
- Staatkundig Gereformeerde Partij (SGP)
- Socialistische Partij (SP)
- VoorNederland (VNL)
- Volkspartij voor Vrijheid en Democratie (VVD)

In its investigation, the committee has always asked three main questions:

- Do the plans take into account the requirement that the government should be predictable and that she herself must also comply with the rules?
- Are the fundamental rights and freedoms of citizens being respected?
- Do citizens have effective access to an independent court?

Firstly, in chapter 2, we identify a number of trends. These are issues which many parties mention in this election year and which have to do with the rule of law. These trends define, in part, the political agenda of the elections.

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<sup>3</sup> In the months prior to the elections, there were seventeen parties in the Lower House, including six who split away, during the 2012-2017 administration, from one of the existing parties. These are the group Kuzu-Öztürk (GrKÖ), de group Bontes-Van Klaveren (GrBvK), Houwers, Klein, Van Vliet en Monasch. The GrKÖ presents itself in the upcoming elections as DENK, the GrBvK participates in the elections as VNL. The programmes of both DENK and VNL are included in the review of the committee because they are currently represented in Parliament by a group of two members. The committee has disregarded election programmes of one-man groups.

In chapter 3, we have elaborated the main questions and explain on which basis we precisely tested the plans of the political parties. We call that the testing framework.

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The Committee does not pass any substantive judgment, but only detects whether a particular plan may be positive or negative for the rule of law. We used three colors in order to make that clear:

**Green:** plans which (may) improve the rule of law. **Orange:** plans which can affect the rule of law. **Red:** Plans which are squarely in conflict with the rule of law.

In chapter 4, the proposals, which the committee defines as green, orange or red, are listed by party. Plans which do not entail substantial changes in the current situation, are qualified by the committee as neutral and are not further discussed in this report.

This time, the committee consisted of the following members:

- prof. mr. drs. Wouter Veraart, Professor, Encyclopedia of Law and Philosophy of Law, Free University of Amsterdam (chairman)
- prof. mr. Lokke Moerel, professor of Global ICT Law, University of Tilburg, and lawyer at Morrison & Foerster;
- prof. mr. Peter Rodrigues, professor of Immigration law, University Leiden;
- prof. mr. drs. Marc de Wilde, professor of General Legal doctrine, University van Amsterdam;
- dr. mr. Camilo Schutte, chairman, advisory committee rule of law NOvA and lawyer at Schutte Schluep & Heide-Jørgensen in Amsterdam.

Based on the discussions of the committee, mr. Drs. Miek Smilde was responsible for the drafting of the report.

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<sup>4</sup> On the procedure of the committee and the testing framework, the relevant political parties have been informed in October 2016.

## **Chapter 2 Trends and conclusions**

In 2017, many election programmes are paying explicit attention to the further regulation of migration and the reception of refugees. Other issues that strongly concern parties are terrorism and jihadism, which they regard as major threats to our free, democratic society. In addition, several parties want to modify the constitutional law, for example by abolishing the Upper House or introducing (binding) referendums. Finally, many parties mention the risks of the Internet and the problems that will entail, for example for the privacy of citizens, and they pay attention to the functioning of Europe.

Four years ago, the commission assessed for the first time the electoral programs.<sup>5</sup> The need for constitutional renewal was then already noticed by the commission. However, compared with previous elections, there are also differences. In the last elections, parties spend remarkably close attention to criminal law, in order to address specific societal challenges. We are still seeing that idea in some parties, but it is less prominent.

The committee identifies five trends in the election programmes 2017-2021:

### **Trend 1: Immigration and constitutional rights**

The emphasis in the election is very much on issues of immigration and integration. The many refugees from still ravaged by civil war Syria, and from other parts of the world, who are seeking protection in Europe, occupy the political minds. The measures, which the parties propose in this field, repeatedly clash with the rule of law and, in some cases, are squarely in conflict therewith. The complete closure of the borders, or setting unilateral quotas on the admission of refugees, violates the international rules to which the Netherlands has committed itself. A minimum requirement of the rule of law is for the government to be predictable and to adhere to the rules applicable to her, including internationally.

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<sup>5</sup>The rule of law, a quickscan. The party programmes for the elections 2017 constitutionally?

Some of the proposals affect the fundamental rights and freedoms of citizens. Asylum seekers, who have exhausted all legal remedies, in certain cases (eg families with children), are also entitled to basic living facilities. He who entirely denies essential means of support (in the political discussions called bed, bath and bread) to these groups, may act contrary to human rights, as enshrined in the European Convention on Human Rights (ECHR), and with commitments, undertaken by the Netherlands in other international conventions, such as the European Social Charter.

## **Trend 2: Combating terrorism en jihadism**

The committee detects a strong focus on the fight against terrorism and Jihadism. Several parties want to take away the Dutch citizenship from jihadists with dual nationality, who have traveled to Syria or elsewhere. In practice, this measure could constitute discrimination against people who only have the Dutch nationality, and could lead to lawlessness. Nevertheless, the committee notes that the parliament recently adopted a law that allows the jihadists with dual nationality to be deprived of the Dutch nationality.<sup>6</sup>

The committee takes the position that she does not involve in her consideration any policy proposals which are applicable Dutch law. For that reason, the committee has only taken into account in its assessment of the election programs the deprivation of jihadists of the Dutch nationality, if the proposals of the parties are clearly a step beyond the adopted bill. One single party proposes in its program, for example, to take returning jihadists into administrative custody. This is contrary to the right to due process. Also, some parties propose not to let jihadists come back, or to deprive jihadists who only have the Dutch nationality of their nationality, with the result that these people are being made stateless.

Statelessness can lead to lawlessness. A constitutional state shall always keep the obligation to guarantee the fundamental rights of its citizens, even though they have probably done the most despicable things.

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<sup>6</sup> On May 24, 2016, in the Lower House, the bill "withdrawal Dutch citizenship jihadists" was adopted. On februari 7, 2017, the Upper House also accepted this proposal.



To avoid the hopeless situation of complete lawlessness, the right to nationality is set out in the Universal Declaration of Human Rights. In addition, Article 8 of the UN Convention on the Reduction of Statelessness prohibits states to make their citizens stateless. Also the Netherlands is bound by this Convention. The committee uses the universal principle that making stateless its own citizens, is contrary to human rights.

### **Trend 3: Constitutional reforms**

As with the previous elections, many parties want to organize the administration in the Netherlands differently. The ideas for the constitutional reorganization range from the abolition of the Upper House and the Provincial Councils and the introduction of the elected mayor, to the introduction of (binding) referendums and the modernization of the Charter for the Kingdom of the Netherlands. This Charter provides, among other things, the relationship between the Netherlands and other countries within the Kingdom. Some of the parties also want to establish a so-called constitutional court. That is a court that reviews the laws which have been adopted by Parliament against the Constitution.

The commission notices that these radical proposals are usually not accompanied by a clear explanation of what those interventions might mean for the establishment of, and thus the balance of power in our constitutional state. Proposals to abolish the Upper House and the Provincial Councils and to downsize the Lower House can, especially in combination, result in the disruption of the balance of power. For example, because the power will lie with a small group, or because the control from the Parliament on the Government (executive power) becomes less effective.

Also, the introduction of various forms of (binding) referendums may have adverse consequences for the effectiveness and predictability of the government. For example, if complex pieces of legislation are afterwards subjected to a binding all-or-nothing view of the population. Introducing the referendum may indeed strengthen the democratic decision-making, but the instrument can also be abused. To possible disadvantages of the

different types of referendums, which are presented in a variety of programs, the parties pay little or no attention.

The committee also notices that quite many parties advocate to again split the Ministry of Security and Justice and to bring the police back under the authority of the Minister of the Interior.

Finally, it is remarkable that many parties explicitly mention in their programmes the prohibition of discrimination in Article 1 of the Constitution. That article states that "all who are in the Netherlands shall be treated equally in equal circumstances" and that discrimination on the grounds of 'religion, belief, political opinion, race, gender or any other grounds whatsoever, shall not be permitted.'" Several parties want to include in this article, explicitly, some new grounds such as sexual orientation or identity, age and disability. For more than four years, the parties have been trying to further find an answer to the question of how discrimination in general and discrimination by the government in particular can be prevented. In the latter case it is often about discrimination by the police (for instance ethnic profiling), against which various parties express themselves.

#### **Trend 4: Law and digitalisation**

In their election programs, parties pay more attention to the digitalization of our society and the Internet and the problems regarding security and privacy, associated therewith. Many parties explicitly say that they are seeking to prevent crime via the Internet (cyber crime). They come up with various measures to make the digital traffic more secure, such as the introduction of a "digital passport". That should complicate anonymous and illegal use of the Internet. Parties also suggest measures which should make it easier for the police, for example, to detect hackers.

Parties not always consider the consequences of the proposed measures on the fundamental right to privacy, which right in particular requires additional protection in a digital world. However, there are also parties, which propose to better protect the privacy of citizens, for example, by better regulating the unfocused collection and

processing of digital personal data (big data).

### **Trend 5: Europe and the international (trade) treaties**

Several parties make critical comments about the functioning of the European Union (EU). They want a smaller role for the EU, and call for more democratic control on what is happening in the EU. It is also clear that the parties in this round of elections speak much more critical about the content and consequences of new international trade agreements, such as the conventions which the EU wants to conclude with the United States (TTIP) and Canada (CETA). The critical concern relates, among other things, to the issue of dispute settlement. Parties are mostly against forms of dispute resolution outside the court.

### **Conclusions**

Although the rule of law in 2017 is on the agenda of many political parties, the assessment by the committee shows a restless image. In five of the thirteen surveyed election programs, the committee has found measures which are inconsistent with the constitutional minimum requirements and are therefore marked as "red", often because they squarely conflict with fundamental rights and freedoms of people or infringe the right to due process.<sup>7</sup> This concerns in particular measures related to terrorism, jihadism, refugees, islam and immigration, themes which strongly attracted attention in recent years. The committee notes that the major societal challenges of our time put the foundations of our constitutional effectively under pressure. Is we wish to preserve the rule of law, then we should, in response to threats from outside, always look for those measures which do not violate our rule of law itself. He who, in order to protect our constitutional democracy, is willing to undermine the rule of law itself, for example by treating certain groups of citizens from now on as second-class, or by depriving them of rights, himself constitutes a threat to the freedoms that are the foundation of our society.

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<sup>7</sup> Four years ago, this was the case for two of the ten election programmes, which were viewed at the time.

What strengthens the troubled image, is the distinctive constitutional reform drive that emerges in many programs. The way the balance of power in the democratic constitutional state is currently organized, is not taken for granted anymore. Also, digitization makes for great changes, and may enhance, but also weaken our freedoms, like measures to protect the Internet infringe the right to privacy.

The committee does not want to give the impression that any change is wrong. Our law is dynamic, and our freedoms are not rigid. Many of the critical alerts by the commission are therefore not red but orange. Thus the committee wished to indicate that these proposals should once again be carefully watched, as they raise questions in constitutional terms, for example because they are not in accordance with existing rules and regulations.

Moreover, there is also good news. More than in the previous round of elections, the committee notes that the rule of law is being indicated as a relevant theme in many of the programmes. It is not confined to general statements of support; many parties make proposals which constitute a concrete strengthening of our rule of law. The committee would like to draw special attention of the electors and elected thereon. These proposals are worth thinking about in the pursuit of ever better rule of law. We are collectively giving form to this.

## **Chapter 3      The rule of law as testing framework**

A democratic constitutional state restricts the power of government by tying her to rules. Between the executive, legislative and the independent judiciary (the separation of powers) a balance of power must exist (checks and balances). The government must abide by national and international legislation and court rulings. The main rules are laid down in the Constitution and in international (human rights) treaties. So the government itself is bound by the law. She may not simply restrict the fundamental rights and freedoms of citizens and other residents.

The constitutional minimum requirements which the Committee has considered are:

- The government itself is bound by the applicable law and court rulings. Its policy towards the citizens should be predictable and controllable ;
- Fundamental rights and freedoms of citizens are respected;
- Everyone should have an effective access to an impartial and independent court .

The committee has only looked at whether the plans in the texts of the election programmes meet these minimum requirements. She thereby assumed that the rule of law is primarily to protect citizens against arbitrary government. So the review of the commission is not exhaustive: an election programme which "passes" this review does not necessarily become "constitutional". At most, it can be said that the text of the relevant programme, on the issues addressed, remains, in the opinion of the committee, above the minimum standard.

### **Political disputes**

The opinions on what a rule of law exactly entails, can vary significantly. How the priorities are set is often linked to political preferences. Not every party considers each element equally important.

An example is the debate about whether judges should be able to assess laws against the Constitution. At present, this is not possible in the Netherlands. Moreover, the Netherlands has no special constitutional court that reviews laws against the Constitution. Germany, for example, does.

Some parties do not find it necessary for the Netherlands to get such special court. They believe that the fundamental rights and freedoms of citizens are adequately monitored by the way laws are made in the Netherlands: First, the Council of State advises, then the Lower House looks at a bill and then the Upper House looks even more closely whether the law meets the requirements of the rule of law. But there are parties who do want a constitutional court, as an independent court could better assess whether the laws are in line with the Constitution than politicians. Other parties want to abolish the Upper House, whether or not following the introduction of a constitutional court. They are of the opinion that the work of the Upper House is superfluous.

Another recent example is the discussion on the scope of the protection of human rights, as implemented by the European Court of Human Rights in Strasbourg. Some people find that such protection goes too far, others may find that such protection does not go far enough. Sometimes fundamental rights collide, and heated discussions arise about which fundamental right deserves priority. For example, think of the discussions in which the prohibition of discrimination clashes with the freedom of religion, as in the discussion on the admissibility of refuse officials, those about a possible ban on the Jewish and muslim religious slaughter and about male circumcision. Another example is the clash between freedom on the Internet and limits of the right to privacy and the freedom of speech.

Moreover, there is difference of opinion about the amount and types of fundamental rights on which citizens should be able to rely against the government. Is it only about the so-called classical political rights and freedoms (such as universal suffrage, freedom of speech, freedom of religion, the right to privacy and the right to bodily integrity) and also of the so-called "second generation" - fundamental rights (including the right to education or the right to work)?

### **Focus committee: a minimal constitutional review**

In itself, these discussions are a good example of what a democracy is all about. On fundamental issues, debates may be held freely, lively and firmly. Also given the rule of law. The rule of law is in fact a form of coexistence, which has plenty of room for different implementations. For that reason we limit ourselves in this report to verification of compliance with the minimum requirements for a rule of law. These requirements are very basic and as politically neutral as possible. It involves requirements, supported by virtually anyone who adheres to a constitutional value and which may also be accepted nationally and internationally, by courts of law and states. The commission intends to assess, as specifically as possible, what the political plans of the parties mean for the core of the rule of law. Thus, politically charged discussions about how the rule of law must be exactly implemented or how fundamental rights relate to each other, remain out of the picture. In this report, the committee restricts itself to the classical fundamental rights. These are the political rights (including voting rights and eligibility) and fundamental freedoms (such as the freedom of speech, the right to privacy and the freedom of religion) in conjunction with the non-discrimination principle, as formulated, among other things, in the first article of the Dutch Constitution.

Below, we will further specify the three minimum requirements previously formulated.

#### **First minimum**

##### **1. The government shall adhere to the rules applicable to her. Citizens**

1.1. A predictable government adheres to its own legal rules and shall adhere to the rules, to which she has bound herself at international and European level.

1.2. The government ensures that it bases its actions on policy, lawfully established and that it exercises its power in a manner, known beforehand and verifiable afterwards. She does right, in proportion, to all who may be affected by its policies and actions.

- 1.3. Regarding criminal law, the rule is that no one should be punished for something that was not yet punishable at the time when the fact was committed (principle of legality).

**The government must be predictable and shall adhere to the rules applicable to her.(first minimum requirement).**

Exercise of public power may lead to arbitrariness. If a government itself does not abide by the rules, or does not treat its citizens equally, she can become capricious, and thereby unpredictable against its citizens. A reliable government is a transparent government which provides legal certainty, is predictable beforehand, and verifiable afterwards.

That means, among other things, that people should not be punished under rules, introduced later, that they could not foresee. This is called the principle of legality, which, for criminal law, is laid down in Article 16 of the Dutch Constitution. It says there: "No act is punishable than by virtue of a preceding statutory penal provision."

**Second minimum**

**2. The fundamental rights and freedoms of all citizens shall be observed.**

- 2.1. Not meeting the minimum standard, are political proposals, to the effect that people are excluded from the exercise or the protection of their fundamental rights and freedoms, on the basis of the simple fact that they belong to a particular group or category.
- 2.2. We define fundamental rights and freedoms in any case as the nationally and internationally recognized political rights and fundamental freedoms, whether or not in connection with the non-discrimination principle.

**Observance of fundamental rights en freedoms (second minimum requirement)**

In a democratic constitutional state, the government respects the fundamental rights and freedoms of the citizen. The rule of law ensures that a democratically elected



majority does not abuse its power to exclude or discriminate against individuals, minorities or members of vulnerable groups. Even democratic majorities may not affect these fundamental rights and freedoms at the core. Some fundamental rights and freedoms are of such great importance that it has been internationally agreed that in a constitutional state even foreigners must be able to appeal to them. This applies, among others, for people who flee from countries where they fear for their lives, and seek asylum. Under international law, the right of asylum is one of the fundamental rights.

Sometimes fundamental rights can collide. He, who relies on his freedom of speech may, for example, collide with someone who relies on the freedom of religion. The committee will not take sides in the debate on the exact scope of fundamental rights and freedoms. After all, these discussions belong in the political debate. The Committee has therefore not fully assessed how the different parties have implemented the existing fundamental and human rights in the different electoral programmes. The committee, however, did set a lower limit. Political proposals, to the effect that people are excluded from the protection of fundamental rights and freedoms, just because they belong to a particular group or category, do not meet the minimum standard. Consider, for example, a law that would prohibit voting by naturalized Dutch citizens, or deprives women the right to speak in public. Such proposals would be directly contrary to the core function of the democratic constitutional state: respecting everyone's fundamental rights and freedoms.

### **Third minimum**

#### **3. There is an effective access to an independent court.**

3.1. There is an efficient and reliable judicial system, in which judges take timely decisions.

3.2. Judges must be able to perform their duties independently and impartially, with sufficient time and resources.

- |                                                                                                                                                                                                                                                                                                                                                                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>3.3. Citizens have the right to a fair trial and may submit their disputes with other citizens or the government to an independent and impartial tribunal.</p> <p>3.4. In criminal cases the suspect of a criminal offense is entitled to a fair trial. He shall be presumed innocent until the contrary is proven in court (presumption of innocence).</p> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**Anyone has the right to an effective access to the independent and impartial court (third minimum requirement)**

Anyone has the right to an effective access to an independent and impartial court. That requirement is part of the hard core of the rule of law. For a person suspected of an offense, it is essential that he or she is brought in good time before a judge. That court must then assess whether there was sufficient ground to arrest and detain him or her. The hopelessness of the situation of prisoners, who are being detained in many places in the world, without trial and without clear charges, clearly shows why access to a court is a minimum requirement of the rule of law. Without a judicial review, the government can pick up random people and detain them indefinitely.

Having effective access to a court, it is not only about the situation of people who are involuntarily deprived of their liberty. In general, it is about the right of citizens to submit their disputes with the government or with each other, to an independent and impartial court. People may have so many rights, but if they cannot exercise their rights, they are in fact without rights.

The Dutch Constitution states in Article 17 that no one should be deterred, against his will, from the judge that the law grants him. A citizen may, voluntarily, submit its dispute to a body other than a court (for example, an arbitrator or mediator), but the government should not make an appeal to the court impossible.

Effective access to justice requires in the first place that a solid judicial organisation must exist: an organisation in which judges may settle

disputes, submitted to them in a timely and efficient manner and have the time and resources to reach to a careful decision. Case law requires perusal and consideration of the facts and of the law. If that is impossible due to lack of resources and time, cases may just as well be decided by lot. That may be cheaper for the state, but then we no longer live in a constitutional state.

Secondly, judges must perform their duties independently and impartially.

Independence means: Sufficiently autonomous towards the legislative and executive powers. With impartial, we mean that judges shall resist pressure from litigants, from politics or from civil society (public opinion). A judge must not be biased with respect to one of the litigants.

Finally, the claimant must also have the real possibility to conduct legal proceedings. If litigation costs extraordinary amounts of money and citizens cannot afford a trial, there is no effective access to justice. This means that for citizens, who can not afford it themselves, a form of legal assistance should be available and that the government, if necessary, bears the cost of the trial.

In the context of this third review, the commission explicitly involves the citizens' right to due process (as for instance enshrined in Article 6 of the European Convention on Human Rights, ECHR). In criminal cases, this means, among other things, that an accused is presumed innocent until the contrary has been proven. The suspect further also has the right to take cognizance of the indictment, to the advice and assistance of a lawyer, and to a timely handling of his case. The suspect also has the right to remain silent, and may not be tortured. In immigration cases, due process means that someone who has lodged an appeal may stay in the Netherlands while awaiting that appeal. In general, the process is that the litigants should be heard by the court and that they have equal procedural rights (equality of arms).

## Chapter 4      The electoral programmes

The committee has reviewed the said thirteen election programmes on the basis of the testing framework described in Chapter 3.<sup>8</sup> In addition, the committee has confined itself to the plan, as expressed in the programmes. We only mention those plans which, in our opinion, can have a positive or negative impact on the rule of law. For the alerts, we use three colors:

**Green:** plans which (may) improve the rule of law. **Orange:** plans which (may) affect the rule of law. **Red:** Plans which are squarely in conflict with the rule of law.

Plans which do not entail substantial changes in the current situation, are qualified by the committee as neutral and are not further discussed in this report.

The studied electoral programmes are listed in alphabetical order. The figures in brackets refer to the page numbers in the programmes.

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<sup>8</sup> At the time of screening, of the thirteen programs, the programmes of CDA and PVV were still in draft form.

## 50PLUS

### Green

- 50PLUS is against age discrimination in all laws and regulations, national and local. The party wants to take active measures to combat age discrimination and wants to include this principle in Article 1 of the Constitution (p.10). This proposal reinforces the non-discrimination principle, as laid down in article 1 of the Constitution.

### Orange

- 50PLUS wants the Netherlands to accommodate a limited number of refugees, proportionally distributed among the countries of Europe and on the basis of population density (p.10). The Netherlands however, has obligations to accept refugees under international and European law. Introduction of quotas is only possible if these treaties, including the UN Refugee Convention, be terminated or if other arrangements be made in Europe, which ensures the reception of refugees. Without further compliance with these constitutional requirements, said measure infringes the minimum requirement of a predictable government, and the requirement that fundamental rights - in this case the right to asylum - be respected.
- 50PLUS wants to introduce a digital passport in order to prevent anonymous use of the internet (p.11). Without further explanation, this may probably be in violation with the right to privacy.
- 50PLUS proposes to abolish the Upper House and wants to reduce the Lower House to a hundred House members (p.12). She also wants to abolish the Provincial Councils as administrative layer. In addition, she proposes to introduce binding regional and national referendums, in which the party draws inspiration from the policy in Switzerland (p.13). What is missing is an explanation of the consequences that these measures (in particular, the sharp downsizing of parliament) have, for the balance between the state powers (checks and balances). That balance is necessary to effectively protect fundamental freedoms and rights of citizens, and to keep the Dutch government predictable and controllable.
- 50PLUS wants to take preventive action against persons who prepare terrorist attacks (p.14). Without further explanation, this proposal ignores the right to due process and the presumption of innocence.
- 50PLUS wants full transparency about the treatments and the past of physicians, who should be recorded on a medical data card, to be newly introduced. (p.6). Without further explanation, this measure violates the right to privacy in general, and those of professionals with a duty of confidentiality in particular.

## **CDA**

### **Green**

- The CDA claims that a good spread of courts is of great importance for the access to justice for the citizen. Therefore, according to the party, new closures of courts are not being addressed. (p.12). The Committee notes that the CDA, at this point, seeks to strengthen the access to justice.

### **Orange**

- The CDA wants greater opportunities for police and judicial authorities to invade digital networks in order to better ensure cyber security (p.13). However, the party fails to elaborate on the necessary guarantees for the protection of the right to privacy.
- The CDA wants to expand the possibilities to anonymously make official reports (p.14). The party does not specify how this expansion relates to the minimum requirement that any defendant is entitled to a fair trial. That right means, in particular, among other things, that the court and the defense may also interrogate the declarant.
- The CDA proposes to give refugees a displaced persons status, in which, admittedly, care is offered to the refugee, but under the explicit understanding that it is merely a temporary stay. (p.18). This measure ignores the fact that refugees often for a long time cannot return to their country of origin and must be enabled, in the meantime, to build a new life. The displaced persons status offers fewer rights than is currently guaranteed by the Geneva Convention and European law.

### **Red**

- The CDA wants to ban the financing of mosques and islamic organizations by foreign governments. (p.15). This constitutes direct discrimination, because this measure affects only islamic institutions and not other religious and / or philosophical organisations.

## **ChristenUnie (CU)**

### **Green**

- In its election programme, the CU pays much attention to the place the Constitution occupies within the Dutch democracy, and explicitly places the constitutional democracy at the heart of its specific policies, for example by extending the prohibition of discrimination in Article 1 of the Constitution to the principles of "disability" and "orientation" (p.11-12).
- The CU advocates sufficient funds for a working system of legal assistance for the poor (p.21) and also alternative forms of dispute resolution, such as and neighborhood mediation and mediation. This promotes good access to justice (p.21).

- The CU recognizes the privacy issues surrounding the use of "big data" and makes detailed proposals for the protection of privacy (p.26).
- The CU grants special and specific attention to the importance of human rights in immigration policy(p.28, 29, 30).
- The CU explicitly takes human rights as a guide for the evaluation of international cooperation and trade agreements and in military missions (p.66, 100, 101, 104).

## DENK

### Green

- DENK advocates in its program several measures to increase access to justice (p.36), and wants to prevent the closure of courts.
- DENK advocates an independent inquiry into institutional forms of discrimination and racism, including ethnic profiling by government authorities, in order to combat discrimination (p.8, 42).

### Orange

- DENK wants to introduce a registry for citizens who make demonstrable discriminatory statements, on the basis of which, to those individuals, working for the government can be denied. (p.9). What is not clear is what the party means by "demonstrable" discriminatory expressions and whether a judicial review hereto applies, as the rule of law does require.
- DENK wants to introduce, as a punishment for child abuse, chemical castration in combination with treatment. (p.34). This punishment is inconsistent with the fundamental right to physical integrity and the prohibition of inhuman or degrading punishment (art. 3 EVRM).

## D66

### Green

- D66 wants to invest in a robust judicial process and keep access to the court open for everyone, among others, by investing in legal assistance (p.11, 156,168).
- D66 advocates more attention to citizens' fundamental rights, including the right to privacy in the digital domain (p.124-126).
- D66 wants to actively combat all forms of discrimination, including discrimination against the elderly, the disabled and people with a different background. Also, the party wants to strengthen the position of women (p.7, 53-58).

- Violation of the principles of the democratic rule of law, according to D66, must have consequences for international relations (p.136). The party wants to contribute to international investment and missions which are aimed at developing a rule of law in other countries, including an independent judiciary, free elections and improving the quality of governance. In addition, she wants the Netherlands to commit to a more effective International Criminal Court with more flexibility and a greater deterrent effect. (p.144).
- D66 feels that the Dutch and European asylum system must be overhauled. The party proposes to amend the Aliens Act 2000 and the Integration Act. In developing the plans, the party focuses, among others, on the inclusion of more refugees under the UNHCR resettlement program, shorter asylum procedures, fewer relocations, expansion of children's pardon, bed / bath / bread for failed asylum seekers and abolition of border detention (p.140-142).

### Orange

- D66 wants to adapt the "cumbersome procedure to amend the Constitution" so that constitutional changes can be made faster and more democratic (p.163). The weighted procedure for constitutional amendments, however, has the function to prevent that the majority too easily can impose its will on the minority, and provides an additional guarantee that fundamental rights are permanently protected in the Netherlands. D66 explains sufficiently how these guarantees look like, if the procedure is being adapted.

### GroenlinksGreen

- Groenlinks takes the position not to compromise on human rights, in respect of refugees (p.49). The party proposes several measures to strengthen the rights of refugees, such as direct right to work and language training, small-scale accommodation and the possibility of family reunification (p.49, 50). Groenlinks also wants to protect vulnerable refugees (women, religious minorities, members of the LGBT community). The asylum procedure should more particularly take into account the interests of the child.
- Groenlinks wants to invest in the rule of law, for example, by reserving more money for the police, the judiciary and the Public Prosecutor. The cost of law (court fees) should be limited and legal assistance for low-income people should be improved (p.64, 65). In the opinion of the committee, GroenLinks thereby strengthens effective access to the independent court.
- GroenLinks states that fundamental rights also apply on the internet. The privacy of correspondence in the Constitution shall be extended to privacy of communication, which includes traffic data and stored communications. The storage obligation for telecom and internet data will be abolished. Journalists will have a



statutory protection of sources, including right of non-disclosure (p.65, 66)<sup>9</sup>. These measures strengthen the rule of law as regards respect for fundamental rights and freedoms.

### Orange

- Groenlinks wants to remove abortion and euthanasia from the criminal code (p.39, 40). Safeguards to protect the right to life of (vulnerable) elderly and the unborn child, are not mentioned at all. Without further explanation or qualification, these proposals are incompatible with the right to life, which must be protected by the rule of law.
- GroenLinks makes several proposals which may undermine legitimate expectations and acquired rights of specific groups of people, such as taxation of the General Pension (p.19), the requirement for specialists to enter into employment (p.39) and the abolition of the squatting ban (p.54). Without further explanation, such proposals are at odds with the principles of predictability and legal certainty.

### Partij van de Arbeid (PvdA)

#### Green

- The PvdA wants to combat all forms of discrimination, including on the labor market (p.11, 41). She suggests for example, that both students and teachers should not be denied on special education, on the basis of cultural background. This reinforces the non-discrimination principle.
- The PvdA writes that everyone shall be able to go to court, even people with low incomes. There will be more money available for subsidized legal assistance (p.22).
- The PvdA explicitly uses the ECHR as a guideline for measures to combat terrorism (p.21).
- The PvdA wants to actively contribute in various ways to the development of the democratic rule of law in Europe and elsewhere in the world. She calls for sanctions against EU Member States, who move towards a more authoritarian direction. She also stands up for equal rights for women and girls (p.60- 63).

#### Orange

- The Labour Party is in favor of "repressive tolerance" where it comes to young people at risk. Under some circumstances, they may lose their right to benefits (p.21). Citizens are entitled to essential resources, as defined in (among others) the European Social Charter. The Netherlands is bound by this. Without further explanation, this proposal may be contrary to the requirement of a predictable government.

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<sup>9</sup> This is stated in the bill "law on intelligence and security services", which on Wednesday, February 8, is on the agenda of the plenary debate in Parliament.

## Partij voor de Dieren (PvdD)

### Green

- The PvdD is focusing on human rights, especially children's rights, in formulating its plans regarding refugee policy (p.25).
- The PvdD aims to increase access to justice for people with limited income, by investing in better financed legal assistance (p.30).
- The PvdD wants to actively combat discrimination in general and gender discrimination in particular. To this end, she mentions in her program, among other things, that a ban on LGBT-discrimination must be included in the Constitution (p.32).
- The PvdD advocates to add ecocide to the crimes, which can be brought before the International Criminal Court, in order to prosecute companies and countries which seriously damage the environment. (p.36).

### Orange

- The PvdD wants to test existing fish farms retroactively, independently, for animal welfare and sustainability. Fish farms which do not pass this test, will be rehabilitated. (p.16). The revocation of licenses already issued, may conflict with the need for a predictable government. The revocation of licenses for exploratory drilling for shale and coal gas (p.20) without further explanation, is at odds with the principle that a predictable government acts on the basis of rules which are known in advance, so that parties can adjust their behavior accordingly.

## PVV

### Red

- The PVV writes in her election program that she does not want to have any more asylum seekers and no immigrants from muslim countries (p.1). The PVV also wants to withdraw all previously issued permits for a certain period of time, and close all refugee centers (p.1). These measures are contrary to international and European law, including the UN Refugee Convention and the ban on discrimination.
- The PVV wants to denaturalise and expel "criminals" with dual nationality (p.1). This broadly worded measure is discriminatory against those who only have the Dutch nationality. Who, in this context, are understood to be "criminals" - only people who are already convicted or also suspects - and how that classification is made, is not further explained by the party. This is in violation of the principle of legality.

- The PVV proposes to ban islamic headscarves in public offices and other islamic expressions which are contrary to public order (p.1). Summarised, these measures affect freedom of religion and run counter to the non-discrimination principle. The measures only affect islamic expressions and leave other religious or philosophical expressions untouched.
- The PVV proposes to close all islamic schools (p.1), to ban the koran (p.1) and to take radical muslims into preventive detention. These measures are contrary to the freedom of education, freedom of religion, freedom of speech, the right to due process, and are discriminatory (so contrary to the principle of non-discrimination of, among others, article 1 Constitution).
- The PVV does not want to allow Syria goers to return to the Netherlands (p.1). This proposal amounts to expulsion and denies basic legal protection to people who have the Dutch nationality.

## **Staatkundig Gereformeerde Partij (SGP)**

### **Green**

- The SGP mentions, in its election programme, several measures to better protect the privacy and personal data in a digital environment (36). For example, she wants to strengthen the penal code, in order to prevent digital forms of extortion.

### **Orange**

- The SGP wants to capture the value of the traditional family of father, mother and children in the Constitution (p.24). Thereby, the party infringes the rights acquired by other family structures. By only wanting to guarantee, constitutionally, the values of the traditional family, the SGP seems to want to deny equal rights to alternative family structures.
- The SGP wants to limit free speech on the internet in order to prevent pornography, blasphemy and defamation (p.36). Without further explanation, the proposed interference of the state in expressing freedoms of citizens, is contrary to the freedom of speech.

### **Red**

- The SGP advocates a complete abortion ban (p.14). Such a total prohibition is contrary to the self-determination of the woman.
- The SGP requires in her programme freedoms for christians freedoms and a privileged position within the rule of law, which are denied to other groups (such as muslims and atheists). This is contrary to the principle of non-discrimination and freedom of religion. Thus, the SGP states that prayer calls from mosques should be opposed and should not be equated with bells. (p.43). Firm action against radical islamic ideology, according to the SGP, should not

curtail the freedom of organization of churches (mosques remain unmentioned, p.30). The SGP also wishes that in the Constitution, reference is made to christian values, and that the government only provides space for the recognition of christian and not of muslim holidays (p.30).

## SP

### Green

- The SP wants to combat all forms of discrimination. In article 1 of the Constitution, it should be made explicit that discrimination is not permitted on grounds of sexual orientation, age and disability. Furthermore, the party wants to speed up the implementation of the UN Convention on the rights of people with disabilities (p.25).
- The SP comes up with concrete plans to strengthen fundamental rights in the digital sphere (p.39). Emails, personal messages and other private communications on the internet, for example, have the same (constitutional) protection as paper mail now has .
- The SP wants to improve access to justice, including by reducing court fees, and expanding the possibilities for legal assistance. (p.31).
- The SP advocates to respect and put into practice the UN Refugee Convention. In addition, there will be a law that regulates the right of residence for children, rooted in the Netherlands (p.57). Herewith the SP reinforces respect for fundamental rights and freedoms.

### Orange

- The SP wants to have a list of organizations who sow hatred and preach violence (p.30). It is not made clear how fundamental rights are hereby protected, and, in doing so, what the role of the independent court will be. is.
- Secret services in Europe, and, among others, the US, should, according to the SP, be given more space to share, without conditions, information on potential terrorists (p.30). It remains unclear who determines who should be considered a potential terrorist and when information can be freely exchanged with foreign intelligence services. Without further explanation, fundamental rights such as the right to privacy and the right to due process, will then come under pressure.

## VoorNederland VNL

### Orange

- VNL does not want to burden police officers with guidelines on ethnic profiling (p.3). The party thereby ignores the danger of ethnic profiling by the police, which may constitute discrimination.
- Life imprisonment is life-time, says VNL (p.3). That view ignores recent judgments of the European Court of Human Rights and the Supreme Court, and therefore ignores the fact that the Dutch government should adhere to (international) court decisions.
- VNL says to stand for a strict immigration policy, in line with Australian model (p.4). The proposed measures are in fact tantamount to abolishing the existing refugee policy. Without further explanation, this is in violation of international and European law.
- VNL suggests that immigrants, during the first ten years, shall not be entitled to social security (p.4). This runs counter to various treaty obligations, as laid down, among others, in the European Social Charter.
- VNL advocates abolition of both the Upper House and the Provincial Councils, but thereby pays no attention to the possibility of thereby jeopardizing the "checks and balances" in a democratic rule of law, which are important in order to keep the government predictable and controllable (p.9).

### Red

- VNL calls for the implementation of administrative detention for jihadists (p.3). Thereby they are completely denied access to justice, which is incompatible with the right of access to an independent court.
- The proposal that jihadists may not return to the Netherlands (p.3) is tantamount to expulsion, is potentially discriminatory and denies basic legal protection to people who have the Dutch nationality.
- VNL wants to introduce a passport points system for people with dual nationality whereby Dutch citizenship lapses when someone loses too many points (p.4). This broadly worded measure provides discrimination against the people who only have the Dutch nationality and can not be made stateless.
- VNL advocates a ban on foreign financing of mosques (p.4). This measure is discriminatory against the freedoms of other (religious and / or philosophical) organisations.

## VVD

### Green

- The VVD advocates various measures to combat discrimination. The party wants, for example, to adapt the family law to the present time and therefore recognizes the rights, for example, of homosexual parents and stepparents (p.17).

### Orange

- The VVD wants to "stop" asylum applications in Europe by providing adequate care in the region (p.19). It remains unclear how this proposal relates to existing international and European law on the accommodation of refugees.
- The VVD wants municipalities to get more opportunities to give an alternative destination to existing buildings in the area outside the cities, even if it conflicts with environmental legislation (p.80) of Without further explanation, . this is in conflict with the principle of a government who adheres to its own rules (environmental legislation) .
- The VVD wants to combat crime on the internet (cyber crime), by giving hacking, as special investigative power to the police. (p.15)<sup>10</sup>. Without further safeguards, this proposal may entail violation of the right to privacy of citizens.
- The VVD wants to immediately imprison returning Jihad fighters (p.14). The VVD acknowledges the need of a legal basis for doing so (p.14), but does not take a position on the necessary judicial review. To imprison just anyone without criminal prosecution or proceeding, is contrary to the right to due process before an independent court.

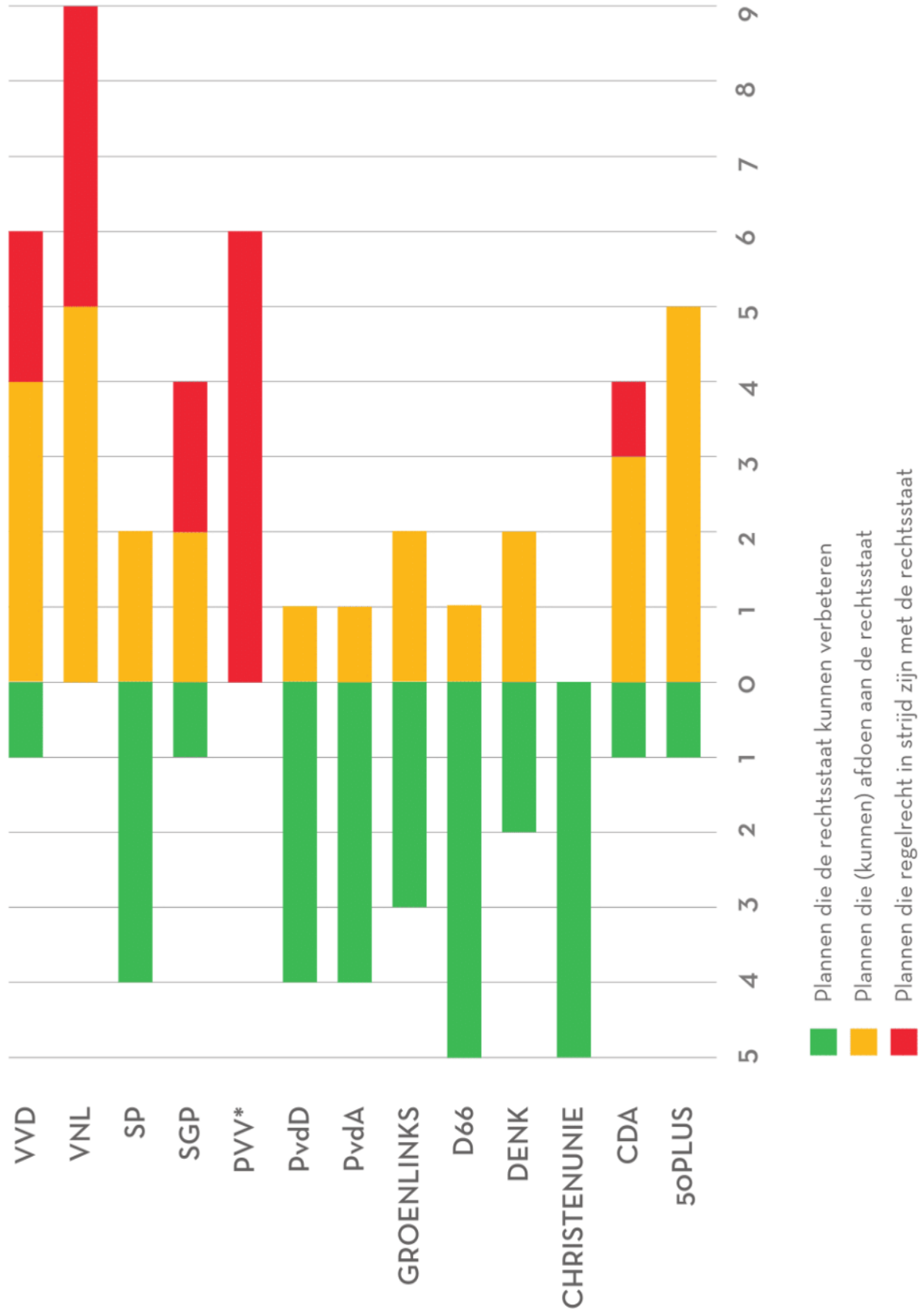
### Red

- Who joins a terrorist organization loses the right to be Dutch, says the VVD. In such a case, the nationality shall be withdrawn, whether someone is criminally convicted or not (p.14). The VVD wants to adapt international treaties, so that suspected terrorists with only the Dutch nationality can be made stateless (p.14). This plan is inconsistent with the universal principle that making its own citizens stateless , is contrary to human rights.
- The VVD does not want any longer that human rights from treaties and decisions of international organizations, have direct effect in the Netherlands. The VVD further wants to reduce the "judicial interpretation of human rights" (p.23). This proposal represents a substantial breach of the protection of fundamental rights in the Netherlands as is currently guaranteed by international conventions and independent Dutch and European courts.

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<sup>10</sup> This proposal is called the Computer Crime Act III. The proposal was adopted on December 20, 2016 by Parliament. The Upper House has a preliminary investigation on March 7, 2017.

# SIGNALERINGEN PER PARTIJPROGRAMMA 'RECHTSSTATELIJKHEID' - 2017



■ Plannen die de rechtsstaat kunnen verbeteren

■ Plannen die (kunnen) afdoen aan de rechtsstaat

■ Plannen die regelrecht in strijd zijn met de rechtsstaat

\*In het rapport krijgt de PVV vijf keer rood. In de Matrix krijgt de PVV zes keer rood in verband met het koranverbod. Dit voorstel is in strijd met de vrijheid van meningsuiting.

# SCOREKAART PARTIJPROGRAMMA 'RECHTSSTATELIJKHEID'

THEMA'S	50+	CDA	CU	DENK	D66	GL	PvdA	PvdD	PVV*	SGP	SP	VNL	VVD
<b>Voorspelbare overheid</b>													
rechtszekerheid													
naleving internationaal recht													
democratische controle													
<b>Bescherming fundamentele rechten</b>													
gelijkheid nationaliteit, etnisch, religieus													
gelijkheid leeftijd, handicap, seksueel													
leven, integriteit lichaam, zelfbeschikking													
privacy digitaal													
privacy overig													
asielrecht, voorkomen staatloosheid													
vrijheid van meningsuiting													
<b>Effectieve toegang tot rechter</b>													
eerlijk proces, rechtsbescherming													
toegankelijkheid rechtspraak													
rechterlijk toezicht op politie en justitie													

- De commissie heeft een of meer concrete plannen aangetroffen die de rechtsstaat (kunnen) versterken
- De commissie heeft een of meer concrete plannen aangetroffen die de rechtsstaat (kunnen) verzwakken
- De commissie heeft een of meer concrete plannen aangetroffen die regelrecht in strijd zijn met de rechtsstaat
- De commissie heeft geen (voldoende concrete) plannen aangetroffen die de huidige rechtsstaat noemenswaardig positief of negatief (kunnen) beïnvloeden

\*In het rapport krijgt de PVV vijf keer rood. In de Matrix krijgt de PVV zes keer rood in verband met het koranverbod. Dit voorstel is in strijd met de vrijheid van meningsuiting.

Als per thema meerdere kleuren toegekend zijn, telt rood het zwaarst.