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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**12th meeting of the Joint Council  
on Constitutional Justice**

**Venice, Italy**

**9 October 2013**

**MINI-CONFERENCE ON**

**“CHILDREN’S RIGHTS”**

**REPORT BY**

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**THE RIGHTS OF THE CHILD IN THE DUTCH CONSTITUTIONAL FRAMEWORK:  
A BIRD'S-EYE VIEW**

1. Dear President, ladies and gentlemen, the Netherlands Constitution does not explicitly protect the rights of the child. The Constitution is generally considered to be rather austere in comparison to constitutions of other countries, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU-Charter). It does not have a preamble that proclaims the basic values on which the State rests; it does not contain provisions protecting inviolable core rights; it does not explore the ultimate sources of public powers.<sup>1</sup> And it does not provide for instance that children have the right to such protection and care as is necessary for their well-being. The only rights of children mentioned in the Constitution are the rights of children of royal birth (so: princes and princesses) in relation to the rules of hereditary succession to the throne (but their rights are not under debate today).<sup>2</sup>
2. The absence of a provision on the rights of the child *as such* in the Constitution does not mean that children do not enjoy any rights under the Netherlands Constitution at all. In fact, one may assume that children enjoy all fundamental rights enshrined in the first chapter of the Constitution as far as applicable. Some rights are more likely to be invoked by adults only like Article 3 of the Constitution which reads “All Dutch nationals shall be equally eligible for appointment to public service”. Other rights though, are relevant to both adults and children like the right to profess one’s religion or belief under Article 6 of the Netherlands Constitution: everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. ‘Everyone’ may refer either to an adult or a child. For instance, the courts recognize that children who attend state schools have this right to freedom of religion, though the State does not have a duty to facilitate it. For example, a request for an empty classroom to say prayers during lunch break at school may be honoured, but there is no obligation stemming from the Constitution to do so.<sup>3</sup>
3. The Convention on the Rights of the Child (New York, 1989) to which the Netherlands is a party contains a variety of rights of the child which do not have an equivalent in the Netherlands Constitution, not even in an ‘everyone’-construction in the sense I have just explained. For example, the Constitution does not explicitly recognize the protection of respect for private and family life, which is in practice an important vehicle to guarantee rights of children under Article 8 ECHR, though it is assumed that this right is (at least partly) covered by the general privacy clause in Article 10 of the Constitution stipulating that everyone shall have the right to respect for his privacy.
4. Now how about the freedom of education? Vital to the freedom of education in the Netherlands is Article 23 of the Constitution. This Article *inter alia* guarantees the freedom to found schools (freedom of establishment), to organize the teaching in schools (freedom of organization of teaching), to determine the principles on which schools are based (freedom of conviction) and finally the neutrality of state schools (that is: schools run by public authorities). Article 23 is the result of long and hot debates in society and Parliament in the second decade of the 20<sup>th</sup> century. However, neither the right of the child to education as such is protected by this clause, nor everyone’s right to

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<sup>1</sup> M. van Roosmalen & B. 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/Portland: Intersentia 2013, pp. 563-581, p. 565.

<sup>2</sup> Articles 26, 27, 28 and 37.

<sup>3</sup> Equal Treatment Commission, opinion of 3 Augustus 2000, No. 2000-51.

education. Article 23 rather protects a right to teach (*droit d'enseigner*) than a right to learn (*droit a apprendre*).<sup>4</sup>

5. Should we care? It may be argued that there is no need to care, for under Article 120 of the Constitution primary legislation – that is Acts of Parliament – cannot be reviewed by the Dutch courts. However, lower statutes can be reviewed by the courts. Besides, constitutional rights such as Article 23 do bind Parliament in the legislative process.
6. In comparison: Article 2 of the First Protocol to the ECHR in the first paragraph guarantees the right of the child providing that no person shall be denied the right to education. In the second paragraph the right of parents and carers is protected, as this provision reads that 'in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.
7. Why is this right of the child under the 1<sup>st</sup> paragraph of Article 2(1) 1P important to a report on the rights of the child in the Dutch constitutional framework? The reason is Article 94 of the Constitution: Dutch courts are not allowed to apply primary (and secondary) legislation if that would amount to a breach of a self-executing clause in (*inter alia*) a treaty to which the Netherlands is a party, like Article 2(1) 1P.
8. In its judgment of 15 July 2012 the Administrative Jurisdiction Division of the Council of State (AJD) held that an educational institution based on the Sudbury Valley School concept, which lets students from preschool through high school age explore the world freely, at their own pace and in their own unique ways,<sup>5</sup> no longer could be regarded as a 'school' in the sense of the Compulsory Education Act 1969 (CEA 1969) which makes pupils over 12 years and parents punishable if pupils are not subscribed to a 'school' in the sense of the Act. The applicants (that is the school, teachers, parents *and children*) had argued *inter alia* that their rights under Article 23 of the Constitution and Article 2 1P had been violated. But the applicants could not rely on their rights under Article 23 of the Constitution, as Article 120 of the Constitution stipulates that the constitutionality of Acts of Parliament, including the CEA 1969, cannot be reviewed by the courts. Article 2 1P had not been violated either, as the rights protected by this provision were not unconditional, while the Minister had interpreted the legal criterion 'education' in an adequate and proportionate way. Those who take an interest in the full reasoning given by the AJD may have a look at the CODICES database.<sup>6</sup> The point I wish to make now is that the rights of the child under international law may be invoked in the Dutch constitutional order by way of Article 94 of the Constitution.
9. Does this also apply to Key Article 3(1) CRC? This provision reads: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
10. Whether or not an international treaty provision is self-executing in the sense of Article 94 of the Constitution depends *inter alia* on the wording of the provision concerned and

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<sup>4</sup> P. Huisman, 'Verwezenlijking en doorwerking van het (internationale) grondrecht' [Fulfilment and Effect of the (International) Basic Right], in: J. Gerards & C. Sieburgh (eds.), *Fundamentele rechten. De invloed van fundamentele rechten op het materiële recht* [Basic Rights. The Influence of Basic Rights on Substantive Law], Deventer: Kluwer 2013, pp. 349-373, p. 351.

<sup>5</sup> See <[www.sudval.org/](http://www.sudval.org/)>, page visited 4 October 2013.

<sup>6</sup> Codices NED-2012-2-007 (Administrative Jurisdiction Division of the Council of State, judgment of 15 August 2012, No. 201111341, *De Kampanje and Others v. Minister of Education, Culture and Science*).

parliamentary history of the Act sanctioning the treaty: does the provision merely contain an instruction to the legislator or is sufficiently clear to be relied on in court?<sup>7</sup>

11. In earlier judgments the AJD has held that Article 3(1) CRC is not self-executing, as it would not follow from the parliamentary documents relating to the Bill sanctioning the CRC that Article 3(1) was among the provisions which the legislator assumed to be self-executing.<sup>8</sup> In some judgments though, the AJD has left aside whether or not Article 3(1) CRC is self-executing.<sup>9</sup>
12. In its judgment of 7 February 2012 the AJD held that Article 3(1) CRC did have direct effect *insofar* as it stipulates that the best interests of the child shall be a primary consideration.<sup>10</sup> With regard to the weight that should be attached to the interest of the child in the case at hand, the first paragraph, given its wording, does not contain provisions which can be directly applied by the court without further implementation by the legislator. However, the court must review whether the administrative body has sufficiently taken into account the interests of the child and has thus remained within the boundaries of the law. In doing so the court should show deference.
13. One cannot appreciate the meaning of this judgment without paying attention to Article 24 of the EU-Charter, which provides *inter alia* that the child's best interests must be a primary consideration in all actions relating to children. The case at hand was an asylum case brought by a minor who relied on Article 24 of the Charter. The AJD first held that the case came within the ambit of the Charter.<sup>11</sup> The AJD further recognized that in relation to Article 24 of the Charter the rules on direct effect under EU constitutional law had to be applied. According to the case law of the Court of Justice of the European Union a provision of EU law can be appealed to before the national court even if it contains a margin of appreciation for the Member States.<sup>12</sup> The fact that a provision of EU law confers such a margin does not exclude the competence of the courts to determine whether the national agencies have exceeded the limits of this margin. Article 24 of the Charter which is based on Article 3 CRC contains such a margin of appreciation. Therefore, the AJD held that the courts can only determine whether the public authority has exceeded this margin in the case at hand.
14. After this brief introduction to the rights of the child in the broad constitutional framework adopted by the Netherlands, let me now make a few remarks on home schooling under Dutch law, as home schooling apparently has been the trigger for dedicating today's mini-conference to 'the rights of the child'.
15. Pursuant to the CEA 1969 parents or carers must subscribe a child to a school.<sup>13</sup> However, there are some exceptions to this rule. For instance, if the parents or carers have serious objections against the conviction of every school within a reasonable distance from their home, they may claim exemption from this duty.<sup>14</sup> Be that as it may, they can only claim exemption, provided that the child did not attend school in the past

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<sup>7</sup> Cf. Court of Cassation 30 May 1986, *Nederlandse Jurisprudentie* [Dutch Case Law] 1986, 688

<sup>8</sup> Administrative Jurisdiction Division of the Council of State, judgment of 23 September 2004, No. 200404485/1; Administrative Jurisdiction Division of the Council of State, judgment of 19 October 2011, No. 201010265/1/H3.

<sup>9</sup> Administrative Jurisdiction Division of the Council of State, judgment of 15 February 2007, No. 200604499/1.

<sup>10</sup> Administrative Jurisdiction Division of the Council of State, judgment of 7 February 2012, No. 201103064/1/V2. Cf. Administrative Jurisdiction Division of the Council of State, judgment of 13 February 2013, No. 201202839, *X v. the Tax and Customs Administration*, CODICES NED-2013-1-002.

<sup>11</sup> In the sense of Article 51(1) of the Charter.

<sup>12</sup> Court of Justice 1 February 1977, Case 51/76, *VNO*; Court of Justice 24 October 1996, Case C-72/95, *Kraaijeveld*; Court of Justice 7 September 2004, Case C-127/02, *Kokkelvisers*.

<sup>13</sup> Article 2(1) CEA 1969.

<sup>14</sup> Article 5(b) CEA 1969.

year.<sup>15</sup> The Court of Cassation, the highest court in criminal law cases, has held in its judgment of 15 February 2011 that this latter requirement does not violate Article 2 1 EP.<sup>16</sup>

16. So basically homeschooling is not provided for or even allowed under Dutch law, unless exemption is claimed once the rather strict criterions set by the Compulsory Education Act have been.<sup>17</sup> Let me close with a possible future development in this respect. The Secretary of State for Education has recently pronounced himself to advocate abolishment of the provision which allows exemptions based on parents' convictions.<sup>18</sup> He is of the opinion that the parents' convictions are outweighed by the interest of the child to attend school. However, draft legislation has not yet been submitted to the Council of State for an advisory opinion by its Advisory Division.
17. One will appreciate the dilemma's the legislature faces when it comes to the question what actually is the right or the best interest of the child. Is it the child's social-emotional development which benefits from school attendance which decides it? Or is it rather the child's right to be brought up and educated by or according to the values and beliefs held by his parents? And what is the right of the parent(s) in this respect? We hear the echoes of the United States Supreme Court's decision in the *Pierce*-case: 'the child is not 'the mere creature of the State'.<sup>19</sup> Be that as it may, I will now leave the floor to others. Thank you for your attention.

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<sup>15</sup> Article 8 CEA 1969.

<sup>16</sup> Court of Cassation 15 February 2011, *Rechtspraak van de Week* [Weekly Case Law Bulletin] 2011, 295.

<sup>17</sup> Article 5(b) j° Article 8 CEA 1969.

<sup>18</sup> Letter of State Secretary Mr. Dekker to the Chair of the Second Chamber (House of Representatives) of the States-General with reference no. 426681 (13 July 2013), see <[www.rijksoverheid.nl](http://www.rijksoverheid.nl)>.

<sup>19</sup> USA Supreme Court, 286 U.S. 510, 535 (1925), *Pierce v. Society of Sisters*.