Digital Equals Public

Assembly Meetings Under a Lockdown Regime

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Abstract

In this article we examine the Dutch emergency legislation for local democracy. In response to the COVID-19 pandemic in the Netherlands, the Temporary Act for digital meetings for local/regional government tiers was enacted. The legislature introduced a system of digital debate and decision-making for municipal and provincial councils, the democratically elected assemblies at the local and regional levels. At the same time the Ministry of the Interior and Kingdom Relations set up an evaluation committee to monitor and evaluate the working of the local and provincial governments with this temporary legislation.

This article discusses the content and application of the temporary provisions for deliberation and decision-making on a digital platform. The purpose of the legislation is to create possibilities for the elected representatives to continue their work during the lockdown. We examine the design and structure of the legislation and disclose the evaluation results so far. The arrangements aim for secure, transparent and reliable democratic practices. Early evidence pertaining to the effects of the Act show that it works effectively only up to a certain level. We critically discuss the sunset clause in the Act and plead against function creep. Moreover, the expectations now and in the future from continuous digitalization of this part of the democratic process should be modest. On the basis of our analysis of the characteristics of the legislation and the effects on the political work of the representatives, we conclude that the current form of digitalization does not provide for the interaction between representatives and their constituencies and the communities at large.

Keywords: COVID-19 regulation, temporary legislation, sunset clauses, digitalization, digital democracy, local democracy, experimental legislation.

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A Introduction

Just before mid-March 2020 the COVID-19 pandemic was prevalent in full severity in the Netherlands, making it necessary to impose restrictions on movement and public gatherings. This affected the democratic process at all levels of government, leading to decisions being postponed or sinking below a minimum level of visibility towards the population. To counterbalance this impact the Dutch legislature moved swiftly and, within 22 days, enacted the Temporary Act digital deliberation and decision-making local democracy, the Act of 8 April 2020. The Dutch legislature introduced the option of digital debate and decision-making for, among others, municipal and provincial councils, the democratically elected assemblies at the local and regional levels. In addition, the Ministry of the Interior and Kingdom Relations set up an evaluation committee to monitor and evaluate whether and how the relevant governments benefit from this temporary legislation.

The Act addresses decision abstinence and lack of publicity, which would make the democratic system deficient in providing legally valid decisions timely and transparently. The relevant government authorities are in no position to allow that to happen, according to the national government,[1] because they are not only dealing with the corona pandemic itself,[2] but also serving as essential links in the country's public administration to meet the challenges of today. Local and regional authorities should continue to act and be seen to do so,[3] and therefore intervention by statute was deemed necessary.

In this article we discuss the contents of the Act and disclose the evidence on its effect so far, as was collected by the evaluation committee shortly after the entry into force of the Act. We present and analyse the material as a country report, with some reference to international literature, with the aim of providing country-specific knowledge. This does not serve to contribute to the theoretical debate among comparativists about the value of comparative constitutionalism, as summarized by Voermans.[4] Our article, however, implicitly argues in favour of sharing knowledge across jurisdictions, not least in such pressing circumstances as the pandemic, being aware that any transposition of arrangements will be accompanied by an appropriate level of adaptation and acculturation.[5]

The article is organized as follows. Section B, the legal descriptive part, deals with the way in which the intentions of the Act were translated into allowances to divert from statutory requirements for a legitimate deliberation and decision-

1 Explanatory Memorandum, p. 1; all references to this memorandum regard the Dutch parliamentary documentation; Kamerstukken II, 2019-2020, 35424, nr. 3.

2 Incidentally, it is not the local councils but the mayors and the distinct security regions that are leading in the fight against the COVID-19 pandemic.

3 Explanatory Memorandum, p. 6.

4 W.J.M. Voermans, 'From legal imposition to legal invitation. From transplants to mutual learning, benchmarks and best-practice-inspiration', *European Journal of Law Reform* 2018. DOI: 10.5553/EJLR/138723702018020001003.

5 A. Baraggia, 'Challenges in comparative constitutional law studies: between globalization and constitutional tradition', *Law and Method*, October 2017. DOI: 10.5553/REM/.000026.

making. We examine the temporary nature of the Act in that section as well. Section C then moves to the empirical part, showing the outcome of the evaluation studies. We present our concluding remarks and recommendations in Section D.

B Content of the Temporary Act

By moving the bill so quickly, the Dutch legislature gave high priority to the continuation of deliberation and decision-making of the assemblies of elected representatives. Owing to the lockdown circumstances in the early weeks of the pandemic in the Netherlands, elected members could hardly come to assembly meetings in person, so meetings were not scheduled, adjourned or held with a part present and a part following online. Current statutory arrangements do provide for decision-making with a limited number of members physically present.[6] This so-called quorum procedure was used here and there, sometimes with the participation of others via an online platform, as a remedy against the risk of decision abstinence but was finally banned, being unattractive in the light of public support and democratic legitimization. Moreover, the procedure still requires the physical presence of persons, which was found to be in violation of the lockdown rules and a bad example on the part of the public authorities.

The public nature of the deliberation and decision-making was the main reason for submitting the bill for this Temporary Act. The Explanatory Memorandum communicates the central government's recognition of the extraordinary position of the local and regional representatives and illustrates the considerable weight it attaches to the publicity of the decision-making process, even in the context of the corona pandemic. The focus is on the members of the public being able to follow the assembly proceedings live stream, in order to secure its public nature. Articles 1.3, 2.3 and 3.1 provide for this transparency as a minimum requirement for legitimate deliberation and voting.

The focus of the temporary arrangement in the Act is on those procedures for which openness to the public is normally essential and laid down in law. That is particularly the case for the deliberation and decision-making of the assemblies of elected representatives, who in the constitutional construction are the highest authorities in the internal hierarchy. For those assemblies the relevant statutes require the meetings to be public by default.[7] Videoconferencing combined with open live streaming is presented in the Act as a temporarily legitimate alternative to the face-to-face assembly of the elected members. Seeing eye to eye and witnessing non-verbal language are supporting arguments for preferring

6 'Raad niet besluiteloos door Corona', Yolanda de Koster, Binnnenlandsbestuur.nl 17 maart 2020 (available at: www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/raad-niet-besluiteloos-door-corona.12646927.lynkx).

7 Art. 23 Provinces Act *(Provinciewet)*, Art. 23 Municipalities Act *(Gemeentewet)*, Art. 35 Water Authorities Act *(Waterschapswet)*, Art. 19 Act on Special Bodies Bonaire, St, Eustatius & Saba.

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videoconferencing and for rejecting audio broadcasting alone.[8] In essence, this Act expresses that 'digital' can also qualify as 'public' as long as certain minimum requirements are fulfilled. On the contrary, all varieties of non-public meetings, secret votes, etc. cannot be digitalized on the basis of this Act.

In five short chapters the Act allows the various types of decentralized government to switch to digital proceedings for their assemblies. The Act is drafted as an exception to the various statutes that apply to these decentralized bodies, as quoted previously, and essentially follows the same pace for all. It allows for the public meetings of the assembly of elected representatives to be held in a digital environment and sets minimum requirements for that meeting and regulates the voting procedures and the digital meetings of official committees of those assemblies. It also provides for the delegation of legislative powers to the Minister of the Interior and Kingdom Relations to frame rules regarding details of technical requirements, public access and further procedural details A separate chapter deals with allowances when certain statutory time limits for financial reporting are not met, due to the pandemic. That part of the Act is not relevant for this article.

Government bodies falling under the Act are, primarily, the three public bodies resulting from geographical decentralization: provinces (Chapter 1 of the Act), municipalities (Chapter 2) and the special bodies for the three small islands in the Caribbean that do not have autonomous status: Bonaire, St Eustatius and Saba (Chapter 5). The water authorities (*waterschap*) are a product of recognized functional decentralization that is deeply rooted in Dutch history. For their proceedings the Act also provides for digitalization (Chapter 3).

The statutory publicity requirement can be fulfilled, according to the Act, when the meeting in the digital environment can be followed by the population real time but remotely, that is, through a live video connection. Minimum requirements for a digital meeting to qualify as such are the following: (i) Every member has access to the deliberations and voting. (ii) Every member's identity is visibly and audibly verifiable by the chairperson, the co-members and the public. (iii) The chairperson is capable of maintaining order on the floor and of deciding on the sequence of the voting items. Interestingly the Act does not list computer security criteria, where the explanatory memorandum explicitly requires that no technical interference with the debate and decision-making process can happen, either from inside (support staff) or from outside.

Most of the decisions in such assemblies are taken by majority vote. Voting by way of a public declaration during the videoconference is the default procedure for items that do not require a secret vote. The form of that declaration can be adapted to the platform that is used, be it by way of vocal expression, clicking on an icon or virtual hand raising. The chairperson can decide to switch to letter voting, when he or he thinks it appropriate, ending in non-secret letter voting, following the procedure of the secret letter vote. For some items a secret vote is mandatory by statute. Then the voting should always take place by letter. For combining digital meeting with voting by letter a manual has been distributed by

8 Explanatory Memorandum, p. 5.

a multi-stakeholder platform for local democracy[9] to support local councils and their clerks. According to the Act and that manual, a vote letter is delivered by council members to the ballot box or sent by mail or courier. Further details on authenticity and secrecy are included in the manual.

Chapter 4 of the Act attends to a specific topic. Joinder of municipal functions in a common organization has been recognized by a separate statute (the Act on Common Regulations), and the Temporary Act does provide for exceptions to that statute in order to allow the same digitalization to happen in the context of the common activities. The same specificity is true of Chapter 6, where the Act allows the minister to indulge provincial and local authorities when the corona crisis causes delays in their conclusion of financial accounts. This concerns the budget relations between central government and provinces and municipalities, as laid down in the Financial Relation Act.

Chapter 7 contains two general provisions, giving the official citation title of the Act and, more importantly, providing for the temporary character of the Act. Article 7.1 arranges for immediate entry into force after publication of the Act and for a fixed end of force on 1 September 2020. That fixed end can – according to the second sentence of Article 7.1 – be postponed by way of a Royal Decree,[10] each time for a maximum of two months. The Act thus carries a sunset clause in order to express the temporary nature of the whole arrangement. It is one of the instruments by which the legislature can secure the effect of a change of circumstances in the future and render the arrangement a temporary one, for which we now live in a golden age, according to Bar-Siman-Tov.[11]

In the literature on temporally limited legislation a distinction is described between legisprudential or technocratic uses, on the one hand, and a political use, on the other hand.[12] The first category of use applies to those instances where the legislature seeks to improve the quality of the new rules – in terms of its adaptability to changing circumstances – by proactively building in a review process. Regulation that allows for evaluation after some time, with input on the effects of the rules from the regulated field, is smarter or more responsive and a better safeguard for effective impact on the field.[13] The second category, political use, applies when the temporal limitations are instrumental in overcoming political hesitations or outright opposition against proposed legislation. The

9 Program Democracy in Action 2018-2022, a cooperation of the Ministry of the Interior & Kingdom Relations, the Assembly of Dutch Municipalities and the national unions of council members, aldermen, council clerks, municipality secretaries and mayors; available at: https://lokale-democratie.nl/.

10 A Royal Decree is a decision taken by the government and signed by the monarch. In the Dutch legal tier system, it is ranked between the decision of an individual minister and the decrees that require involvement of parliament (*algemene maatregel van bestuur*).

11 I. Bar-Siman-Tov, 'The lives and times of temporary legislation and sunset clauses', *American Journal of Comparative Law* 2018, 66(2), 453-457 on 453.

12 I. Bar-Siman-Tov & G. Harari-Heit, 'The legisprudential and political functions of temporary legislation', in S. Ranchordas & Y. Roznai (eds.), *Time, Law and Change: An Interdisciplinary Study*, Oxford, Hart Publishing, 2020, 227, on 230.

13 N. Gunningham & D. Sinclair, 'Smart regulation', in P. Drahos (ed.), *Regulatory Theory. Foundations and Applications*, Australian National University Press, Acton (AUS), 2017, 133-148.

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threshold to support a bill in the legislative process is lowered with reference to the 'only temporal' nature of the proposal. A delegation of power is sometimes hidden in the review arrangements when the involvement of parliament is exempted for the consecutive review of a statute. These are referred to in the literature as 'Henry VIII clauses', referring to the 16th century English ruler, who is associated with a tendency to bypass parliament.[14]

First and foremost, the sunset clause in this Temporary Act bears a technocratic nature. Evidence for that is found in the parliamentary documentation.[15] It is a statute that intervenes in a crisis situation, which is expected to be temporary. At the end of this specific situation, the legislation can and should be withdrawn, and a simple way to achieve that effect is the actual sunset. Despite this technocratic intention of the bill, the political use of the sunset can also be traced, particularly in the various contributions to the, in itself rudimentary, debate on the bill in the two houses of the Dutch Parliament. The video record of the row of senators climbing the lectern to stress their consent being dependent on the temporal nature of the Act provides clear evidence of this consideration.[16]

In order to remain within the technocratic usage of time limits, a reference to the pandemic in the arrangement for postponement and an inclusion of the discussion of the evaluation reports in parliament by way of a procedural provision would have been consistent.[17] However, Article 7.1 contains neither any criterion for the decision to postpone the fixed end nor a procedural requirement to involve parliament in the decision and discuss the reports of the evaluation committee, before an extension is decided. The absence of both substantive and procedural thresholds allows for the extraordinary provision to still be in force long after the current crisis has been overcome. A misplaced enthusiasm for digital meetings, that is, a short memory regarding the supremacy of physical meetings, discussions and voting over digital proceedings,[18] can lead the central government to use the extension option beyond its original context.

A fortunate counterbalancing mechanism against this shortcoming is found in the fact that the relevant assemblies are independent in regard to whether and for how long they use the exceptional digital platform.[19] The presiding mayor or governor or the majority of the members can decide to move the meetings from the digital platform back to their assembly halls, irrespective of the continuation

14 Lord Rippon, Henry VIII Clauses, (1989) *Statute Law Review*, 205-207; N.W. Barber & A.L. Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty', *Public Law* 2003, 113, available at: SSRN: https://ssrn.com/abstract=2744709; C. Forsyth & E. Kong, 'The constitution and prospective Henry VIII clauses', *Judicial Review* 2004, on 17, fn. 1.

15 *See* the Explanatory Memorandum, p. 3.

16 Available at: www.eerstekamer.nl/verslagdeel/20200407/wetsvoorstel (last accessed 01 October 2020).

17 A. Kouroutakis & S. Ranchordas, 'Snoozing democracy: sunset clauses, de-juridification, and emergencies', *Minnesota Journal of International Law* 2016, 25(1), 29-78, on 55-56.

18 As confessed to on p. 3 of the Explanatory Memorandum.

19 The minister points to this aspect in the Explanatory Memorandum on p. 8.

of this Act beyond the emergency it is designed for.[20] However, there is duality in this independence. The political rulers of the day, usually a majority of the members of the relevant assembly, may find the practice of digital deliberations attractive. It may be perceived as a welcome brake mechanism on the long but non-consequential statements of the members of the opposition, which render council meetings very time-consuming and inefficient. The Act does not contain a safeguard against the toxic mix of a central government with short memory and a less democratically inclined local majority. Explicit criteria and more procedural safeguards for the extension could have presented a mechanism against such an occurrence in the future.

The Dutch parliament has already been informed by letters of the Minister of the Interior of the first and second deferral of the sunset. Those letters, however, carry very few supporting arguments. The first letter[21] states that circumstances have not changed and that it is better to provide certainty before the summer recess. What is important to note is that the evaluation committee also pleaded in its first report for this extension. The first period of three months may have been unrealistically short, anyway. The second letter[22] refers to the rising infection rates in the fall and to the request for deferral from organizations on behalf of the actors involved in the local and regional governments.

The Act remains silent on technical requirements. The relevant authorities have independence in regard to their choice of IT systems. A limited number of mainstream systems are available, yet technology neutrality has primary importance. Intending to meet this standard, the Act does not prescribe any process or scenario but merely lists the substance of the requirements for a legitimate assembly debate and decision. The practical challenges lie in the combination of a videoconferencing platform with the system already in use for document distribution and information to council members.[23] Disruptions in the IT are dealt with, not in the Act but in the explanatory memorandum, as impediments to participate, comparable to illness and other force majeure. As long as the minimum number of voting members remains digitally present, the ballot is valid.[24] Unlawful interventions in the decision-making by breaches of IT security have been mentioned previously and are to be excluded under the substantive requirements.

20 One of the provinces already decided to return to physical public meetings at a locality that allows for the observance of COVID-19 measures; with a reference to the poor quality of the digital debate; available at: www.noord-holland.nl/Actueel/Archief/2020/Augustus_2020/Provinciale_Staten_vergaderen_vanaf_14_september_in_Egmond (last accessed 02 October 2020).

21 Kamerstukken II, 2019-2020, 35424, nr. 7.

22 Letter of 8 October 2020; at the time of concluding this article a number in the file Kamerstukken II, 2019-2020, 35424, was not yet published.

23 Explanatory Memorandum, p. 6.

24 *Ibid.*, p. 5.

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C Application of the Temporary Act

This section explains the application of the Temporary Act as it was found by the evaluation committee. The committee focused its research on three aspects, in line with the assignment it received from the ministry: (i) legal and constitutional aspects (ii) technical and cybersecurity aspects (iii) political aspects. The committee published two reports so far, one in May 2020[25] and the other in July 2020.[26] A third report is announced for November 2020. In the next paragraph the data and facts after the first month of working with the Temporary Act are presented. Topics are the participation rate, the technical and security details and the preliminary appreciation of digital deliberation and decision-making. After that, section II analyses the July Report, which revealed more details about the actual impact on the political and democratic practices within the relevant authorities. Questions dealt with are as follows: How do the local councillors consult and deliberate? Do they see sufficient opportunities for proper debate?

I The First Report

In the first report the focus is mostly on facts and figures in regard to the use of the Temporary Act by the local governments. These have been gathered primarily between 1 May and 13 May by conducting surveys among the clerks at the different local and regional levels. Table 1[27] gives the distribution on the actual meetings in a digital environment.

Table 1

Have digital meetings already been held in your municipality/ province/water authority?	**Municipalities**	**%**	**Provinces**	**%**	**Water authorities**	**%**
(1 answer possible)						
yes	192	88	11	92	13	65
No, but a digital meeting has been scheduled	15	7	1	8	5	25
No, and there are no concrete plans yet	12	5	0	0	2	10
N	219	100	12	100	20	100

As the table shows, in the majority of the municipalities (88%), provinces (92%) and water authorities (65%), digital meetings took place by mid-May. No digital meetings have been conducted by the island councils in the Caribbean in April and May. In two-thirds of the municipalities, decisions have been made during

25 Available at: https://kennisopenbaarbestuur.nl/rapporten-publicaties/eerste-tussenrapportage-evaluatiecommissie-tijdelijke-wet-digitale-beraadslaging-en-besluitvorming/.

26 Available at: https://kennisopenbaarbestuur.nl/rapporten-publicaties/tweede-rapportage-evaluatiecommissie-tijdelijke-wet-digitale-beraadslaging-en-besluitvorming/.

27 First report of the Evaluation committee, May 2020, p. 22.

the digital council meetings. This number is higher (three-quarters) in the provinces and water authorities. Most local governments have produced more detailed and mainly informal agreements about the various aspects of digital meetings, such as the speaking order on the digital floor.

Little use has been made of the option of a voting app in digital meetings. A voting app was used in only 9% of local council meetings and in 25% of provincial meetings. The Temporary Act also makes it possible to vote in writing, but this option has been used even less. The committee found only two instances of non-secret letter voting.

The surveys contained questions about personal experiences concerning the digital meetings as well. The majority of the clerks replied with a positive or neutral answer. 'It works, but it's not ideal' is a statement that sums up the opinion of the clerks. It is found to be a good alternative during this corona pandemic, but there are all sorts of disadvantages. Representatives miss the contact and interaction that are normally there during physical meetings, debating is more difficult, and the digital meetings are experienced as more intense and tiring. Managing and guiding the digital meetings is difficult for most chairpersons, especially when technology is ailing or failing.

1 Technical and Cybersecurity Aspects

With regard to the technical and cybersecurity aspects, it is important to distinguish between deliberation meetings and decision-making meetings. For deliberation, most decentralized authorities in the Netherlands make use of widespread commercial platforms such as Microsoft Teams and Zoom. The software is easily available, has already been used in some cases or can easily be connected to other software that has been used before. These systems, however, have some disadvantages, according to the report. While Zoom is user friendly, it had received frequent negative attention in the media owing to security risks. Microsoft Teams is secure and stable but has the limitation that a maximum of four participants can be displayed simultaneously. This is not only perceived as impractical during a meeting but can also raise questions when voting has to take place in the decision-making meetings. The evaluation committee also notes that a few incidents have been reported but no major ones. A lot of work has been done to get digital meetings off the ground in municipalities, provinces and water authorities. Although there are sometimes technical problems and members take time to get accustomed to the new style, meetings often continue as usual and incidents can presumably be qualified as start-up problems.

For the voting at decision-making meetings, there are security risks when using separate voting apps. The greatest risk concerns establishing the identity of the voter: it cannot be established with sufficient certainty that the elected representative who takes part in the meeting is the same individual who expresses his vote in the voting app. This risk is not present when one digital environment is used for meetings and voting. The evaluation committee realizes that the majority of municipalities and provinces, as well as all water authorities, chose not to use digital apps to vote. But where digital deliberations and decisions

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would be structurally embedded in the future, the evaluation committee deems it necessary to repair the current discrepancy between digital versus physical voting. It is recommended that representatives can vote within the digital meeting environment so that the persons whose identity has been irrefutably confirmed in the meeting can vote for themselves. For the medium to long term, the evaluation committee considers it desirable that providers of meeting software implement safe and effective voting facilities or make it possible to vote by hand raising after identifying all those present in a meeting. It is important that this software shows not only totals after a vote, but also the precise distribution of votes.

2 Standards of Legitimacy

On the four legal quality criteria discussed in Section B and one additional test regarding perceived equality on the political playing field the evaluation committee collected limited evidence in its first report. It found that digital meetings have perceived impact on the political playing field. There is not enough space for everyone, the speed of interaction is lower and new skills are required. Regarding public access, it has become apparent that the already developed practice of internet streaming, supplemented by broadcasting via local media, is sufficient for passive public access. A start has been made on creating the ability to provide active communication during the digital meeting. The individual digital accessibility of the meeting for representatives is fulfilled mainly with a duty of care for the clerks and supporters of the general management. They pay attention to individual support and try to offer tailor-made solutions. In addition, when calling a digital meeting, chairpersons seem to be aware that they must take into account the objections of a potentially less digitally skilled minority, and in practice meetings are suspended and postponed in the event of technical problems. There is a reassuring caution in the use of voting apps with regard to the integrity of decision-making. If they are used, in practice they fulfil a facilitating role in identifying the voting ratio. The effective ban on hybrid meetings is important because it safeguards equality on the political playing field. In practice, the combination of a decision-making meeting in which the quorum is composed partly digitally and partly physically does not seem to occur any more. That is not to say that other threats to the political playing field cannot arise. However, the evaluation committee has not yet been able to collect general information about this. Finally, the digital meeting order also appears to be going well in practice. In about 1/10 of the digitalized meetings of 192 municipalities the chairperson needed to intervene, and the qualitative evidence showed that this capability was actually used. That capability was the fourth standard of legitimacy mentioned in the Act.

However, organizing an adequate and efficient meeting order was found to be seriously hampered by the limited possibilities of the available platforms. A functional environment that shows all meeting participants simultaneously and/or can change more quickly in the event of a joint call, would considerably increase the opportunities for 'sound democratic decision-making', according to

the committee. With regard to safeguarding some institutional decorum, the third element that the commission assigns to the concept of the order of the meeting, useful standards appear to be developing in practice. All in all, from the legal perspective, the committee has concluded that there is no reason to amend the Temporary Act or to make use of the option to set further ministerial rules.

II Results From the July Report: The Political Administrative Effects on Local Governments

In the first report of May, the evaluation committee concluded that the Temporary Act clearly met a need. Based on the outcome of the survey among clerks, supplemented with self-collected information, the committee concluded that in practice meetings were lawful and cyber-secure. In any case, there was no reason to amend the Act or to impose further national rules. The narrowest bottleneck was the lack of good videoconference software.

The report from the evaluation committee, issued in July, supplements, updates and refines the conclusions from the first report.[28] The main new sources of information are as follows: a manually collected overview of all decentralized plenary meetings between 15 March and 15 June, a survey among all decentralized representatives and a series of interviews by the committee with those directly involved. This regards the representatives, the mayors, aldermen and (town) clerks for municipalities and the comparable actors for the provinces and water authorities. On the basis of these results, the evaluation committee finds that the Temporary Act still meets a need, albeit increasingly as part of a varied practice of meeting in the one-and-a-half-meter society.

In the report for July, the committee reports on user experiences with the Act to date, concluding that they are not disappointing. Although the already known drawbacks of digital meetings are confirmed by the representatives (not enough speed, not enough interaction, not enough emotion, technical hassle), the statement 'digital meetings went better than I thought' shows that there is a considerable level of consensus. Age, education level of the representatives or size of municipality do not appear to make much of a difference. Significant for the preliminary opinion among the political users of the law is the conclusion with regard to the future: more than half would consider digital meetings to be a possibility that should remain available as an alternative. That certainly does not mean that there is nothing to improve in current practice. Support, in the form of technical assistance, could be improved, and the limitations imposed by the meeting software remain a problem in the eyes of the evaluation committee. But all in all, the overall consensus in the second report can be summarized as follows: 'It still isn't ideal, but it can become an alternative for physical meetings'.

In its second report the evaluation committee reports a variety of perceptions on the number of real-time followers at the digital assembly meetings and the composition of the public. Some interviewees suspect that in corona times a new

28 Second report of the evaluation committee, July 2020, pp. 11-16.

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kind of public interest has been raised. Others assume that the followers come from already involved groups, such as the internal civil servants, people actively supporting the political factions and (in the case of provincial assemblies) municipal representatives.

Not much could be said in the first report of May about the impact of the use of the Temporary Act on relations relevant for the political process. Local and provincial democracy and administration feed on relations between councillors and their electoral constituencies, between councillors among themselves and between councillors and the contexts of business, residential areas, local pressure or lobby groups etc. According to the second report, it is now clear to the evaluation committee that the representatives themselves experience considerable limitations in their role as councillors, where they want to fulfil their threefold constitutional function: setting the framework for the administration, controlling that administration and representing the people. However, it would be too short-sighted to blame digital conferencing for this. The lack of contact with the supporters is not primarily a result of digital meetings, but more of the corona crisis and the crisis measures in general. Furthermore, many representatives, especially of opposition parties, believe that the fulfilment of their framework-setting and controlling role is suffering in the digital meeting era. This observation is confirmed since many boards have not involved the representatives in the decision-making on aid packages with budgetary consequences. This indicates that the challenges for local democracy during the corona crisis are certainly not only caused by digital meetings and also not sufficiently remedied by the provisions of the Temporary Act. We will discuss this further in the next paragraph.

D Concluding Remarks and Recommendations

In this article we discussed the contents of the Temporary Act digital deliberation and decision-making local democracy and examined the evidence on its effect as was collected by the evaluation committee. Section B described the intended technology-neutral approach in the Act in allowing the switch from mandatory public presence meetings to any digital environment and only specifying the substantive criteria for legitimacy. The sunset clause in the Act was also discussed, and, in particular, the lack of criteria for postponing the end of the Act was critically highlighted.

Section C delved into the results of the evaluation committee as presented in their reports of May and July. In sum, the vast majority of the relevant assemblies actually used the opportunity to meet in a digital environment and was able to meet the substantive criteria. The evaluation committee has not yet dug deeper into the topic of high interest, namely public access to the digital assembly meetings. Exact measurements of the quantity of active followers from the public in this new medium have yet to take place. It must be quite easy to collect the relevant data from the provinces' and municipalities' IT staff if they

deploy a simple counting device for unique visitors on the platform. It is the committee's intention to report on this issue in its third report, scheduled for November. When it comes to the political administrative aspects, the committee saw that digital conferencing impacts the political debate in the wider sense.

Our reflection on this last issue is that this effect should be ascribed not only to digitalizing the official meetings, but also to the corona crisis in its entirety. Deliberation and decision-making are important parts of the political process, which can be accommodated by digital meetings. But it was never the intention of the Temporary Act to accommodate the broader democratic process of interacting with the constituency and the objects of administration. We mean the site visits, the receptions, the soapboxes for the politicians at openings, the informal communication among politicians and with the public at large. Democracy is – also under COVID-19 circumstances – more than just the exchange of substantive points of view followed by voting in a digital meeting. We recommend the actors that are in a position to do so, to communicate clearly about the limited ambitions of digitalization in its present form. In addition, the other forms of interaction should be accommodated and incentivized to the extent possible while observing social distancing. We advise the platform Democracy in Action (footnote 9) to act as a useful forum for the exchange and development of good practices.

We discerned a first signal that the digitalization under the COVID-19 pressure turns out to be a laboratory for changing the mode of deliberation and discussion in the future. References to the more distant future in the July Report of the committee, accompanied by pleas for improvement of the platforms for voting, indicate that at least a share of the relevant actors already imagines such changes. Arguing in favour or against this would overstep the boundaries of this article, but we want to proactively criticize a facilitation of this change by extensive use of the extension clause in the Act. We have shown in Section B that the text of the Act would not prevent this but it would effectively suspend a statute without the mandatory parliamentary consent. In that sense the chosen procedure – a Royal Decree suffices to extend the exceptional regime – indirectly injects a Henry VIII clause into the statutory arrangements for the normal situation, which is unwarranted and unconstitutional.[29]

Moreover, the temporary nature of the Act would change purpose, from enabling flexibility to respond to changing circumstances to: enabling experimentation. This is in our view an acceptable – also technocratic – use of sunset clauses,[30] but we recommend not to do so without going back to parliament. An important aspect of local/regional democracy would be affected by

29 A bill for a Temporary Act to cover the wider range of COVID-19 measures (Kamerstukken II, 2019-2020, 35526, nr. 2) was heavily criticized on this specific point: extension without parliament. At the time of writing, the bill was slightly amended by the government on this topic; Kamerstukken II, 2020-2021, 35526, Nota naar aanleiding van het verslag, p. 46, items 107-110, 114. Parliament is informed and is given time to debate and intervene, but explicit consent is not required.

30 S.H. Ranchordás, *Sunset clauses and experimental legislation: Blessing or curse for innovation*, Koninklijke Wöhrmann B.V., 2014.

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such a function creep. It would be more consistent with the Dutch statutory rules for local or regional government to insert the desired digital component in the relevant statutes, which would entail parliamentary consent.

The statutory arrangements for the assembly meetings in the Municipalities Act do not detail the place of the meeting. Internal Regulations of the assembly can do that, and there are instances where the official Assembly Hall has been indicated as *the* place of meeting. Unless the regulation permits making an exception in special circumstances, the local assembly may be locked in its own Hall. The Temporary Act does not provide for such an exception, but it also does not oblige the assemblies to move out of their dedicated place of meeting. It is for the relevant assemblies to adapt their Internal Regulation to the digital meeting order, if so desired, an adaptation that may be decided on only in a physical meeting in the dedicated Hall.

The reports of the evaluation committee show that the elected representatives perceive the digital meeting practice as a good emergency alternative, though far from ideal. There are several parts of the political process, such as agenda meetings, presidency meetings and other procedural meetings, that do not entail the interaction with the constituency, carry almost no political weight and could therefore be safely transmitted to a digital meeting platform. Along these lines, a practice might evolve in which the digital mode becomes the default for these meetings of a procedural nature, where political decisions are not taken and where this digital mode may prove to be very efficient. In case the Internal Regulation comprises the aforementioned lock-in, an explicit adaptation of the rules must be necessary. Not unlikely is that this mode survives the pandemic context; a form of creeping digitalization of the meeting practice that we would find less problematic because of the low political impact and the non-statutory nature of the regulation.

Finally, we would like to stress here that doubts should be raised every time the corona-induced digitalization is reframed as experimentation. It has not been a choice between comparable alternatives in a proper experimental set-up. The alternative to digital meetings was to suspend the democratic process, with potentially major consequences that needed to be avoided, obviously at a cost. Consequently, any evaluation of the so-called experiment would be tainted by the duress-like nature of the pandemic and not render sound evidence as an appropriate basis for such major changes.