3rdCongress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
28 September – 1 October 2014
Seoul, Republic of Korea

Questionnaire

Reply by the Council of State of the Netherlands

Reply by
Mr. Ben VERMEULEN, Member of and Judge in the Dutch Council of State
Ms. Marjolein VAN ROOSMALEN, Legal Adviser to the Dutch Council of State

A. Court description

The Dutch Council of State is the highest general court of administrative law in the Netherlands. The Council of State has already provided a description for the CODICES database, to which we refer.[1]

B. Social integration

1. Challenges of social integration in a globalised world
1.1. What challenges has the Council of State encountered in the past, for example in the field of asylum law, taxation law or social security law?
The Council of State has faced challenges in the following fields:
a) asylum law,
b) nationality law,
c) integration law,
d) social security law, and
e) education law.

These challenges concern:

a. nationals and legally residing non-nationals, *for instance*
   - nationals who are members of a minority such as Orthodox Protestants or Muslims applying for permission to establish schools based on their specific religious convictions;
   - parents of disabled children seeking a place for their children in a school close to their family home;

disabled persons wanting to take part in every aspect of public life;

b. persons who are nationals who have relatives who are (non-legally residing) non-nationals, *for instance*
   - legally residing aliens applying for social benefits who share accommodation with non-legally residing relatives of full age;

[1] *See also* <http://www.raadvanstate.nl/the-council-of-state.html>.

- special attention must be paid to European Union nationals who (have family members who) travel between the various EU Member States;

c. non-nationals outside the country, *for instance*
   - aliens applying for asylum; and
   - migrants from non-Western countries seeking family reunification, being under a legal obligation to pass a language and (Dutch) culture test at the embassy or consulate in their home country prior to being granted the necessary permits.

1.2. How are issues of social integration or conflict transformed into legal issues?
Issues of social integration are primarily transformed into legal issues by legislation. Such issues become concrete legal issues once they are brought before the court.[2] The court decides the case, taking the facts, legal arguments and norms presented by the parties as its starting point, followed by a search for (additional, substantively similar) legal norms to apply to those facts. Pursuant to Article 8:69(2) of the General Administrative Law Act the Council of State may supplement the legal basis of the arguments on its own initiative, for instance by 'translating' complaints concerning arbitrary treatment into an appeal to equality norms in the Constitution or human rights treaties. The main legal instruments in cases raising issues of social integration are basic freedoms (such as the freedoms of religion and education) and equality norms.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration (1.3.1)?
If so, what were the dominant questions before the Council of State in the past and what are they at present (1.3.2)?
Please give two or three typical examples (please refer to the précis in the CODICES database, when you have already contributed these cases. Otherwise, please consider sending précis / summaries to be included in the CODICES database) (1.3.3).

1.3.1 Trends towards an increase of legal issues[3]

Major topics are individual emancipation and the need for social cohesion.
In the past decades fundamental changes in Dutch society, policy and law took place. These changes have resulted in a shift away from the traditional strategies of pluralist accommodation ('*verzuiling*', multiculturalism). There is a movement towards a more substantive concept of citizenship, characterized by secularism and a strive for unity and social cohesion, combining restrictive immigration policies and stricter integration and naturalization requirements with a trend towards a more rigorous separation of religion and state and stricter limitations of the freedom of religion and education.

A stronger emphasis on social integration, civic commitment and citizenship is the *common inspiration* behind developments in different policy areas, which at first sight are unrelated. There is an interconnection between changes in immigration law, integration policy and nationality law. And there is an interconnection between on the one hand these changes in law and on the other hand demands in society and politics for restrictions of fundamental freedoms and a more stringent separation of church and state. To a large extent these developments can be explained by this one motive: the wish to strengthen civic commitment

[2] Or, if applicable, at the start of an administrative objection procedure.
[3] For a full account of these trends, *see* B.P. VERMEULEN, 'On freedom, equality and citizenship. Changing fundamentals of Dutch minority policy and law (immigration, integration, education and religion)', in: M.-C. FOBLTETS, J.-F. GAUDREAULT & A. DUNDES RENTELN (eds.), Brussels: Bruylant (Editions Yvon Blais) 2010, pp. 45-143.

and social integration, and to restrict diversity and to counter segregation based on culture, ethnicity and religion.[4]
These developments at least in part explain the increase of legal issues concerning social integration.

1.3.2 The dominant questions concerning social integration before the Council of State in the past and at present

Dominant questions concern, for instance, requirements as to knowledge of the national language and clothing (and other) habits including face-covering veils.
To summarize the issues mentioned in §1.1, the dominant question in the past and at present may be how to secure diversity and freedom, while at the same time maintaining social cohesion and public order. The Dutch model of pluralist cooperation[5] is an important *institutional arrangement* protecting religious, cultural and ethnic minority groups. But it also contains individual guarantees securing diversity. The position of minorities is generally guaranteed in that restrictions on freedom as such should in general be based on legal provisions which are proportional (that is they are only lawful in so far as they are necessary to attain important social goals).

1.3.3 Examples derived from the Council of State's case-law

a) Council of State 30 March 2011, case No. 201006801/1/H2, the As Siddieq case,[6] CODICES NED-2013-3-009
According to the Primary Education Act (*Wet op het primair onderwijs*) schools have to encourage active citizenship and social integration. The Education Inspectorate had doubts as to whether these goals were met by the As Siddieq school, an orthodox Islamic school in Amsterdam. The Inspectorate set the school an achievement scheme (*prestatieafspraken*) to improve its citizenship education programme. However, the school did not meet each and every requirement set by the Inspectorate. Therefore, the State Secretary for Education, Culture and Science (hereafter: the State Secretary) partly suspended the financing of the school. The school board objected, but the State Secretary turned down its objections. The board then appealed to the Council of State.

The Council of State held that the requirements concerning educating for active citizenship and social integration set by the Primary Education Act had not been specified into regulations formulating concrete targets (*kerndoelen*). Neither have these requirements been specified in other secondary legislation. Therefore, schools do have a wide margin of discretion with regard to how to encourage active citizenship and social integration. This margin had been stressed by the drafters of the Act of Parliament who aimed at including active citizenship and social integration aims in the Primary Education Act, while at the same time respecting the freedom of education.[7] Despite the fact that the school may not have fulfilled the requirements set by the Inspectorate for the second period of its achievement

[4] In his essay of 2010 VERMEULEN has argued that, on the one hand, some of the policies introduced may challenge the basic principles of the liberal state, as they are based on a too one-sided and substantive – secular-individualistic – view on man and society. On the other hand a strict immigration and integration policy based on more neutral socio-economic arguments may be justifiable.
[5] A model in which the state is neutral in that it treats all religions equally, and where government supports religious as well as non-religious activities on an equal basis.
[6] Another example may be derived from Council of State, judgment of 29 October 2003, No. 200300512/1, CODICES NED-2013-3-007, *Jurisprudentie Bestuursrecht* 2004, 3 annotated by Verhey (a case in which a person placed under guardianship who (for that reason) had lost the right to vote argued that the decision to deny him the right to vote had been in breach of Article 25 of the International Convenant on Civil and Political Rights ICCPR). The Council of State held, that unconditional exclusion of persons placed under guardianship of the right to vote in concrete cases can be incompatible with Article 25 ICCPR. This judgment led to a change in Article 54 of the Netherlands Constitution in 2008.
[7] Parliamentary Documents Chamber of Representatives, 2004/2005, 29 666, No. 8, pp. 2-3.

scheme, the Council of State quashed the State Secretary's decision, taking into account that the school had actually started a project called 'The Peace loving School' (*De vreedzame school*), which was sufficient, given the school's wide discretion in this matter.

b) Council of State 22 December 2010, No. 200909234/1/H2, X (a citizen) v. Tax/Allowance Authorities; exclusion of social benefits for reasons of illegality, CODICES NED-2013-3-008
In the case at hand a woman legally residing in the Netherlands had applied for rent allowance (*huurtoeslag*). The Tax/Allowance Authorities (*Belastingdienst/Toeslagen*; hereafter: the Authorities) granted the allowance, but stopped and reclaimed the allowance, as they learnt that she shared her house with her son, who was of full age and did not legally reside in the Netherlands.

In appeal proceedings the Council of State held that the difference in treatment between tenants who share their accommodation with a legally residing housemate and tenants who shared their accommodation with a non-legally residing housemate did not amount to a violation of Article 26 of the International Covenant on Civil and Political Rights and Article 14 in conjunction with Article 8 of the European Convention on Human Rights (ECHR). The principle stipulating that illegal aliens and – in some cases, as in the present case – legal residents/family members allowing them to stay at their home are not entitled to social security benefits and other social services (*koppelingsbeginsel*), in general provides for a reasonable and objective justification. Furthermore, the decision to stop and reclaim the allowances did not render it impossible for mother and son to share accommodation. However, under Article 94 of the Netherlands Constitution, Acts of Parliament cannot be applied if they violate self-executing treaty provisions such as those just mentioned. In exceptional circumstances a decision to stop and reclaim allowances from a tenant sharing accommodation with her non-legally residing child of full age may amount to a violation of the said anti-discrimination clauses. In the case at hand the tenant/mother was infected with HIV/AIDS and claimed dependence on her son. Besides, her son had in the meantime got a residence permit, as he could not leave the country through no fault of his own.

For these reasons, the authorities should have examined whether the circumstances of the case were so exceptional, that the exclusion clauses in the General Income-Related Regulations Act (*Algemene wet inkomensafhankelijke regelingen*) ought not be applied. However, although the Council of State quashed the decision (for lack of reasons), it upheld its legal effect. The exclusion clauses could be applied, as the desirability of the son's presence for social-medical reasons did not suffice; it had not been proven that the son could only take care of his mother while sharing accommodation. Therefore, there were no exceptional circumstances requiring non-application of the Act.

c) Council of State 1 April 2014, No. 201211916/1/V2 and No. 201300404/1/V2; integration requirements in immigration law[8]
The Council of State organised a hearing in these cases concerning the Civic Integration (Newcomers Abroad) Act (*Wet inburgering buitenland*) on 30 September 2013. This Act of Parliament requires migrants from non-Western countries seeking family reunification (with family members residing in the Netherlands) to pass a Dutch language & culture test at the embassy or consulate in their home country prior to being granted the necessary permits. The main question is whether this requirement is a proportional limitation to the right to family reunification, justified by the need to already start the process of integration when one is still abroad. The Council of State has requested a preliminary judgment from the European Court of Justice.

[8] As this is only an interlocutory judgment, it has not been submitted to the CODICES database.

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

First, a major international influence is European Union law, especially in relation to non-nationals (see § 1.1), in the field of social security law and equal treatment law.

Moreover, on the basis of Article 94 of the Constitution statutory regulations shall not be applied by the courts if such application is in conflict with treaty provisions 'that are binding on everyone'. In other words, the Dutch courts are not allowed to apply primary and secondary legislation if that would amount to a breach of self-executing treaties. Thus, the Netherlands does have a system of review of conformity with international law, in particular with constitutional principles laid down in international treaties.

Therefore, in this monistic system Dutch courts are competent to review all legislative acts, including Acts of Parliament in the light of self-executing treaty provisions. The courts are not allowed to determine whether Acts of Parliament are compatible with the Netherlands Constitution (Article 120 of the Constitution). However these treaties, in particular the European Convention on Human Rights, function as a *de facto* constitution.[9] Moreover, the courts 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 Constitution.

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, Article 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.[10]

2.2. Does the Council of State apply specific provisions on social integration that have an international source or background?
Yes, as already mentioned in § 2.1, the Council of State applies provisions on social integration that have an international source background, provided that they are self-executing. Treaty provisions containing freedom rights and equality norms are self-executing. Most treaty provisions on social rights however are not self-executing and therefore cannot be applied in court cases.

2.3. Does the Council of State directly apply international instruments in the field of social integration?
Yes. As mentioned earlier, Dutch courts are not allowed to judge on the compatibility of Acts with the Constitution. However, self-executing provisions in international instruments (treaties and EU law) function as a *de facto* constitution, in the light of which Acts of Parliament can and must be reviewed. Furthermore, the conformity of subordinate legislation (e.g. by government and individual ministers, as well as by provincial and municipal councils)

[9] Further reading: P. VAN DIJK, 'Constitutional Review in the Netherlands' in: P. VAN DIJK and S. GRANATA-MENGHINI (eds.), *Liber Amicorum Antiono La Pergola*, Lund: Juristförlaget 2009, pp. 101-110; Marjolein VAN ROOSMALEN & Ben VERMEULEN, 'Constitutional Review by the Dutch Courts. A View from Kneuterdijk 22', in: M. VAN ROOSMALEN, B. VERMEULEN, F. VAN HOOF & M. OOSTING, *Fundamental rights and principles: liber amicorum Pieter van Dijk*, Cambridge/Antwerp: Intersentia 2013, pp. 563-581.

[10] *See e.g.* Council of State 14 July 2010, No. 200906181/1/H1, *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 Compararive Analysis of the Changing Practices of Western Highest Courts*, Oxford/Portland: Hart 2013, p. 161.

not only with international instruments but also with the Dutch Constitution is reviewed by the courts. [11]

2.4. Does the Council of State implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

Usually international instruments are expressly referred to.

2.5. Has the Council of State ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved? Please indicate a few typical examples (if possible by reference to cases in the CODICES database).

The Council of State tries to avoid conflicts between international standards and national law by interpreting national law in the light of international law. We refer to the paragraphs above in which we have already mentioned the concept of 'reading together' (harmonizing interpretation), in particular in the *Jezus Saves* Case mentioned in § 2.1, and the case on the *Staatkundig Gereformeerde Partij* which will be discussed below in § 4.3. However, conflicts between international and national law in immigration law cases sometimes are unavoidable, for instance when the rather strict provisions in the Aliens Act and secondary legislation collides with the right of respect for one's family life (Article 8 ECHR) and the prohibitions of non-refoulement (Article 33 Refugee Convention, Article 3 ECHR).

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", Staatszielbestimmungen, ...?
Specific freedoms, especially relevant for minorities, are protected by the Netherlands Constitution, international treaties and European Union law, as well as by means of detailed statutory provisions. Of particular relevance are constitutional and human rights provisions, protecting fundamental rights such as the freedom of religion and belief, the freedom of education, cultural and linguistic rights, and equal treatment norms (for instance in the sphere of social security).

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?
The Council of State is the highest administrative law court with general jurisdiction. Constitutional law provisions may be relied on by individuals, provided that they have standing. Pursuant to Article 1:2(1) of the General Administrative Law Act an 'interested party' is an individual, group or legal person whose interest is directly affected by an order.

3.3. Does the Council of State have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?
The Council of State may hear claims brought by social groups representing their members. Pursuant to Article 1:2(3) of the General Administrative Law Act legal entities may have standing, provided that their interests are deemed to include the general and collective interests which they particularly represent in accordance with their statutory goals and as evidenced by their actual activities.

[11] *See e.g.* Council of State 13 July 2011, No. 201011441/1/H3, *The priest of the parish of St Margarita Maria Alacoque v. the Mayor and Aldermen of Tilburg*, CODICES NED-2011-2-005.

3.4. How does the Council of State settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?
Pursuant to Article 8:70 of the General Administrative Law Act the Council of State may rule that an appeal is well-founded, in which case it (sometimes partly) annuls the disputed order, pursuant to Article 8:72(1) of the same Act. Under Article 94 of the Netherlands Constitution Acts of Parliament violating self-executing treaty provisions are not be applied in the specific case at hand. It is not for the Court to annul legal provisions as such. However, because of judicial restraint (*see also* §3.5) inherent in the separation of powers, it is not up to the Council of State to *annul* legal provisions as such.

3.5. Can the Council of State act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?
The Council of State acts with deference towards the legislature, which is illustrated by the following example.[12]

Two citizens of Aruba were denied permission by the municipal board of The Hague to participate in the elections for the Dutch Parliament (the Second Chamber; *Tweede Kamer*) and for the European Parliament. With regard to their claim to vote in the European Parliament elections, the applicants contended that since Aruba was subject to European Union legislation, they should be considered as European Union citizens. The Council of State referred the matter to the European Court of Justice for a preliminary ruling. The Court of Justice held that although it was up to the Member States to determine which citizens had the right to vote,[13] certain provisions in the Dutch legislation on voting were not in accordance with the principle of equal treatment. The Council of State then overturned the municipal board's decision.[14] However, the Council of State held that the *legislator* – not the court - should make changes to the legislation in the light of the Court of Justice's preliminary judgment (a *trias politica* argument). It concluded that the Court itself was not competent to solve the matter, because several solutions – involving political choices – were possible. It was up to the legislator to solve the issue, of course within the limits set by the judgments of the Council of State and the Court of Justice.

3.6. Has the Council of State ever encountered difficulties in applying these tools?
See § 3.5.

3.7. Are there limitations in the access to the Council of State (for example only by State powers), which prevent it from settling social conflicts? Please provide a few typical examples (if possible also by reference to cases in the CODICES database).
Pursuant to Article 1:2(1) of the General Administrative Law Act 'interested party' means an individual, group or legal person whose interest is directly affected by an order. Pursuant to Article 1:2(3) interests of legal entities are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.

4. The role of constitutional justice in social integration
4.1. Does your Constitution enable the Council of State to act effectively in settling or avoiding social conflict?
Our Constitution may not contain any such specific provisions, other than the fundamental rights catalogue in the first chapter. One may think in particular of Article 1 of the Constitution (principle of equality).

[12] Council of State, judgment of 21 November 2006, No. 200404446/1, *AB* 2007, 80 annotated by P.J. STOLK, CODICES NED-2006-3-004.
[13] CoJ, *Eman and Sevinger*, judgment of 12 September 2006, Case C-300/04.
[14] Which the legislator actually did, *see* Parliamentary Documents (*Kamerstukken*) 31 392.

Our Constitution relies primarily on the legislature to present other State powers with instruments to solve social conflicts. A specific aspect of our electoral system is that elections have never resulted in a majority party. Therefore, coalitions are needed. In that way even the smallest party can be required to constitute a majority; they do have a voice when it comes to enacting legislation.

4.2. Does the Council of State de facto act as 'social mediator', or/and has such a role been attributed to it?

The Council of State does check whether cases brought before it may be suitable for mediation. If such is the case, parties will be invited to try mediation.[15] However, the Council of State is not itself in the position of a 'social mediator'. Its role is restricted to give a binding judgment in the specific case before it.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to the Council of State which had to find a 'legal' solution, which normally should have been found in the political arena? Please provide a few typical examples (if possible by reference to cases in the CODICES database).

Yes. An example may be found in decisions in a case in which civil courts ruled that the State should stop subsidizing the orthodox Christian *Staatkundig Gereformeerde Partij* (SGP), or otherwise should endeavour to stop this small political party – with two seats in the Second Chamber of Parliament – to deny women full membership of the party for Biblical reasons.[16] Several women's organisations (none of them, however, actually representing women who themselves had expressed the wish to become full member of the SGP) had filed civil lawsuits against the State and the SGP for violating Article 7 of the Convention on the Elimination of Discrimination Against Women (CEDAW). Civil courts ruled that the State should end this policy of the SGP, which they regarded as discriminatory against women. However, the Council of State in a parallel public law suit ruled, that ending government subsidy of the SGP would be incompatible with fundamental freedoms and principles of pluriformity and democracy.[17]

[15] Detailed information is available to the general public on the Council of State's website. *See* <http://www.raadvanstate.nl/onze-werkwijze/mediation/werkwijze.html> (in Dutch).

[16] In highest instance: Court of Cassation 9 April 2010, No. 08/01354 and 08/01394, *Administratiefrechtelijke Beslissingen* 2010, 190 annotated by VAN OMMEREN, *Nederlandse Jurisprudentie* 2010, 388 annotated by ALKEMA, *NJCM-Bulletin* 2010, pp. 485–500 annotated
by NEHMELMAN and WOLTJER.

[17] Council of State, judgment of 5 December 2007, No. 200609224/1, *Administratiefrechtelijke Beslissingen* 2008, 35 annotated by SCHUTGENS and SILLEN, *Jurisprudentie Bestuursrecht* 2008, 24 annotated by KANNE, NEHMELMAN and SCHLÖSSELS, *Reformed Political Party and Others v. the Minister for the Interior and Kingdom Relations*, CODICES NED-2007-3-006.