

THE NETHERLANDS/PAYS-BAS

a) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

b) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

1. In accordance with Article 81 of the Constitution, legislation is enacted jointly by the Government and the States General, consisting of the House of Representatives and the Senate.

Draft legislation

2. When drafting legislation, the ministries concerned check the quality of draft legislation and their conformity with the Constitution and relevant provisions of international law. The Convention is of great significance in this process. Drafters assess the legislation in the light of the Convention in the manner laid down in policy on legislative quality and the Instructions on legislation, in particular Instructions 18, 212g and 254.¹ Instruction 18 reads: 'During the drafting of legislation, it must be ascertained which rules of higher law have limited the freedom to regulate in relation to the issue concerned.' Instruction 212g states that the Explanatory Memorandum should contain a justification of the legislation in question. This will include, in any event, the relationship of the Act being drafted to other legislation and to existing and forthcoming international and EU legislation.

3. One of the checks consists of an examination by the Legislation Department at the Ministry of Justice in consultation with the Ministry of Foreign Affairs and the Ministry of the Interior and Kingdom Relations of the compatibility of the draft legislation with obligations arising from international and European law (see Instruction 254). Although the Ministry of Justice bears primary responsibility for monitoring legislation for compliance with the principles of good governance and the rule of law, this does not detract from the responsibility resting on the other ministries to ensure that the legislation they draft is of the highest quality. To this end the officials involved have at their disposal an integral assessment framework for legislation that includes several models for testing draft legislation against the fundamental rights laid down in the Convention and its Protocols.

4. In the drafting phase, new statutory measures are submitted to external parties for consultation, including representatives from the legal profession, the judiciary, the independent supervisory body in the area of data protection and the national human rights institute. In addition, the Dutch section of the International Commission of Jurists (NJCM) frequently renders an opinion on the human rights compatibility of draft legislation. The advice of these individuals and agencies is always dealt with in a substantiated manner in Explanatory Memorandums with legislative proposals.

¹ These Instructions are laid down in a circular letter which is published in the Government Gazette.

5. After the Dutch Council of Ministers has given its approval, the proposed regulations are submitted to the Council of State (*Raad van State*) which has the constitutional task to advise the Government on legislation and administration. The Council of State applies a policy analysis evaluation, a legal evaluation and a statutory evaluation, and assesses whether a proposed regulation complies with internationally recognised human rights standards. If there is any lack of clarity on this issue, the Council will make a recommendation.

6. Finally, during their debate on the draft legislation the Parliament addresses the issue of compatibility with the Convention. Although there is no specific parliamentary procedure for verifying this, the permanent Justice Committee of both the House of Representatives and the Senate place considerable emphasis on compliance with human rights instruments. The relevant, obligatory, paragraph in the explanatory memorandum why the draft legislation is deemed compatible with international human rights standards, serves as an essential tool to promote parliamentary debate on the issue.

Administrative practice

7. As for policy instruments that are not laid down in formal legislation, they are subjected to a similar check. The aliens policy is a good example in this regard. This policy seldom is incorporated in legislation, but it does have significant human rights implications. The legal experts of the responsible department assess whether the freedom to develop the new policy is limited by rules of higher (international) law. If necessary, they can call on the Legislation and Legal Affairs Department at the Ministry of Justice for advice. This department annually renders around 250 advices on compatibility with the Convention to colleagues in other government departments, to the Constitutional Affairs and Legislation Department of the Ministry of the Interior and Kingdom Relations and to the Legal Department of the Ministry of Foreign Affairs. It goes without saying that the Parliament can raise the compatibility with the Convention of a (proposed) policy for discussion.

Laws in force

8. A substantial number of laws contain an evaluation clause, by means of which the legislation must be evaluated after a number of years. The potential effects in the area of fundamental rights often form a significant part of this evaluation.

9. Furthermore, it occurs on a regular basis that existing legislation needs to be reviewed following a judgment of the Court, whether or not the judgment is against the Netherlands. In its *Salduz* judgment² the Court held that Article 6 ECHR required that a suspect be assisted by a lawyer during police interrogation. Since such assistance during the police interrogation is not common practice in the Netherlands, the Minister of Justice announced that Dutch law would be amended accordingly. While draft legislation was being prepared, the Supreme Court already had to rule on the subject matter.³ Following the judgments of the Court and of the Dutch Supreme Court, the Public Prosecutor's Office issued new policy guidelines in April 2010 in anticipation of the new legislation to be adopted by parliament. More recently the Supreme Court ruled that, in anticipation of the entry into force of the new legislation, suspects are entitled to the presence of a lawyer during police questioning as from 1 March 2016.⁴

² *Salduz v. Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02.

³ Supreme Court 30 June 2009, LJN BH3079.

⁴ Supreme Court 22 December 2015, ECLI:NL:HR:2015:3608

10. It is up to the directly responsible ministry to consider whether the Court's jurisprudence in a particular field necessitates adjustment of legislation in that field. In addition, the International Law Division of the Ministry of Foreign Affairs (which also comprises the office of the Government Agent), the Legislation and Legal Affairs Department of the Ministry of Security and Justice and the Constitutional Affairs and Legislation Department of the Ministry of the Interior and Kingdom Relations have a more general role in informing, advising and facilitating.

11. The above system is based on two principles: (a) the primary responsibility as to policy content always lies with the relevant ministry; (b) overall expertise on the Convention is concentrated in three contact points with a more general responsibility of informing the other ministries. The system works efficiently and does not give rise to problems. Usually the contact points have no difficulty in drawing the attention of their colleagues in other ministries to an issue of compatibility with the Court's jurisprudence. Follow-up remains, however, the responsibility of the relevant ministry.

12. To adequately perform this overall task of signaling it is important that the contact points have the necessary capacity. A good example of a structural mechanism that functions well can be found in the field of alien law where awareness of relevant jurisprudence is guaranteed partly through the distribution of analyses to all relevant departments and partly through regular consultation mechanisms.

13. As for the role of parliament in this context, it is of the utmost importance that members of parliament (and their staff) have their own access to expertise in the field of human rights, independent from the Government. The Dutch parliament mostly calls on the expertise of academics and the Netherlands Institute for Human Rights.

c) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

14. No such assessment is planned.