For the Supreme Court of the Netherlands it is difficult, if not impossible, to complete some parts of the questionnaire as requested. The main reason for this is the circumstance that in the Netherlands a Constitutional Court does not exist. In fact, article 120 of the Dutch Constitution explicitly prohibits the Dutch Courts – thus including the Supreme Court – from reviewing the constitutionality of Acts of Parliament and of treaties. As a result, no judicial (or other) system of constitutional review of legislation exists (please note: the constitutionality of regulations of lower government bodies, e.g. municipal regulations, can be reviewed). However, article 94 of the Dutch Constitution stipulates that domestic law is inapplicable if it conflicts with treaties of a generally binding nature (e.g. ECHR). This means that (domestic) laws can be tested against treaty norms and obligations including fundamental rights, which system of judicial review somewhat approaches constitutional review (but it is of course not quite the same).

From time to time however, the question is raised within the legislature (and the House of Representatives ("Tweede Kamer") in particular) whether the above described system is satisfactory. In this regard, in 2008 the Senate ("Eerste Kamer") passed a private member's (Ms Halsema) bill, proposing the possibility of constitutional judicial review. In March 2015 the House of Representatives started the consideration of the proposal ("tweede lezing"). Because the proposal concerns a revision of the Dutch Constitution, it requires a two-thirds majority in both chambers in order to be adopted (which requirement makes an adoption of the proposal not very likely).

Also interesting regarding this topic, is another proposal of a member of the House of Representatives, Mr Taverne. With his proposal he seeks to deprive the judge of his power (based on article 94 of the Dutch Constitution; see above) to declare domestic law inapplicable if it conflicts with treaties of international law of a generally binding nature. In his view the aforementioned power should exclusively belong to the legislature, with the result that the legislator will review more thoroughly whether laws are compatible with international law or not. Also this proposal aims to adapt article 93 of the Dutch Constitution in such a way that it is made possible that specific provisions of international law can be denied binding force by the legislator.

With due consideration of the aforementioned characteristics of the Dutch Judicial system, some of the questions of the questionnaire will be left unanswered by the Supreme Court of the Netherlands (which will be indicated with a ' – ').

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 Dutch constitution, (domestic) national law and international (binding) treaties (e.g. ECHR) are important sources of law that establish the principle of the rule of law in our legal system. Additionally, some of the most basic fundamental laws in the Dutch constitutional system are not explicitly expressed in the written Constitution (so called 'unwritten constitutional law').

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?

It is difficult to answer this question unambiguously. But in short, the rule of law in The Netherlands is interpreted in the most classic way, meaning that there has to be a separation – and balance - of the three powers (legislative, executive and judicial), the so called 'trias politica'. The rule of law is directly related to democracy. After all, democratically adopted rules are all well and good, but have no true value unless they are applied in practice. In a state governed by the rule of law, those

democratically adopted rules are indeed put into practice. Also, in such a state the upmost respect for fundamental rights is of immense importance, which can on occasion entail that the opinion of the majority should not always prevail.

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.)?

The rule of law is always respected by the three sections (civil, criminal and tax law) of the Supreme Court of the Netherlands.

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.

In 2014 the tax chamber of the Supreme Court ruled – in brief - that a person that is not financially capable of paying court fees, cannot be declared inadmissible (Hoge Raad 28 March 2014, ECLI:NL:HR:2014:699). In this context, also see the ruling of the civil chamber of the Supreme Court concerning court fees, as mentioned in the answer to question 9.

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.

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

Yes, in particular the case law of the ECtHR, which has influenced the Dutch legal system in various ways. Sometimes the ECtHR's interpretation of the Convention leads to the conclusion that the Netherlands has violated the ECHR. For example in the "Engel" ruling (ECtHR 8 June 1976, NJ 1978, 223, AA 1977, 55, (Engel v the Netherlands)) the ECtHR determined that the military disciplinary penalties of close arrest and committal to a disciplinary unit involved a deprivation of liberty. Subsequently, this ruling was a reason to amend the legislation concerned. Sometimes that adjustment of legislation takes the form of amending a number of provisions or adding a number of new provisions to an already existing Act. At other times, the adjustment takes the form of the implementation of a completely new act, which sees an adjustment being made to the national system of the division of powers and checks and balances (e.g. ECtHR 23 October 1985, NJ 1986, 102, (Benthem v the Netherlands)). But rulings by the ECtHR may also lead to an adjustment of the policy of the executive (e.g. ECtHR 22 November 2007, NJ 2008, 216, (Voskuil v the Netherlands) and ECtHR 14 September 2010, NJ 2011, 230, (Sanoma Uitgevers B.V. v the Netherlands)). And rulings may simply amount to criticism of the way in which national courts apply national legislation (e.g. ECtHR 31 July 2012 (Van der Velden v the Netherlands)). In brief, all state powers are influenced by the ECHR through the case law of the Court. Apart from the direct influence of the ECtHR's case law, there is also the indirect influence of the legislature and the administration through the case law of the national courts under the scope of Article 94 Constitution.

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)?

A 2011 proposal to substantially increase the amount of Court Fees was withdrawn (after consulting the President of the Supreme Court and the Procurator-General on this matter; https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Over-

de-Hoge-Raad/Publicaties/Rapporten%20en%20adviezen/Griffierechten.pdf), because the proposed legislation would seriously endanger the constitutional right (also embedded in international treaties) of access to justice . Also, one can argue that the proposal by Mr Taverne (as mentioned in the introduction to this questionnaire) that aims to deprive the judge of his power to declare domestic law inapplicable if it conflicts with treaties of international law of generally binding nature, may constitute a threat to the rule of law.

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

As in many other European countries, the rise of terrorism in recent years sometimes results in "stricter" legislation in an attempt by the legislator to protect citizens against terrorism. An example of this is the – by some publicly criticized – proposal of a new legislative proposal by the Dutch Minister of Justice, who wants to broaden the possibilities for fighting terrorism. This objective involves proposals that would enhance the investigation and prosecution of terrorist acts. According to the proposal, the measures are necessary to continue to effectively combat terrorism and to prevent attacks as good as possible. The legislative proposal also takes into account recent manifestations of terrorism, such as the events taking place this past year in Western Europe and elsewhere. In addition, the Minister would also like to bolster the investigation and prosecution of terrorist offences. To that end, he proposes to broaden the possibilities for holding jihad fighters suspected of a terrorist offence in provisional detention. This measure would allow more time to gather evidence for those cases requiring complicated (forensic) investigatory work. According to the proposal, in such cases the Public Prosecution Service should be able to detain a terrorism suspect, even without strong suspicion, for an additional thirty days. Furthermore Dutch citizenship may be withdrawn if a person provides services which seriously harm the essential interests of the Kingdom of the Netherlands (e.g. terrorism). There is a proposal to also make this withdrawal possible in case someone helps with the preparation of a terrorist offense.

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.

There are numerous cases in which our Court deals with national legal norms that collide with international norms, mostly set out by the ECHR. The Supreme Court of the Netherlands follows the ECtHR closely.

One example in this regard is the Supreme Court's jurisprudence concerning "Salduz". The European Court of Human Rights (ECtHR) issued a judgment in the case of Salduz v. Turkey and formulated the basic premise that suspects being questioned by the police must have access to some form of legal assistance. If legal assistance is not provided, any statement made by a suspect during police interrogation may not be used against him/her (Salduz v. Turkey, ECtHR Grand Chamber (2008), No. 36391/02). At that time, it was unclear whether a general right to legal assistance during police interrogation could be derived from this premise. Following this ruling of the ECtHR, the criminal chamber of the Dutch Supreme Court issued important rulings regarding these questions (see, inter alia: Hoge Raad 30 June 2009, ECLI:NL:HR:2009:BH3081 and Hoge Raad 22 December 2015, ECLI:NL:HR:2015:3608). These rulings made clear how the jurisprudence of the ECtHR regarding legal assistance must be interpreted in the Dutch criminal justice system. In essence, all suspects were given the right to consult with a lawyer prior to the interrogation, and juvenile suspects were given

the right to have a lawyer or an appropriate adult present during the interrogation. These developments in legal assistance prior to and during police interrogation have resulted in the adaptation of regulatory instruments in the Netherlands.

Another interesting recent case is the ruling by the criminal chamber of the Supreme Court regarding the "life long sentence". In the "Murray" case, the European Court of Human Rights (Murray vs. The Netherlands, EHRM 26 April 2016, nr. 10511/10) the execution of a life sentence can under certain circumstances be considered inhumane and no one deserves to be treated as "forgotten human waste". This ruling by the ECtHR was made in a case brought by family members of murderer Murray. He was sentenced to life in prison for committing murder. He served his life sentence in the Correction Institute Aruba and asked to be pardoned several times, but all his requests were rejected. He was finally pardoned when he was terminally ill and died on November 26th, 2014, from the complications of cancer. According to the Court, the execution of Murray's life sentence proved an inhumane punishment, partly due to a lack of psychological counselling. The pardon-system also did not comply to the rules in this case - revenge and repression played a role in the evaluation of all his pardon requests. In the light of this ruling of the ECtHR the Supreme Court of the Netherlands ruled as follows (Hoge Raad 5 July 2016 ECLI:NL:HR:2016:1325):

> *"In the review, the question that needs to be addressed is whether there have been such changes on the part of the convicted person and whether he or she has made such progress in their resocialisation that the continued implementation of life imprisonment is no longer justified. The criteria used in this context should not be so stringent that release is allowed only when a serious illness or other physical obstacle stands in the way of the further implementation of life imprisonment, or upon reaching an advanced age. The review must be based on information with respect to the convicted person as an individual as well as the opportunities offered for resocialisation. Moreover, at the time of the imposition of a life sentence, it must be clear to the convicted person to a sufficiently precise extent what objective criteria will be applied in the review, so that he knows what requirements must be met, if he wants - eventually – to be considered for a reduction of his sentence or for (conditional) release. The point of departure in the future must be that the review must take place after no more than 25 years after the imposition of life imprisonment and that after that period the possibility of periodical re-assessment is required. The reassessment shall be surrounded with sufficient procedural safeguards. The case law of the European Court of Human Rights does not require that a provision to curtail a life sentence can only consist of a statutory periodic review of the sentence by a judge. That does not detract from the view of the Hoge Raad that assigning the reassessment to a judge in itself represents an important guarantee that the implementation of life imprisonment will take place in accordance with Art. 3 of the ECHR. Finally, in order to provide a real opportunity for reassessment, it is important that the convicted person during the execution of the life sentence - even before the reassessment takes place - must be able to prepare for a possible return to society and that, related to this, possibilities for resocialisation should be offered within the framework of the implementation."*

The Supreme Court mentioned in its ruling that it anticipates the government to reform the law relating to life imprisonment in such a way that it would meet the standards it had spelled out, and that the Supreme Court will remain seized with the case until 5 September 2017. In other words: to be continued.

In another recent ruling of the civil chamber of the Supreme Court of the Netherlands (Hoge Raad 8 April 2016, ECLI:NL:HR:2016:607), the Court ruled that in case of asylum seekers who have exhausted

all legal procedures and which may earn no income because of this status and are not entitled to benefits and thus have no financial resources at all, the collection of court fees represents an unacceptable obstacle to the right to justice, as laid down in art. 6 ECHR.

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?

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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?

In the Netherlands, the lower courts are not formally bound by judgments of higher courts, including the Supreme Court. However, lower courts will generally follow the decisions of higher courts, those of the Supreme Court in particular, in similar matters. Consequently court rulings, especially those of the Supreme Court, have a wider importance than the specific case in respect of which that ruling was given. One of the most important tasks of the Supreme Court is to uphold uniformity in law. In new cases, therefore, the lower court will take the decisions of the Supreme Court into account when giving its judgment.

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.).

We like to believe that many of our rulings contribute towards better standards for law-making and a better application of law (also on the doctrines as mentioned in the question), as ensuring 'unity of the law' and contributing to the 'development of the law' are two of the Supreme Court's main tasks. For a recent ruling of the Supreme Court on the principle of 'non bis in idem' see: Hoge Raad 9 February 2016, ECLI:NL:HR:2016:222.

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

There are some rulings of the Supreme Court concerning the admissibility of actions/evidence by private actors exercising more or less public functions and/or tasks. For example, in a 2003 case – concerning the admissibility as evidence of observations made by a private detective - the Supreme Court ruled that if a private actor undertakes any form of investigative actions without knowledge of the police/investigating authorities, this will in principle not lead to the inadmissibility of the prosecution. However the Supreme Court also ruled that it cannot be ruled out that unlawful actions by private actors in this regard can, under certain conditions, lead to the exclusion of evidence as a result of a violation of principles of due process or a disregard of the rights of the defence (Hoge Raad 18 March 2003, ECLI:NL:HR:2003:AF4321). In later case law (Hoge Raad 2010 ECLI:NL:HR:2010:BL7688 and Hoge Raad 27 November 2012, ECLI:NL:HR:2012:BY0215) the Supreme Court ruled that if video footage that has been shot by a private person is voluntarily submitted (and on their own initiative) to the police, there is no need for a warrant by the prosecutor. This is a difference with a case from 2010 (Hoge Raad 21 December 2010, LJN BL7688), in which a supermarket had voluntarily given video footage from a security camera to the police, but not after

the police had first asked for it. In that case, the prosecutor did require a warrant. Furthermore, the Supreme Court ruled in its judgment of 2012 that video images are considered personal data under the Data Protection Act. This law provides a basis for voluntary disclosure to the police for the purpose of prevention, investigation and prosecution of criminal offenses.

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?

Where the criminal liability of public authorities and public officials is concerned, in the Netherlands the following distinction can be made. In the first place, Title XXVIII of the Penal Code contains several Serious Offences Involving Abuse of Office ("ambtsmisdrijven"). These are serious offences which can only be committed by public authorities and public officials. Two of these offences have an obvious connection with the political-administrative activities of public authorities; the others are, however, closely related to ordinary offences, albeit that they can only be committed by public officials. Except for these specific offences involving abuse of office, one general penal provision is also relevant for the criminal liability of public authorities and officials, i.e. Article 51 of the Penal Code, concerning the criminal liability of legal entities (also see Hoge Raad 26 April 2016, ECLI:NL:HR:2016:733 in this regard). As public authorities may at the same time be legal entities or organs of a legal entity, this provision is – up to some extent – also relevant for the criminal liability of public authorities.

Already before 'Volkel' ruling (Hoge Raad 25 January 1994, NJ 1994, 598) there had been a number of decisions by the Supreme Court with regard to criminal prosecution of decentralized governmental bodies. In this case law, two criteria had emerged. First, if a government body was not a `public body' ("openbaar lichaam") in the sense of Chapter 7 of the Dutch Constitution, it can be prosecuted. Secondly, public bodies (in the sense of Chapter 7 of the Dutch Constitution) can be prosecuted with regard to activities that are not performed as part of their `public tasks'. Regarding both of these criteria there turned out to be considerable demarcation difficulties. Whether a government body is a public body `in the sense of Chapter 7' is sometimes difficult to establish. Whether a certain activity is part of the `official' or `public' tasks has always been a vexed question, but is felt to have become more complicated since come government tasks have been privatised. If the government itself acts in a commercial manner, it is difficult to see why it cannot always be treated in the same manner as private companies and/or individuals.

The Supreme Court has in its case law (considerably) limited the criminal liability of public authorities. Thereby a distinction is made between the criminal liability of the State and that of the other legal entities under public law. In its 'Pikmeer II' ruling, the Supreme Court ruled that local authorities are no longer immune to criminal law (Hoge Raad 06 January 1998, AB 1998, 306; esp. ground 5.5). In this particular ruling, the Hoge Raad decided that in order to decide whether a public task was involved, the court has to consider the legal framework. If a certain task is attributed exclusively - i.e., as the Hoge Raad stipulates explicitly, exclusively according to the law, not in fact - to public officials, this is an obstacle to criminal prosecution. Examples of such tasks can be found in the area of law enforcement, but also the provision of permits and the distribution of passports are tasks that legally cannot be performed by others than government officials.

Another interesting case regarding this matter, is the ruling by the Supreme Court concerning the criminal liability of a local Amsterdam politician for inciting discrimination and hatred against gay people (Hoge Raad 16 December 2014, ECLI:NL:HR:2014:3583). This politician said on television that gay people were deviants and that they should be 'booted out'. The Supreme Court ruled that while

politicians can shock or insult as part of public debate, they also have a responsibility 'to prevent spreading pronouncements which conflict with the law and the principles of a democratic state'.

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.

In The Netherlands, in principle it is not possible for a citizen to oppose to a law itself (you can only 'complain' about the application/interpretation/legality of an act in a concrete case. It is also possible for an individual to lodge a complaint against a tax assessment, which case may ultimately be referred to the Supreme Court).

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

As mentioned under the answer to question 9 there are rulings of the Supreme Court concerning court fees (Hoge Raad 8 April 2016, ECLI:NL:HR:2016:607, also see HR 10 January 2001, nr. 35782, ECLI:NL:HR:2001:AA9393 and the ruling of the tax chamber of the Supreme Court: HR 28 March 2014, ECLI:NL:HR:2014:699). Concerning time limits/access to justice, see the following ruling of the tax chamber of the Supreme court: Hoge Raad 22 July 1988, BNB 1988/292).

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

Yes. It is the strong conviction of the Supreme Court that the rule of law also covers the protection of fundamental (individual) human rights. Indeed, those rights form the backbone for our civilised society that is governed by the rule of law. For that reason alone, compliance with these fundamental rights cannot be left to the legislative or executive power; in respect of these rights, there is a clear and specific task for the judiciary, including – or even: especially – the Supreme Court. The various rulings of the Supreme Court that are mentioned in the answers to the questions of this questionnaire, constitute an example of performing this task.

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?

Yes, see the answer to question 1.