

## Netherlands

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*Netherlands Institute for Human Rights*

### International accreditation status and SCA recommendations

The Dutch NHRI was re-accredited with A status in December 2020. In its review, the SCA encouraged the NHRI to advocate for the extension of the applicability of the Equal Treatment Act to the Caribbean territories of the Netherlands, to ensure that the NHRI can discharge the full breath of its mandate in these territories. The SCA also called on the NHRI to further to advocate for the formalisation of a clear, transparent and participatory selection and appointment process to avoid situations of conflict of interest. Finally, the NIHR was asked to continue to advocate for adequate funding necessary to allow it to address a broader range of priorities, including, for example, the rights of migrants and of the LGBTI community.

#### *References*

- Letter of the NIHR to the Minister for Legal Protection regarding the re-accreditation: Brief aan minister Dekker naar aanleiding van de re-accreditatie | Mensenrechten

### Impact of 2020 rule of law reporting

#### Follow-up by State authorities

To our knowledge, the ENNHRI rule of law report was not used at national level. Representatives from the Dutch NHRI did refer to it in other talks, e.g., vis-à-vis EU institutions.

#### Impact on the Institution's work

The 2020 ENNHRI rule of law report has reaffirmed the usefulness of having EU rule of law as focus of attention for the Dutch NHRI. This is channelled in particular through the membership of one of the Institute's commissioners of the Meijers committee, a committee of independent experts (lawyers, judges, NGO professionals) giving legal analysis-based advice to Dutch and EU-level politicians and their support staff.

## Follow-up initiatives by the Institution

Briefing to NGOs working on the EU rule of law in the EU context, co-organised by Amnesty International and Open Society Justice Initiative.

## Human rights defenders and civil society space

As regards freedom of assembly, under the Dutch Public Assemblies Act (*wet openbare manifestaties*) planned assemblies need to be pre-notified to the public authorities. The intention for this is to be a procedural requirement, i.e., merely to allow public authorities to assess security risks and make arrangements in time. Such assessment however has, on occasion, also involved mayors checking the actual substantive contents of the planned assembly with a view to fulfilling the procedural requirement and led to a practice where the content has played a role in decision-making.

In addition to the findings of the NHRI in 2019, during the COVID-19 pandemic demonstrations were allowed to continue. Additional requirements were included in order for the organisers to ensure the implementation of the COVID-19 measures (incl. 1,5-meter distancing of the participants). Several demonstrations were cancelled as mayors deemed that compliance with the COVID-19 measures could not be ensured. Other protests were cut short, or interventions were made to ensure that everyone was able to keep their distance and comply with the measures, for example by not allowing new protestors to come to the place of the protest. Generally speaking, the right to freedom of assembly was ensured during the COVID-19 pandemic, although there have been instances where questions were raised about the necessity and proportionality of the requirements imposed on the organisation of the protests. At least in two instances this has led to litigation.

Furthermore, there have been various protests concerning the COVID-19 measures that have resulted in violence and destruction of property. On several occasions the police had to step in to end the protests.

In addition to the information provided on our website on COVID-19 measures, the Institute has published an informative article on the right to protest.

### References

- The NIHR informs the public about COVID-19 measures in light of human rights via its webpage, this also includes an answer to the question whether a demonstration can be cancelled due to COVID-19 (Q18): Coronavirus en mensenrechten | College voor de Rechten van de Mens
- Lawsuit against the mayor of The Hague for the limitations imposed on grounds of COVID-19 measures: Rechtszaak tegen beperking protest op grond van de coronamaatregelen verloren - PILP (pilpnjcm.nl)
- Judgment of the District Court of Amsterdam  
<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2020:2126>
- Webpage: Van blokkades tot online demonstreren: wat mag wel en niet tijdens een demonstratie? | College voor de Rechten van de Mens (mensenrechten.nl)

## Checks and balances

What is known as the 'child benefit scandal' ('*toeslagenaffaire*'), was the reason for the Dutch government to resign at the end of 2020. In the Netherlands parents are entitled to receive day-care allowance under certain conditions, in order to continue working or following an education. The benefits are given without a thorough check of the request, but when a mistake is made, the parents are required to reimburse the allowance to the tax authority. After many years of research by journalists and parliamentarians, it turned out that certain parents were subjected to additional controls of their request for child benefits because of their nationality, their double nationality and/or the day-care they were sending their child(ren) to. If selected for additional monitoring, also (minor) administrative mistakes would result in the requirement to reimburse the entire sum of day-care allowance received – to a maximum of 5 years. Parents had to pay back tens of thousands of euros, which they had already spent on day-care. This resulted in serious financial troubles and emotional harm, sometimes leading to unemployment and loss of their homes. In a report a parliamentary committee concluded that as a result of strict legislation, rigid execution thereof, biased acting, non-transparent decision-making and insufficient legal protection, more than ten thousand parents were unjustifiably targeted as fraudulent. It was the combination of political pressure to deal with frauds and harsh legislation, that resulted in an all-or-nothing approach, which limited the possibility of the tax authority to mitigate consequences for (minor) administrative mistakes made by the parents and led to a very restrictive review by the Dutch

administrative judges. Parents that were marked as fraudulent, were required to provide extensive information about their situation without knowing what would be relevant for their case, and in some cases, on what grounds the decision to reimburse the money was taken. In addition to this, the tax authority and government were not open about the situation even after continued questions were raised in parliament about the day-care allowance issue. Also, when parents were finally provided the documents on the basis of which the reimbursement decisions were taken – almost all information was erased with black ink.

The government is currently in the process of improving the day-care allowance system and reviewing legislation and the practice of the tax authorities. Furthermore, parents that were victimised will be immediately entitled to reimbursement of 30.000 EUR. Although efforts are being made, at the moment the targeted parents are still dealing with problems as a result of the day-care allowance affair. In light of this affair, serious questions have been raised about the lack of parliamentary oversight regarding the tax authority, and executive authorities more generally.

The day care allowance affair has had a serious impact on the trust of citizens in state authorities. Not only citizens but also municipalities have concerns about the government's approach to the matter and its solution to it, which is considered to lead to more problems for the parents.

Besides starting a project to inform Dutch authorities on what the prohibition of discrimination means in practice, including for executive authorities, the central government has pinpointed the Dutch NHRI as the place for victimised parents to request a decision on whether they were discriminated. The tax authority will accept the decision of the Dutch NHRI. The challenge for the NHRI is, however, that its mandate as an equality body in cases concerning social benefits is limited to determining whether there was discrimination on the basis of race/ethnicity, and not on other discrimination grounds. In addition, the Dutch NHRI is requested to develop and carry out trainings for officers working at executive authorities to prevent discrimination in practice.

The Netherlands Institute of Human Rights is furthermore involved in various legislative processes through advising the government, both as regards new law proposals and existing laws and policies. It has issued an annual report in 2018 on access to justice, in which it discussed policy developments and developments in legislation that restricted access to justice. It has also issued a report on self-sustainability (*zelfredzaamheid*) as the government is considering that individuals are able to ensure their rights themselves. These developments of limiting access to justice and reliance on self-sustainability are considered to have contributed to the day-care allowance affair.

Furthermore, the Dutch NHRI is currently in the process of talking about extra funding from the government to decide on cases relating to day-care allowance reimbursement, and training government professionals.

### References

- Pages of parents in black ink: Ouders zwartgelakte dossiers: 'Ik weet nog steeds niet wat ik fout heb gedaan' | NOS
- For more information about this and what the Dutch NHRI does, see Nooit meer een toeslagenaffaire: pak discriminatie aan | College voor de Rechten van de Mens (mensenrechten.nl)
- De Tweede Kamer is een falende controleur - NRC
- Gemeenten zeggen vertrouwen in Belastingdienst op | Trouw

## Functioning of justice systems

No progress was made on the issues mentioned in ENNHRI 2020 Rule of Law Report, on which concerns persist.

In addition, there are concerns about the respect for fair trial standards and the right to liberty in the Netherlands. The ECtHR has delivered several judgments on these issues concerning the Netherlands in 2020 and 2021. Three cases concerned the lack of motivation of (continuation of) pre-trial detention decisions by judges, which a study of the Dutch NHRI shows is a structural issue (NB various courts are currently in the process of improving their decision-making). The Dutch NHRI had been requested to intervene in the case in order to share information about its study and the systemic nature of the problems. Other violations of Article 6 ECHR related to the right of a suspect to question a witness who has made incriminating statements (*Keskin v. The Netherlands*, app. no. 2205/16). The attorney-general of the Supreme Court has incorporated the ECtHR's judgment on hearing witnesses in his opinion to the Supreme Court, and also criminal courts are starting to improve their motivation of pre-trial detention.

### *References*

- Nederlandse strafrechtspraktijk moet op de schop: betere motivering van voorlopige hechtenis nodig | College voor de Rechten van de Mens (mensenrechten.nl)
- The Conclusion of the Attorney-General, ECLI:NL:PHR:2021:91, Parket bij de Hoge Raad, 19/02460 (rechtspraak.nl)

## **Impact of measures taken in response to COVID-19 on the national rule of law environment**

### **Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law and human rights protection**

The Dutch government has enacted the Temporary Act on COVID-19 measures. Although it was an emergency law it took over half a year before the Act was approved by the parliament and senate. This was partially due to the time given for deliberation in parliament and senate, including various amendments and advice from various organisations (including the Dutch NHRI). In the meantime, measures were either put forward as recommendations, or they were imposed on other legal bases (sometimes the validity of those was questioned). The Act entered into force on the 1st of December 2020. It provides the basis for the government to restrict fundamental rights, including the right to freedom of movement and freedom of assembly. On the basis of this law, the government has amongst others restricted the amount of people you are allowed to gather with in public, imposed a requirement to wear a facial mask, closed shops and prohibited the execution of certain professions.

The government recently also imposed a curfew from 9 p.m. to 4:30 a.m. in order to limit social gatherings at night even further, which is not a measure foreseen in the Temporary Act. This curfew is enforced and in case of violations, people can be fined with 95 EUR. Besides (violent) protests against the curfew, the main legal issue was the legal basis for this measure (NB our Institute provided information in relation to questions on necessity and proportionality of the measure and considered that there were sufficient arguments to that effect for imposing the curfew). The curfew was imposed on the basis of a specific law that allows for emergency measures (WBBBG). It has been argued by scholars that this law can only be used when there are extraordinary and urgent circumstances that prevent the government from getting approval by the Parliament and Senate in time. However, several argued that such circumstances were not in

place, as the Parliament was consulted in a debate to see whether the government would get approval for the measure. Furthermore, another – a more democratic means – for enacting the curfew was not chosen. This would have been to amend the Temporary Act COVID-19 measures, as was suggested by the Council of State. In February litigation was pending before the preliminary relief judge (*voorzieningenrechter*) and Court of Appeal. According to the preliminary relief judge the measure did indeed lack a legal basis, and the curfew was lifted. The decision to lift the curfew was suspended the same day by the Court of Appeal. A week later the Court of Appeal decided that the WBBBG formed a valid legal basis for the curfew. Whilst the litigation was pending, the government had issued an emergency law (*Tijdelijke wet beperking vertoeven in de openlucht covid-19*, Temporary Act on restriction to stay in the outdoor COVID-19) which has been approved by the parliament and the senate and is now in force. In any case, therefore, the curfew would have had a legal basis even if the Court of Appeal had decided that the WBBBG would not suffice.

Our Institute is currently in the process of researching long term effects of the COVID-19 outbreak on human rights. In particular it has discussed this impact on youth in various podcasts.

In its annual report 2020 (expected to be published in June 2021), the Institute will discuss the impact of the crisis on human rights in the area of employment. In short, what it notices is that there are problems on the one hand for people getting employment. This concerns those who for the first time access the labour market, students that cannot finish their studies because of the lack of internships or people who face discrimination in the recruitment and selection process for a job. The problems may result in long-term unemployment, which has serious effects on people's enjoyment of fundamental rights and could lead to poverty.

On the other hand, those who have a job may be subject to working and employment conditions that are contrary to human rights standards. For example, the crisis has shown the vulnerability of migrant workers to unsafe working conditions and risks of getting sick from COVID-19, this because they are dependent on their employer or employment agency for their housing and health benefits and are often transported together to work. Another issue with employment conditions is the increasing flexibility of employment contracts, resulting in people losing jobs and not being entitled to the same social benefits as those with permanent contracts. The report will conclude with several recommendations to the government to better ensure human rights protection in the area of employment, now and in the future.

The NIHR has taken various actions by providing information and advising the government on Acts to be enforced. Measures are explained in the Institute's annual report 2020.

### *References*

- The Institute updated its webpage with information about the curfew in light of human rights (Q23): Coronavirus en mensenrechten | College voor de Rechten van de Mens
- Judgment of the Court of Appeal regarding the legal basis of the curfew (incl. proportionality analysis) Invoeren avondklok was toegestaan (rechtspraak.nl)
- Wees alert op de effecten van de coronamaatregelen op jongeren | College voor de Rechten van de Mens (mensenrechten.nl)

### Most important challenges due to COVID-19 for the NHRI's functioning

The Institute's main challenge at the start of the pandemic was to continue deciding on discrimination cases as an equality body. After the first months the Institute continued its hearings and is currently doing its utmost to catching up on delays from last year.

### *References*

- Information about the hearings and COVID-19 measures: Update coronavirus: het oordelenproces van het College en de bereikbaarheid | College voor de Rechten van de Mens (mensenrechten.nl)

