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'The rule of law and Constitutional Justice in the Modern World'

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Questionnaire

Reply by

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THE NETHERLANDS: THE COUNCIL OF STATE

A. The rule of law and Constitutional Justice in the Modern World

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The rule of law is not explicitly part of our Constitution. There is no provision in the Netherlands constitution explicitly referring to the rule of law as such.¹ Nevertheless, it is beyond doubt that the Dutch State is a *democratische rechtsstaat*, a democracy based on the rule of law. In Dutch legal culture, those two concepts are connected. The rule of law sets limits to majority decision-making in order to protect minorities. Secondly, the concept of legality is understood in the way that the main norms preferably should be enacted by the parliamentary legislature. Moreover, restrictions to fundamental rights in Dutch legal culture should rest on explicit provisions enacted by the parliamentary legislature.

Elements of the rule of law – such as legality, applications of the doctrine of separation of powers, fundamental rights and an independent judiciary (see below, § 2) – are enshrined in the Netherlands Constitution and in Acts of Parliament, though. See the following examples.

- First, the principle of legality in criminal law is laid down in Article 16 of the Constitution and in section 1, paragraph 1, of the Criminal Law Code.
- Secondly, applications of the doctrine of separation of power can for instance be found in Article 57, paragraph 2, of the Constitution, providing *inter alia* that a member of the States-General may not be a Minister, State Secretary, member of the Council of State, member of the Court of Audit, National Ombudsman or Deputy

¹ Please note that the Netherlands Constitution does not have a preamble.

Ombudsman, member of the Court of Cassation or Procurator General or Advocate General at the Court of Cassation.

- Thirdly, chapter 1 of the Netherlands Constitution contains a fundamental rights catalogue including fundamental freedoms and social rights.
- Finally, the independence of the courts is protected by the Constitution. Article 112 reads:
 1. The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.
 2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament.Article 116 provides *inter alia* that the courts which form part of the judiciary is specified by Act of Parliament and that the organisation, composition and powers of the judiciary is regulated by Act of Parliament.
Article 117, paragraph 1, of the Constitution and Article 74, paragraph 2, of the Constitution hold that members of the judiciary responsible for the administration of justice and members of the Council of State respectively shall be appointed for life by Royal Decree. Such persons shall cease to hold office on resignation or on attaining an age to be determined by Act of Parliament. See also sections 2, 8 and 10 of the Council of State Act.

Besides, the rule of law (or elements thereof) is referred to in case-law – including the case-law of the Administrative Jurisdiction Division of the Council of State, as will be explained below in § 4.

A draft law to change to Constitution has recently been proposed to Parliament.² This draft proposes to add to the Netherlands Constitution the following provision preceding Chapter 1: “*De Grondwet waarborgt de democratie, de rechtsstaat en de grondrechten*” [The Constitution guarantees (the) Democracy, the rule of law and (the) Fundamental Rights].³ The Advisory Division of the Council of State⁴ had issued an opinion in which it expressed concerns with the formula proposed by Government, as it felt *inter alia* that its normative meaning and the consequences for the (constitutional) legislature and for the courts should be made sufficiently clear.⁵

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

Formal and substantive concepts of the rule of law are known to Dutch constitutionalists but they do not play an important role in legal debate. In general the rule of law is perceived as a substantive concept. There is an abstract and a more concrete approach towards the rule of law.

² First round of the procedure for amending the Constitution; see Articles 137-139 of the Constitution.

³ *Kamerstukken* [Parliamentary Documents] 2015/16, 34516, No. 2.

⁴ This Division is required to give advisory opinions on every draft statute (including proposals to approve of treaties) and every draft order in council before it is debated in Parliament, see Article 73, paragraph 1, of the Constitution.

⁵ *Kamerstukken* [Parliamentary Documents] 2015/16, 34516, No. 3. The Advisory Division had further concerns relating to the relationship between the three constituent parts, the fact that the provision addressed the constitutional legislature and the use of articles (‘the’ Democracy and so on).

It is agreed that the rule of law generates some concrete basic elements which have a firm basis in Dutch constitutional law and, accordingly, play a big part. Some of these elements are more formal, others clearly are of a substantive nature.

Among the basic elements – according to Dutch legal doctrine⁶ – are in any case:

- legality (first, every act of state entities and organs must be based on general rules enacted on the basis of an own power or a power delegated to them; secondly, every act which is punitive in nature or otherwise poses a burden on citizens must be based on a general rule enacted prior to the said act);
- the concept of separation of power (especially the requirement that legislation and execution in the sense of administrative government are not exercised by the same branch of the state/state entity, in the sense that members of the government cannot be members of Parliament. Admittedly, government is co-legislator and may issue orders in council, but the essence of laws, that is the main features of laws, require the involvement of Parliament);
- fundamental rights; and
- an independent judiciary.

According to the Netherlands Scientific Council for Government Policy, the rule of law is a multi-levelled concept: there are 'basic concepts', 'constitutional principles' and 'constitutional positive norms' and, finally, cases in which these are applied.⁷ If the rule of law is perceived as 'multileveled', one can for instance think of 'legality' as a basic concept, of 'equality before the law' as a constitutional principle and of the 'positive norm' stipulating that 'All persons in the Netherlands shall be treated equally in equal circumstances', a norm which is laid down in Article 1 of the Constitution of the Netherlands.⁸

In 2010 the (then) Vice-President of the Council of State started a project on the legal meaning and scope of the rule of law in the Council of State's judgments in administrative law cases and advisory opinions on draft legislation.⁹ This research focused on the rule of law in Dutch legal doctrine and in the Council of State's judgments and opinions. The project included some 60 judgments and 60 advisory opinions. After the examination of these 120 cases, the researchers concluded that the Council of State also seemed to apply

⁶ Wetenschappelijke raad voor het regeringbeleid [Scientific Council for Government Policy; WRR], *De Toekomst van de nationale rechtsstaat* [The Future of the National Rule of Law], WRR: Den Haag 2002; C.W. VAN DER POT/A.M. DONNER, *Handboek van het Nederlandse staatsrecht* [Text Book on Dutch Constitutional Law], edited by D.J. ELZINGA, R. DE LANGE and H.G. HOOGERS, Deventer: Kluwer 2014; A.D. BELINFANTE, J.L. DE REEDE and editors, *Beginnelsen van het Nederlandse staatsrecht* [Principles of Dutch Constitutional Law], Deventer: Kluwer 2015; A.W. HERINGA and Others, *Staatsrecht* [Constitutional Law], Deventer: Kluwer 2015; M.C. BURKENS and Others, *Beginnelsen van de democratische rechtsstaat* [Principles of a Democracy based on the Rule of Law], Deventer: Kluwer 2012; C.A.J.M. KORTMANN and Others, *Constitutioneel recht* [Constitutional Law], Deventer: Kluwer 2016.

⁷ Wetenschappelijke raad voor het regeringsbeleid (WRR-rapport), *De Toekomst van de nationale rechtsstaat* [The Future of the National Rule of Law], WRR: Den Haag 2002.

⁸ For examples in relation to our Court's case-law see the report on the Rule of Law presented by M. VAN ROOSMALEN at the 11th meeting of the Joint Council on Constitutional Justice in Brno, Czech Republic, in 2012, CDL-JU(2012)017.

⁹ W.J.M. VOERMANS and J.H. GERARDS, *Juridische betekenis en reikwijdte van het begrip 'rechtsstaat' in de jurisprudentie & jurisprudentie van de Raad van State* [Legal Meaning and Scope of the Rule of Law in the Council's Judgments and Advisory Opinions] (Studies en Rapporten No. 4), The Hague: Council of State, 2011.

constitutional principles which were not connected to the rule of law by Dutch legal authors, such as the separation of State and Church and the notion of pluralism.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

Our Court is the Administrative Jurisdiction Division (“AJD”) of the Council of State, an appeal court and one of the superior courts in the country. No appeal in cassation can be lodged against its judgments. Not only is our Court the highest court in spatial planning- and migration cases, but it is also the highest administrative law court with general jurisdiction.

The *specific fields* in which our Court most frequently ensures respect for the rule of law are the following:

- Migration law;
- Punitive administrative law (e.f. administrative penalties); and
- Electoral law.

Besides, the following *relevant topics* can be highlighted from the Court’s case-law:

- Equality of the law in general administrative law cases;
- Intensity of review;
- Administrative procedural law.¹⁰

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

There are some cases in which the Court has *explicitly* referred to the rule of law as a concept. For instance, the Court has frequently held that, bearing in mind the importance in a state governed by the rule of law attached to access to an independent court, it could not be accepted, in the circumstances of the case, that an appeal would be declared inadmissible for not having paid court fees.¹¹

Another example in which explicit reference was made to the rule of law is the *Landsbanki Case*.¹² Provincial and municipal administrative orders to commence collection proceedings against the Icelandic bank Landsbanki should not have been annulled by the Crown on the basis of the reasons given for the reversal, the Council of State held. The justification requirements set for this type of Royal Decree had not been met. The justification given by the Crown must be comprehensive and understandable. The Administrative Jurisdiction Division of the Council of State held that it did not follow from the reasons given by the

¹⁰ The ECHR is quite important to these fields and themes, see below § I.6

¹¹ See for instance AJD, judgment of 12 October 2016 in Case No. 201508042/2/A3, ECLI:NL:RVS:2016:2730, and judgment of 19 March 2014 in Case No. 201211628/1/A3, ECLI:NL:RVS:2014:915.

¹² AJD, judgment of 2 April 2009, Case No. 200809196/1, ECLI:NL:RVS:2009:BI1842, *The Provincial Executive of Noord-Holland and Others v. the Crown*, CODICES NED-2009-1-001.

Crown in the present Royal Decree, how the public authorities' interests in terms of legal certainty (access to the civil law courts) had been taken into account in the decision-making process preceding the Royal Decree. This was a very serious matter, as legal certainty is essential to a democratic state under the rule of law.

In the *SGP Case* reference was also made to the way in which the legislature had interpreted the rule of law by considering that political parties have a special role in society and an essential task in a pluriform democracy based on the rule of law.¹³ In that case our Court held that granting a subsidy to a political party that deems women to be ineligible to stand for elections does not amount to an application of statutory regulations that is in conflict with Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women.

Elements of the rule of law play an important part in the case-law of our Court,¹⁴ that is:

- legality (the prohibition to act without a legal basis¹⁵ and *nulla poena sine lege*¹⁶);
- separation of powers (checks and balances in the relationship between the legislature and the executive¹⁷ or between the courts and the legislature¹⁸);
- fundamental rights;¹⁹ and
- the independence of the courts.²⁰

¹³ AJD, judgment of 5 December 2007, Case No. 200609224/1, ECLI:NL:RVS:2007:BB9493, *The Reformed Political Party v. the Minister for the Interior and Kingdom Relations*, CODICES NED-2007-3-006.

¹⁴ Examples can especially be derived from the VOERMANS & GERARDS-report, see note 9, and the CODICES Database of the Venice Commission.

¹⁵ See for instance AJD, judgment of 19 April 2006, Case Nos. 200409931/1, ECLI:NL:RVS:2006:AW2275; judgment of 7 February 2007, Case No. 200606192/1, ECLI:NL:RVS:2007:AZ7977; and judgment of 31 March 2010, Case No. 200905180/1/M2, ECLI:NL:RVS:2010:BL9595.

¹⁶ See for instance AJD, judgment of 8 July 2008, Case No. 200707433/1, ECLI:NL:RVS:2008:BD7378.

¹⁷ See for instance, AJD, judgment of 23 July 2008, Case Nos. 200707561/1, ECLI:NL:RVS:2008:BD8331; and judgment of 21 June 2009, Case No. 200805962/1, ECLI:NL:RVS:2009:BJ3621.

¹⁸ See for instance AJD, judgment of 29 October 2003, Case Nos. 200300512/1, ECLI:NL:RVS:2003:AM5435, CODICES NED-2013-3-007; judgment of 21 November 2006, Case No. 200607567/1, ECLI:NL:RVS:2006:AZ3201, CODICES NED-2006-3-004; judgment of 5 December 2007, Case No. 200609224/1, ECLI:NL:RVS:2007:BB9493, CODICES NED-2007-3-006; judgment of 31 October 2007, Case No. 200701874/1, ECLI:NL:RVS:2007:BB6813; and judgment of 3 September 2008, Case No. 200706325, ECLI:NL:RVS:2008:BE9698.

¹⁹ See among many examples AJD, judgment of 26 November 2015, Case No. 201500577/1/V1, *Secretary of State of Security and Justice v. X (a foreigner)*, ECLI:NL:RVS: 2015:3415, CODICES NED-2015-3-002; AJD, judgment of 18 November 2015, Case No. 201501544/1/A4, *X (a citizen) and Others v. the Minister of Economic Affairs*, ECLI:NL:RVS:2015:3578, CODICES NED-2015-3-001; AJD, judgment of 23 April 2014, Case No. 201302419/1/A3, *Occupy Rotterdam/Mayor of Rotterdam*, ECLI: NL:RVS:2014:1439, CODICES NED-2014-2-006; AJD, judgment of 20 November 2013, Case No. 201207897/1/A3, *Shooting Society 'De Bunker' v. State Secretary for Security and Justice*, ECLI:NL:RBARN:2012:BX2311, CODICES NED-2014-1-002; AJD, judgment of 23 October 2013, Case No. 201301126/1/A3, *Central Office for Motor Vehicle Driver Testing (CBR) v. X (a citizen)*, ECLI:NL:RVS:2013:1643, CODICES NED-2014-1-001; AJD, judgment of 13 March 2013, Case Nos. 201107207, 201107202 and 201209565, ECLI:NL:RVS:2013:BZ3972, *Vereniging van Vrijzinnige Hervormden Middelburg and others v. Mayor and Aldermen of Middelburg*, CODICES 2013-1-005.

²⁰ See for instance AJD, judgment of 6 June 2007, Case No. 200608642/1, ECLI:NL:RVS:2007:BA6497, *Minister of General Affairs v. Dutch Broadcasting Foundation*, CODICES NED-2007-2-004.

The CODICES database contains various references to the way in which our Court ensures respect for the rule of law in *specific fields* mentioned above – that is migration law,²¹ punitive administrative law²² and electoral law²³ – as well as case-law relating to the *relevant topics* indicated above: equality of the law in general administrative law cases,²⁴ intensity of review²⁵ and administrative procedural law.²⁶

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

In our country constitutional justice is but one of the means to encourage constitutional government, that is subordination of the State and its entities to the law.

Traditionally, it is for the legislature to uphold the conformity of statutes (Acts of Parliament) with the Netherlands Constitution. This concept is one of the pillars of the constitutional system and is laid down in Article 120:

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.²⁷

In the decades after the Second World War, the role of the courts in upholding the constitutionality of statutes in a broader sense, that is for their conformity with self-executive provisions of human rights treaties, has increased significantly, though.

An initiative bill of 2002 sought to amend the Netherlands Constitution so that the courts can review statutes in the light of self-executing fundamental rights provisions of the Netherlands Constitution. It passed the first round of the severe procedure set for changing the Constitution.²⁸ However, in the second round the proposal has met a considerable lack of

²¹ AJD, judgment of 13 April 2016, Case No. 201507952/1/V2, ECLI:NL:RVS:2016:890, *X (an Alien) v. Secretary of State for Security and Justice*; an unofficial translation of this judgment is available on the Council of State's website.

²² AJD, judgment of 23 October 2013, Case No. 201301126/1/A3, ECLI:NL:RVS:2013:1643, Central Office for Motor Vehicle Driver Testing (CBR) v. X (a citizen), CODICES NED-2014-1-001.

²³ AJD, judgment of 29 October 2003, Case No. 200300512/1, ECLI:NL:RVS:2003:AM5435, *X (a citizen) v. Mayor and Aldermen of Bloemendaal*, CODICES NED-2013-3-007; judgment of 22 June 2011, Case No. 201011803/1/H2, ECLI:NL:RVS:2011:BQ8870, *Europese Klokkenluiderspartij v. the Electoral Council*, CODICES NED-2011-2-002; judgment of 27 January 2011, Case No. 201101075/1/H2, ECLI:NL:RVS:2011:BP2851, *X v. the principal electoral committee for the elections of the members of the Provincial Council of Utrecht*, CODICES NED-2011-1-001; judgment of 15 January 2010, Case No. 201000115/1/H2, ECLI:NL:RVS:2010:BK9420, *Political association Stop Wilders.nu v. Central Electoral Committee for the election of the members of the municipal council of the municipality of The Hague*, CODICES NED-2010-1-001.

²⁴ AJD, judgment of 20 November 2013, Case No. 201207897/1/A3, ECLI:NL:RBARN:2012:BX2311, *Shooting Society 'De Bunker' v. State Secretary for Security and Justice*, CODICES NED-2014-1-002.

²⁵ AJD, judgment of 13 April 2016, Case No. 201507952/1/V2, ECLI:NL:RVS:2016:890, *X (an Alien) v. Secretary of State for Security and Justice*; an unofficial translation of this judgment is available on the Council of State's website.

²⁶ AJD, judgment of 25 February 2013, Case No. 201301173, ECLI:NL:RVS:2013:BZ2265, *VEB and others v. the Minister of Finance*, CODICES NED-2013-1-003.

²⁷ However, the courts do adjudicate on the conformity of subordinate legislation (e.g. by government and individual ministers, as well as by provincial and municipal councils) and administrative measures with the Netherlands Constitution.

²⁸ *Kamerstukken* [Parliamentary documents] 28331 and 32334. The proposal is to add a new paragraph to the current text of Article 120 stipulating that statutory regulations shall not be applicable if their application is in conflict with equality rights and civil liberties. Social rights are not included.

political enthusiasm, so that at present no amendment of Article 120 of the Netherlands Constitution is soon to be expected.

The notion to put the stress to uphold the rule of law on a democratic institution in the first place, can also be found in other contexts. For instance, in the field of electoral law, the court concerned will review the electoral authorities decisions with deference.

See for instance the AJD's judgment of 27 January 2011 in the case of *X v. the principal electoral committee for the elections of the members of the Provincial Council of Utrecht*, CODICES NED-2011-1-001

The applicant claimed that the principal electoral committee for the elections of the members of the Provincial Council of Utrecht (hereinafter, the «principal electoral committee») had wrongly issued a declaration of validity with regard to the list of candidates which included the appellation of the political grouping the SGP (Reformed Political Party).²⁹ The applicant argued that the SGP discriminated against women by denying them, contrary to Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women (hereinafter, the «Convention»), the right to stand for election to all publicly elected bodies, including provincial councils, and that it followed from a final judgment by the Court of Cassation that the state must take effective measures in this respect. Since the state so far had omitted to take such measures, the principal electoral committee was not, under Article 94 of the Netherlands Constitution, allowed to restrict itself to the requirements listed in the relevant provisions of the Elections Act 1989.

The Administrative Jurisdiction Division of the Council of State held that the argument was based on a misinterpretation of the Court of Cassation's judgment: it was for the legislator to end the situation which that court had held to be unlawful, as this would require a balancing of interests of a political nature. It followed from the history of the Elections Act that it was for the courts and not for the administration (in this case: the principal electoral committee) to review the aims and activities of political groups for their conformity with the law. Besides, the legislator had made it sufficiently clear that lists of candidates can only be submitted by individual voters and not by political groups.

For these reasons the Administrative Jurisdiction Division of the Council of State held for the principal electoral committee, as it had lawfully issued a declaration of validity with regard to the list of candidates concerned on the basis of the clear, limitative set of requirements set out in the Elections Act 1989.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

Yes, international law does have an impact on the interpretation of the rule of law in our country. The Netherlands has a system of review by the courts of conformity with international law, in particular with constitutional principles laid down in international treaties. In this monistic system Dutch courts are competent and even under an obligation in concrete cases to review all legislative acts, including Acts of Parliament in the light of self-executing

²⁹ See also AJD, judgment of 5 December 2007, Case No. 200609224/1, ECLI:NL:RVS:2007:BB9493, *The Reformed Political Party v. the Minister for the Interior and Kingdom Relations*, CODICES NED-2007-3-006.

treaty provisions. These treaties, in particular the European Convention on Human Rights, function as a *de facto* constitution.³⁰

In a contribution written on request of the President of the Constitutional Court of South-Korea, it was explained by Pieter VAN DIJK and the present authors that, so far, the human rights treaties to which the Netherlands is a party play a more important role in Dutch legal practice, and especially in the case-law, than the fundamental rights provisions of the Netherlands Constitution. Since 1953, the Netherlands Constitution regulates the relationship between international and national law in a way that has been of determinant importance for this matter and has put the Netherlands in a rather exceptional position in Europe for a long time.

Article 93 of the Netherlands Constitution reads:

Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94 stipulates:

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Articles 93 and 94 of the Constitution were for the larger part a codification of a legal practice that had developed as customary law. They make clear that the Netherlands adhere to the monist view, considering international and domestic law as belonging to one and the same legal order in which both sets of law are to be applied according to a certain hierarchy. The fact that, in virtue of the Netherlands Constitution, human rights provisions of treaties have a stronger position in the Dutch legal order than domestic law, including the Constitution itself, did not automatically and immediately result in a practice in which full legal force was, and is, given to human rights treaties in all cases and in all respects. This depends to a large extent on the attitude of the national authority concerned. Although the relevant provisions were included in the Constitution in 1953, one year before the ECHR entered into force for the Netherlands, that fact did not lead to full attention being given to the ECHR right away. However, since the eighties that attitude changed remarkably.³¹ The actual picture is that the human rights treaties to which the Netherlands is a party, are regarded as a fully integrated part of the Dutch legal order, with a very high, if not the highest status.³²

³⁰ Further reading: P. VAN DIJK, 'Constitutional Review in the Netherlands' in: P. VAN DIJK and S. GRANATA-MENGHINI (eds.), *Liber Amicorum Antonio La Pergola*, Lund: Juristförlaget 2009, pp. 101-110; M. VAN ROOSMALEN & B. VERMEULEN, 'Constitutional Review by the Dutch Courts. A View from Kneuterdijk 22', in: M. VAN ROOSMALEN, B. VERMEULEN, F. VAN HOOFF & M. OOSTING, *Fundamental rights and principles: liber amicorum Pieter van Dijk*, Cambridge/Antwerp: Intersentia 2013, pp. 563-581; J. GERARDS & J. FLEUREN, 'The Netherlands', in: J. GERARDS & J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law*, Cambridge/Antwerp/Portland: Intersentia 2014, pp. 217-260; P. VAN DIJK, M. VAN ROOSMALEN & B. VERMEULEN, 'Judicial Protection of Human Rights in the Netherlands. National and International Legal Framework', forthcoming in a volume edited and published by the Constitutional Court of South-Korea for the benefit of the Association of Asian Constitutional Courts and Equivalent Institutions.

³¹ P. VAN DIJK, "Domestic Status of Human-Rights Treaties. The Attitude of the Judiciary. The Dutch Case", in: M. NOVAK a.o. (eds), *Fortschritt im Bewusstsein der Grund- und Menschenrechte* [Progress in the Spirit of Human Rights], Kehl am Rhein: N.P. Engel Verlag 1988, pp. 631-650.

³² P. VAN DIJK, M. VAN ROOSMALEN & B. VERMEULEN, 'Judicial Protection of Human Rights in the Netherlands. National and International Legal Framework', forthcoming in a volume edited and published by the Constitutional Court of South-Korea for the benefit of the Association of Asian Constitutional Courts and Equivalent Institutions.

The Administrative Jurisdiction Division of the Council of State uses the concept of 'reading together' (that is, a harmonizing interpretation) of constitutional and international fundamental rights provisions. In the *Jezus redt* Case, for instance, Articles 6 and 7 of the Netherlands Constitution, concerning the freedom of religion and the freedom of expression are generally interpreted in the light of these same rights enshrined in Articles 9 and 10 of the European Convention on Human Rights.³³

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

The Netherlands is one of the countries in the Eurozone. Not only has it suffered from the global financial crisis but also from the Eurozone crisis. The Eurozone crisis led to an increase of government debts, problems on the housing market, lack of economic growth and the bailout of banks. Though of course the Netherlands did suffer from the world-wide economic crises, this did not mean a threat to the rule of law. New legislation, though, was adopted to meet the challenges set by the crisis.

For instance, the Crisis and Recovery Act came into force on 31 March 2010. The original purpose of that temporary Act was to ensure that (listed) planned construction projects could be carried out more quickly. With the Crisis and Recovery Act the government wished to make sure that in economically difficult times, the country's economic structure is nevertheless reinforced through implementing projects sooner than planned. The act aimed to simplify and accelerate a number of court procedures. The Administrative Jurisdiction Division has heard many cases under this law.

Another example is the Act on Financial Supervision. The Act itself had already come into force on 1 January 2007, so prior to the outbreak of the global financial crisis. Part 6, which entered into force in 2012 however provided for special, far-reaching powers for the Minister of Finance to guarantee the stability of the financial system. The Minister of Finance issued an expropriation order based on Part 6 of the Financial Supervision Act in relation to securities and assets of the SNS Bank on 1 February 2013. More than 700 applicants (clients of the bank and interest groups) lodged an appeal to the Administrative Jurisdiction Division of the Council of State.³⁴ A hearing was held on 15 February 2013. Judgment was given only ten days later (so on 25 February 2013).

At present, there are no major threats to the rule of law at the national level either.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

We are under the impression that such international events have an impact on the courts to a certain extent, in the sense that such developments stress the importance of all aspects of the rule of law, in particular legality and respect for fundamental rights.

³³ AJD, judgment of 14 July 2010, Case No. 200906181/1/H1, ECLI:NL:RVS:2010:BN1135, X (*a citizen*) v. *Mayor and Aldermen of Giessenlanden*, CODICES 2010-2-004. See also E. MAK, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford/Portland: Hart 2013, p. 161.

³⁴ AJD, judgment of 25 February 2013, Case No. 201301173, ECLI:NL:RVS:2013:BZ2265, CODICES NED-2013-1-003.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

In virtue of their obligation under Articles 93 and 94 of the Netherlands Constitution, the courts are to apply and give priority to self-executing provisions of treaties. Since the obligation to give priority to a treaty provision over a conflicting provision of domestic law also applies to conflicting provisions of the Constitution, that obligation may even lead the courts to not applying a constitutional provision, if and to the extent that it is found not to be in conformity with a self-executing treaty provision. Practice shows, however, that the courts in the Netherlands are rather inclined to interpret both applicable provisions in such a way that a conflict between them may be avoided ('harmonizing interpretation'). Its justification is the presumption that the legislator may be supposed to have had the intention to keep or bring domestic law in conformity with the state's international legal obligations.³⁵

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Our Court's judgments are executed. An example is the judgment in the *Groningen gas extraction Case*, which had big economic and public financial consequences. In that case³⁶ the Administrative Jurisdiction Division of the Council of State held that gas extraction from the northern province of Groningen was temporarily limited from 33 billion cubic metres of gas to a maximum of 27 billion cubic metres of gas (which could only be raised to a total maximum of 33 billion cubic metres if the 2015-2016 gas year would prove to be relatively cold).

In view of all the information available, the Minister should have explained more clearly why the limitation on gas extraction could not be set at less than 33 billion cubic metres. After all, the studies on which his decision was based concluded that less gas extraction would mean a lower seismic risk for persons living in the vicinity of the gas fields. And, although fundamental rights do not require that activities entailing risks be ruled out entirely, when weighing the interests involved the Minister must show that 'necessary precautions' have been taken, given the seriousness and nature of the consequences of gas extraction. When weighing the interests, the Minister incorrectly assumed that the risks in the area affected by earthquakes were comparable to the risks in parts of the river delta; whereas the risk calculations suggested that the risks in the area affected by earthquakes were greater. And, although the Minister was entitled to attach great importance to the security of supply, he permitted a higher level of extraction than the average that is required. The Minister should have explained more clearly why he based the maximum level of extraction on a relatively

³⁵ See P. VAN DIJK, M. VAN ROOSMALEN & B. VERMEULEN, 'Judicial Protection of Human Rights in the Netherlands. National and International Legal Framework', forthcoming in a volume edited and published by the Constitutional Court of South-Korea for the benefit of the Association of Asian Constitutional Courts and Equivalent Institutions.

³⁶ AJD, judgment of 18 November 2015, Case No. 201501544/1/A4, ECLI:NL:RVS:2015:3578, X (a citizen) and Others v. the Minister of Economic Affairs, CODICES NED-2015-3-001.

cold year. This meant that, in less cold years, more gas would be extracted than was necessary for the security of supply.³⁷

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

One can argue that lower courts usually do follow the superior courts' case-law, for their judgments will be quashed in appeal procedures if they choose otherwise. This does not mean, though, that superior courts do not listen to the lower courts. On the contrary. There is an ongoing dialogue between those two sets of courts. For instance, there are visits from and to the lower courts. Nevertheless, the superior courts have the final say with regard to concrete cases.

In the Netherlands issues may arise between the four highest administrative courts (for instance on provisions of the General Administrative Law Act or the ECHR) or between a superior administrative court and the Court of Cassation as the highest court in criminal or civil law cases (for instance on the Netherlands Constitution (as there is no Constitutional Court), the ECHR, 'public civil law' and 'administrative penal law').

There is strong wish to prevent inconsistencies. An example is the case law from the Administrative Jurisdiction Division of the Council of State and Court of Cassation on alcohol-locks in cars in which the question had arisen whether there was a *criminal charge* in the sense of Article 6(1) of the Convention. Sometimes superior courts give judgment (nearly) the same day. Judgments may also be given by the five-member grand chamber comprised the President of the Administrative Jurisdiction Division, the Presidents of the Central Appeals Court for Public Service and Social Security Matters and the Administrative Court for Trade and Industry and a justice of the Supreme Court (the latter three being Extraordinary Councillors), and a State Councillor from the Administrative Jurisdiction Division.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

Yes, here again the *Groningen gas extraction Case* can be mentioned as an example.³⁸ The Administrative Jurisdiction Division found that there was a link between the annual gas extraction from the field and the seismic threat: a reduction in the extraction would lead to a lower seismic threat and therefore a reduction in the seismic risk. Even though the minister was entitled to place great importance on the need to provide for a sufficient supply of gas, the Council held that the minister had allowed a higher production level than was required on average. Thus, the justification provided by the minister to base the maximum level of extraction in a relatively cold year was insufficient.

Giving the guidelines with regard to the new decision to be taken by the minister, the Administrative Jurisdiction Division set out how the fundamental rights which had been invoked by the applicants ought to be weighed. The Administrative Jurisdiction Division confirmed its standing case-law that local bodies and their organs could not rely on human rights, as those rights, given their nature and historic origin, are not meant to protect public

³⁷ Extract from the press release on the case, available in English at <www.raadvanstate.nl>.

³⁸ AJD, judgment of 18 November 2015, Case No. 201501544/1/A4, ECLI:NL:RVS:2015:3578, X (a citizen) and Others v. the Minister of Economic Affairs, CODICES NED-2015-3-001.

bodies. Moreover, the Administrative Jurisdiction Division found that the right to life protected by Article 2 ECHR as interpreted by the European Court of Human Rights was applicable in the case of gas extraction, as this really was a dangerous industrial activity which might raise positive obligations. In addition, the Administrative Jurisdiction Division held that Article 8 ECHR was applicable, as there was a sufficiently clear risk to the life and homes of the earthquake area residents. The Administrative Jurisdiction Division held that positive obligations under Articles 2 and 8 ECHR and Article 1 Protocol 1 ECHR would not prohibit gas extraction, but merely required an effective legislative and governmental framework. The Administrative Jurisdiction Division further held that the Mining Act in principle provided for such a framework and concluded that the minister had quite an amount of discretion with regard to the choice of measures to take in concrete circumstances. Whether the boundaries of this discretion are respected, can only be reviewed once a new decision has been taken.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

Private actors exercising public functions need to live up to the standards set by the rule of law in the same way as public authorities do. Section 1, 1st paragraph, of the General Administrative Law Act provides that 'administrative authority' means: (a) an organ of a legal entity which has been established under public law, or (b) another person or body which is invested with any public authority. Our Court does not treat the persons or bodies under (b) any different from those mentioned under (a).

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

Our Court does not hear fraud cases or other cases relating to corruption etc.

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

There is individual access to our Court regarding individual acts. The relevant provisions from the General Administrative Law Act (to be read in conjunction with the Council of State Act 2010) are the following:

Section 1:2, 1st paragraph reads:

'Interested party' means a person whose interest is directly affected by an order.

Section 1:3 reads:

1. 'Order' means a written decision of an administrative authority constituting a publiclaw act.

2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order. (...)

Section 8:1 provides:

1. An interested party may appeal to the district court against an order.
2. With an order shall be equated another act of an administrative authority in which a public servant as such as referred to in article 1 of the Central and Local Government Personnel Act, or a conscript as such as referred to in article 2 of the Conscripts (Legal Status) Act, their surviving relatives or their successors-in-title, have an interest.
3. The following shall be equated with an order:
 - (a) a written decision containing a refusal to approve an order, a generally binding regulation or a policy rule or repealing or laying down the entry into force of a generally binding regulation or policy rule, and
 - (b) a written decision containing a refusal to approve an order to prepare a legal act under private law.

However, our Court does not hear claims regarding general acts, as Section 8:2 of the General Administrative Law Act reads:

No appeal may be lodged against:

- (a) an order containing a generally binding regulation or a policy rule,
- (b) an order repealing or laying down the entry into force of a generally binding regulation or policy rule,
- (c) an order approving an order, containing a generally binding regulation or a policy rule or repealing or laying down the entry into force of a generally binding regulation or a policy rule.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

Yes, there is a very substantive body of case-law on subjects like court fees and time limits. For instance, one may think of the judgment given by the grand chamber of the Administrative Jurisdiction Division of the Council of State on 29 January 2014,³⁹ which happened to be the first judgment given by a grand chamber in an administrative law case.⁴⁰ A uniform period of four years was set in that judgment as the reasonable time for the disposal of disputes under administrative law involving an objection procedure and court proceedings at two separate instances. This period includes two years for the objection procedure and the application for judicial review (based on six months for the objection to the administrative authority and 18 months for review by a district court) and two years for the appeal. If these time limits are not adhered to, the state must pay €500 in compensation for non-pecuniary damage for every six months by which a time limit is exceeded.

17. Has your Court developed case-law on other individual rights related to the rule of law?

Yes, on fundamental rights (cf. what is written above in answer to question I.4).

³⁹ Case No. 201302106/1/A2, ECLI:NL:RVS:2014:188.

⁴⁰ Cf. our reply to question II.9.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

No, in such cases reference can be made to international human rights clauses (cf. what is written above in answer to question I.6).