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Developments in the Dutch legislation and advisory opinions and judgments of the Council of State regarding #MeToo and (trans)Gender, Equality and Discrimination

REPORT BY

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On the occasion of this year's mini-conference I have the honour to bring to your attention some developments in the Dutch legislation and in the advisory opinions and judgments of the Council of State regarding first #MeToo and secondly (trans)gender, equality and discrimination.

Part A

1. #MeToo

#MeToo reached the Netherlands in the autumn of 2017. In the media, for instance, several actors and journalists shared their stories. Likewise, attention was raised to the rights of those accused of sexual intimidation.

As to the political arena, the hashtag inspired the Prime Minister to make a press statement, the Minister of Justice and Security to write a letter to the House of Representatives and the House of Representatives to debate. I will now briefly discuss the statement, the letter and the debate.

On the 10th of November, Prime Minister RUTTE, in his weekly press conference, encouraged women who have faced sexual intimidation to report this to the police at once.[1] He expressed his support for the #MeToo-discussion, but he rejected the idea of the establishment of a special agency focussing on sexual intimidation. Such an agency had been proposed by VAN VOLLENHOVEN, chair of Victim Support Netherlands.[2] The Prime Minister said that the police is well-equipped and has specialised vice squads. The idea of a special agency did not find support in Parliament either.

In his letter to the House of Representatives of 24 November 2017, the Minister of Justice and Security wrote that some 134,000 workers have to deal with sexual intimidation by colleagues or superiors in the Netherlands each year.[3] Moreover, women are facing this type of intimidation four times more often than men. Preventing sexual cross-border behaviour starts with changing awareness in society, the Minister argued. Especially in schools, sports clubs and at work attention for prevention is necessary. The Government is keen to encourage prevention by engaging in awareness campaigns and education. For 2018, special campaigns and pilots have been planned.

On 22 February 2018, the House of Representatives debated on #MeToo.[4] The possibility of a legislative proposal making sexual intimidation punishable was mentioned by Christian-democrat MP VAN TOORENBURG.[5] I will discuss this draft later on.

Let me now conclude this part of my report by referring to the announcement made by the Chair of the House of Representatives regarding a research project on sexual intimidation in relation to *inter alia* the Second Chamber itself – #MeToo as a source of inspiration for self-reflection. The main question would be: what about those who work for Parliament itself? However, on the 8th of June it came to light that the project had been called off, as it is not supported by every parliamentary party.[6] The political parties are the formal employers of the

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[1] Press conference of 10 November 2017; full text available at: www.rijksoverheid.nl/documenten/mediateksten/2017/11/10/letterlijke-tekst-persconferentie-na-ministerraad-10-november-2017.

[2] Reported by RTL News on 8 November 2017, www.rtlnieuws.nl/nederland/politiek/van-vollenhoven-aparte-instantie-moet-metoo-beschuldigingen-onderzoeken.

[3] *Kamerstukken II* [Parliamentary Documents] 2017/18, 34 843, No. 1.

[4] See www.tweedekamer.nl/nieuws/kamernieuws/debat-over-seksuele-intimidatie-op-de-werkvloer.

[5] *Handelingen* [Proceedings], 2017/18, No. 56, p. 23-9.

[6] Reported by the Dutch Broadcasting Company nos.nl/artikel/2235674-geen-metoo-onderzoek-onder-fractiemedewerkers-tweede-kamer.html.

people working for the Second Chamber of Parliament, so their co-operation is a necessity for the self-reflective operation which had been planned for. It is said that political parties represented in Parliament may now examine the situation of their employees themselves.

2. Intimidation on the street

Already in the spring of 2017 – so prior to the very peak of #MeToo – socialist MP MAROUCH drafted a private member's bill in order to amend the Criminal Code, introducing a provision penalising sexual intimidation. The draft was submitted to the public for consultation, which led to two comments; one quite extensive and one fairly short – and very disapproving by the way.[7]

The drafter proposed that any person who, orally or gesturing, expresses himself sexually towards a person whom he brings – through this – in a threatening, hostile, offending, humiliating or hurting situation, is liable to a term of detention not exceeding one month or a fine of the second category.[8] The reason for his proposal was that – I quote – 'a large and diverse part of Dutch society is confronted with sexual-intimidating behaviour in daily life' [end of quotation]. He argued that, whereas criminal law is an *ultimum remedium* (a last resort), the Criminal Code had to be amended, as it allegedly did not criminalise 'sexual unacceptable behaviour in a non-physical way'. It stems from the explanatory notes that MARCOUCH referred to, for instance, making comments and hissing sounds.

Whereas the drafter was of the opinion that such behaviour had not been covered by criminal law yet, the Netherlands Bar, responsible for an elaborate comment in the consultation phase, did not agree with him on this point. This organisation advised against the bill, as it doubted its necessity. The Netherlands Bar held the view that much of the conduct covered by the draft bill, like remarks of an offending nature and other forms of serious intimidation on the street, had already been covered by criminal law. The Netherlands Bar doubted whether there was any pressing social need in the light of Article 10 ECHR for criminalising and thus limiting expressions as whistling and hissing.

Whether this severe criticism put the drafter off, I do not know. In any case, he was not re-elected after the general elections of March 2017 and it took a while before legislative developments regarding sexual intimidation were set in motion again. In the meantime, the #MeToo movement reached its very peak. And whereas #MeToo does not specifically have to do with sexual intimidation on the street, the connection between suffering from intimidation on the street and suffering from similar behaviour in the work place may be evident.

In the meantime, in the cities of Amsterdam and Rotterdam, intimidation on the street was made an offence pursuant to the applicable general municipal bye-laws – so by means of local laws.[9] The aim of the Amsterdam-provision, for example, was to add an offence to Section 266 of the Criminal Code, which makes insult punishable.[10] The Amsterdam-provision aimed to

[7] See www.internetconsultatie.nl/verbod_seksuele_intimidatie/details.
[8] That is from € 3 up to € 3350, see Section 23(2) and (4) of the Criminal Code.
[9] See the amended general municipal bye-law of Amsterdam 2017:
https://zoek.officielebekendmakingen.nl/gmb-2017-31783.html
See also the amended general municipal bye-law of Rotterdam 2018:
https://zoek.officielebekendmakingen.nl/gmb-2017-234723.html
[10] Section 266 of the Criminal Code (*Wetboek van Strafrecht*) reads:
"1. Any insult, which is not of a slanderous or libellous nature, intentionally expressed either in public verbally or in writing or by means of an image, or verbally against a person in his presence or by other acts, or by means of written matter or an image sent or offered, shall constitute simple defamation and shall be punishable by a term of imprisonment not exceeding three months or a fine of the second category.
2. Acts which are intended to express an opinion about the protection of public interests and which are not at the same time designed to cause any more offence or cause offence in any other way than follows from that intent, shall not be punishable as simple defamation."

forbid to hiss at others or to harass others by bullying or using offensive langue, gestures, sounds or conduct, either alone or in a group, on the street or in a building accessible to the general public. Those who get caught, may be fined or detained for up to three months. It must be stressed that in both municipalities – Amsterdam and Rotterdam – this legislative change at the local level has been part of a much broader campaign primarily focussed on raising awareness. I have it as my personal opinion that education in the end may prove to be more fruitful than penalisation. Though *if* one wishes to amend the Criminal Code, it may be preferred that the same rules apply everywhere.

In March 2018, a draft bill was sent to Parliament by MPs ASSCHER and Van TOORENBURG, referring to #MeToo and proposing to amend the Criminal Code,[11] adding a Section 429ter, stipulating that any person who, orally or gesturing, expresses himself sexually towards a person whom he brings through this in a threatening, hostile, offending, humiliating or hurting situation, shall be liable to a term of detention not exceeding three months or a fine of the third category.[12] This is a sequel of the MARCOUCH-draft, although it provides for more severe punishment. From a constitutional point of view, it is striking that the MPs who introduced their bill to Parliament were of the opinion that the conduct covered by the bill did not fall within the scope of Article 10 ECHR.[13]

In the meantime, the Advisory Division of the Council of State has issued an advisory opinion on the ASSCHER/VAN TOORENBURG-bill of initiative. However, because both MPs have not yet responded to this advisory opinion, the opinion has not yet been published, so that, unfortunately, I cannot discuss it with you today.[14]

3. Confidentiality

Due to #MeToo people may feel more encouraged to share their personal accounts on sexual intimidation. They may usually not share their experiences in newspapers, on social media or in television shows, but in a much smaller setting. Therefore, creating a safe environment in daily life, so that people can share such experiences more easily, for instance with a confidential counsellor, is important.

In 2007 the mayor and aldermen of the city of Arnhem had rejected an application for access to information – documents and electronic information – relating to unwanted conduct by municipal civil servants. This conduct included behaviour of a sexual or erotic nature towards other municipal local servants or temporal workers who worked for the municipality, but did not have the status of a civil servant. The mayor and aldermen refused. The applicant then lodged an appeal. The District Court decided in his favour, after which the mayor and aldermen appealed to the Administrative Jurisdiction Division of the Council of State.

This superior court held that documents and electronic correspondence relating to sexual intimidation by civil servants did fall within the ambit of the Government Information (Public Access) Act,[15] as they qualify as 'documents concerning an administrative matter' within the meaning of the statute.[16] Nevertheless, notes taken by a municipal confidence counsellor –

[11] See *Kamerstukken II* [Parliamentary Documents] 2017/18, 34904, No. 2.
[12] That is from € 3 up to € 6700, see Section 23(2) and (4) of the Criminal Code.
[13] See *Kamerstukken II* [Parliamentary Documents] 2017/18, 34904, No. 3, p. 10.
[14] According to Dutch law, advisory opinions are published once those who took the initiative for a bill – so the Government or one or more members of the House of Representatives – have written a response to the advisory opinion. Section 26 of the Council of State Act. So it is not for the Council of State itself to decide whether or not or when to publish its advisory opinions.
[15] Administrative Jurisdiction Division of the Council of State, Judgment of 21 January 2009, Case No. 200807348/1, ECLI:NL:RVS:2009:BH0453.
[16] Section 3(1) of the Government Information (Public Access) Act reads: "Anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an

who is a civil servant working for the municipality – cannot be requested under the Government Information (Public Access) Act, because such notes are saved by the confidence counsellor on a personal disc, so that these notes cannot be found and read by others. These documents, therefore, cannot be considered to be 'held by the local administrative authority', for otherwise it is not possible to guarantee the necessary confidential character of the notes also *vis-à-vis* the mayor and aldermen.

Part B

4. Transgenders and intersex persons

In 2017, three MPs – liberal BERGKAMP, socialist YÜCEL[17] and green party-member VAN TONGEREN[18] – introduced a bill in order to clarify the legal position of transgender and intersex persons in the Netherlands.[19] Their bill seeks to amend the Equal Treatment Act (*Algemene wet gelijke behandeling*) in order to specify the prohibition to discriminate on the ground of gender. It proposes to refer explicitly to 'gender characteristics, gender identity and gender expression'. The explanatory notes acknowledge that there is no legal necessity to do so, because 'gender', at present, is interpreted in a broad sense in legal practice and in case law. The aim of the bill, though, is to increase legal certainty and 'recognisability' of transgender and intersex persons.[20]

The Advisory Division of the Council of State held in its advisory opinion that adding the words 'gender characteristics', 'gender identity' and 'gender expression' was in breach of the system of the Equal Treatment Act, which only specifies non-discrimination grounds when there is a need to do so – which is not the case with regard to gender.[21] Moreover, the Council pointed out that the bill does not give a definition of who is to be considered 'transgender' or 'intersex person'. Especially this omission raises questions, for the explanatory notes also refer to other groups, like genderfluid persons, polygender persons and genderqueer persons. In particular because the main purpose of the bill is to improve the 'recognisability' of transgender and intersex persons, it seems to be important that the bill contain definitions (descriptions), the Council argued. The Council further remarked that the bill only seeks to change the Equal Treatment Act, leaving unaltered non-discrimination clauses in other Acts of Parliament.

The initiators, in their additional report, replied that their main point is that a strict division between male and female is too narrow to reflect developments in society. With regard to the focus on the Equal Treatment Act, they explained that they did not wish the present bill to touch upon questions on criminal liability. At present, the bill is still under debate in the House of Representatives.

5. Registration of gender

The judgment of the German Federal Constitutional Court of 10 October 2017, in which that Court held that the right of personality and the right not to be discriminated based on gender – both rights protected by the Basic Law – are violated if civil status law requires that the gender be registered, but does not allow for a further positive entry other than male or female.[22] Because of this 'third gender'-judgment, which has been added to the CODICES database

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administrative authority for information contained in documents concerning an administrative matter."

[17] Now VAN DEN HUL.

[18] Now ÖZÜTOK.

[19] *Kamerstukken II* [Parliamentary Documents] 2016/17, 34650, No. 2.

[20] *Kamerstukken II* [Parliamentary Documents] 2016/17, 34650, No. 3.

[21] *Kamerstukken II* [Parliamentary Documents] 2016/17, 34650, No. 4.

[22] *Bundesverfassungsgericht*, Judgment of 10 October 2017, Case No. 1 BvR 2019/16, CODICES GER-2017-3-020.

recently, I have chosen to share some developments in Dutch legal practice in this respect. Pursuant to Dutch civil law, if the child's gender is doubtful, then a birth certificate will be drawn up in which it is recorded that the sex of the child cannot be determined. Within three months after birth, a new birth certificate will be drawn up in which the child's gender, if this has been established in the meantime, will be recorded by means of a submitted medical certificate. If no medical certificate is submitted or if such a medical certificate indicates that it is still impossible to establish the child's gender, then the new birth certificate will report that the sex of the child could not be determined.[23] This provision came into force in 1993 and lacked retrospective effect.

In the Netherlands, it has been possible to change the registration of one's gender since 1985. Section 28 of Book 1 of the Civil Code stipulates that every person of Dutch nationality aged 16 years or older who is convinced that he is of another gender than marked on his birth certificate may request the Registrar to order a change of the description of his gender on his birth certificate.

Since 2001, it has no longer been required that the person concerned is unmarried. Moreover, since 2014, it has no longer been a condition that this person is physically adjusted to the desired gender insofar as this is possible and acceptable from a medical and psychological point of view. Besides, it is no longer necessary that this person (if marked on the birth certificate as a male) is definitely incapable of procreating or (if he is marked on his birth certificate as female) is definitely incapable of giving birth to children. The Council of State in its advisory opinion at the time raised critical questions in relation to two elements of the new law: that it also applied to children (16 years or older) and that the request was not dealt with by the District Court, but rather by the Registrar.[24]

For people who do not feel at ease with the division male-female, no legal arrangements have been made so far. Parliament passed a motion in which the Secretary of State was asked to explore the possibilities in 2013.[25] Indeed, a report was written by scholars from Utrecht University.[26] They concluded that there were no boundaries in international law to set aside a twofold gender division.

In its 2007 Judgment, the Court of Cassation, the superior court in this field of the law, held that there was no room for a neutral gender registration given the applicable legislation.[27] Be that as it may, quite recently a lower court – the District Court of Limburg – has ruled that nowadays a different conclusion is to be reached. The lower court based its decision on developments in society and the law in the past 11 years.[28] The District Court of Limburg held that in the light of these developments the right to self-determination of the person now had to prevail over the general interest to enforce the law. With reference to, *inter alia,* the Yogyakarta Principles and recent case-law on Article 8 of the ECHR,[29] it decided that the registration in this case should be that 'the sex could not be determined' – so a wording close to the text of Section 19d of Book 1 of the Civil Code. This is quite a far-reaching judgment indeed. On the one hand, one may argue that the court draws very near the boundaries of its adjudicative powers by striking this new balance. On the other hand, the judgment may also be regarded as one in which the

[23] Section 19(d) of the Civil Code.
[24] Advisory Division of the Council of State of 4 May 2012, *Kamerstukken II* [Parliamentary Documents] 2011/12, 33 351, no. 4.
[25] *Handelingen* [Proceedings], 2012/13, no. 69, item 27 (2 April 2013).
[26] M. VAN DER BRINK & J. TIGCHELAAR (2014), *M/V en verder* [M/v and beyond], www.wodc.nl/binaries/2393-volledige-tekst_tcm28-73312.pdf.
[27] Court of Cassation, Judgment of 30 March 2007, ECLI:NL:HR:2007:AZ5686.
[28] District Court Limburg, Judgment of 23 May 2018, ECLI:NL:RBLIM:2018:4931.
[29] ECtHR, *Y.Y. v. Turkey*, Judgment of 10 March 2015, Case no. 14793/08; ECtHR, *Birzietis v. Lithuania*, judgment of 14 June 2016, Case no. 49304/09; ECtHR *R.B. v. Hungary*, Judgment of 12 April 2016, Case no. 64602/12; ECtHR, *Nicot v. France*, Judgment of 6 April 2017, Case Nos. 79885/12, 52471/13 and 52596/13.

court interprets the law in conformity with international treaties. Be that as it may, one is anxious to know whether other (higher) courts will reach the same conclusion.