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**Commission I – Kommission I**

**THE RIGHT TO ADEQUATE FOOD – SELECTED LEGAL ASPECTS  
LE DROIT A UNE ALIMENTATION ADÉQUATE –  
ASPECTS JURIDIQUES**

**DAS RECHT AUF ADÄQUATE ERNÄHRUNG –  
AUSGEWÄHLTE RECHTLICHE ASPEKTE**

**National Report – Rapport national – Landesbericht**

**The Netherlands – les Pays Bas –  
die Niederlande**

# The Netherlands: abundant in food, wanting in law

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## 1. Introduction

This paper gives an account of the right to food in Dutch law for Commission I of the 2005 CEDR-conference in Røros, Norway.

The account does not follow the questionnaire precisely. For the purposes of comparison, the questions from the questionnaire appear in text boxes with a summary of the answer to each question as elaborated in the text.

This paper starts in § 2 with some background information on the legal system of the Netherlands in general and the role of human rights in particular, including some information on human rights education in the Netherlands.

§ 3 is dedicated to the place of Article 11 CESC, the right to adequate food, in Dutch law. It will be seen that the impact of Article 11 CESC is limited. For this reason the remaining subjects have been treated outside the scope of Article 11 CESC in § 4. This part of Dutch food law consists mostly of directly applicable EU law and national legislation harmonised by EU directives. In § 5 a short conclusion is drawn. Finally § 6 explains the references to literature and gives some suggestions for further reading.

## 2. Background

### 2.1 The Dutch legal system

In this paper we will refer to Dutch case law and parliamentary proceedings. This approach follows from the Dutch system of law. For a better understanding of our reasoning we will start with some background information concerning this system of law.

In comparative law the Netherlands<sup>2</sup> is included with the civil law family of continental Europe.<sup>3</sup> Among other things, this means that legislation is the most important source of law.<sup>4</sup> The Netherlands has a written constitution<sup>5</sup> with which lower legislation must be in

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<sup>2</sup> Adjective: Dutch. After its seafaring provinces on the western coast the Netherlands is also known as 'Holland'.

<sup>3</sup> For an introduction to Dutch law in English see: Jeroen Chorus (c.s. eds.) Introduction to Dutch Law, 3<sup>rd</sup> ed. Kluwer Law International 1999; Sanne Taekema (ed.) Understanding Dutch Law, BJu ([www.bju.nl](http://www.bju.nl)) The Hague 2004; Leonard F.M. Besselink, Constitutional Law in the Netherlands, Ars Aequi Libri Nijmegen, 2004; see also Oswald Jansen and George Middeldorp, Researching Dutch Law <http://www.llrx.com/features/dutch.htm#top>. A sociological portrait of Dutch law is available on the Internet, Fred J. Bruinsma, Dutch Law in Action: <http://www.uu.nl/content/dutchlawinaction2003.pdf>.

<sup>4</sup> But it is not necessarily the highest. In Dutch doctrine usually four sources of law are distinguished: international treaties (including secondary international law), written legislation, case law, and unwritten law (like general principles of law, general principles of proper administration and customary law).

conformity. The courts can annul legislation that departs from the constitution. There is one exception to this rule. The highest level of legislation, called 'formal legislation' or sometimes translated as: 'Acts of Parliament', is legislation forged in co-operation between the national government and parliament, and may not be annulled for unconstitutionality. The idea is that the formal legislator with its democratic basis has the power of final interpretation of the Constitution, not the courts. In all other cases the courts have the power of 'authentic interpretation'. That is to say, the courts have the final say on what legislation means, if it is valid, and more generally what the law is. This gives case law a status almost equal to legislation as source of law. Although case law exercises considerable influence, there is no doctrine of binding precedent. The courts are free to depart from earlier decisions given at the same or even higher levels. Nevertheless they will be reluctant to do so in cases of established case law. For this reason case law is a key factor in legal analysis. There are four courts that are highest in their respective field(s) of law. The 'Hoge Raad' ('Supreme Court') is the 'Court de cassation' in civil, criminal and fiscal cases. It judges on matters of law, not of fact. The three other highest courts are all administrative courts that pass judgements both on the law and on the facts. They are the 'College van Beroep voor het bedrijfsleven' ('Industrial Appeals Board'<sup>6</sup>) specialised in economic administrative law. It will not be mentioned again in this paper; the 'Centrale Raad van Beroep' ('Central Court of Appeal') specialised in social security law; and the 'Afdeling bestuursrechtspraak van de Raad van State' ('Administrative Judicial Review Division of the Council of State') for all other administrative law cases.<sup>7</sup>

The courts use different instruments for the interpretation of legislation. Important amongst these is the so-called 'legal-historic' method. When they apply this method the courts rely on the intentions of the legislators as are apparent from the published proceedings of parliament.

The Dutch Constitution has a monistic approach to international law, as explained below.

## 2.2 Human rights in the Dutch Constitution

The Dutch Constitution was re-codified in 1983. The new Constitution opens with a chapter on fundamental rights ('grondrechten'). This chapter contains civil –and political rights as well as economic –and social rights. In Dutch legal doctrine the old-fashioned distinction between justiciable fundamental freedoms that basically require non-intervention from the authorities and non-justiciable economic, social and cultural rights that require positive action from the authorities, is still alive. Most economic and social rights are set out not as entitlements of citizens but as concerns of the authorities.

More subtle distinctions between different kinds of negative and positive obligations connected to all human rights (e.g. obligations to respect, to ensure, to promote and to protect) are present in literature as well,<sup>8</sup> but are not prevalent.

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<sup>5</sup> For an English translation see: [http://www.minbzk.nl/contents/pages/6156/grondwet\\_UK\\_6-02.pdf](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf).

<sup>6</sup> Known from ECHR 19 April 1994, case no. 16034/90 (Van der Hurk case; the Commission decided on 10 December 1992, no. 16034/90), and in EC-law from many preliminary questions.

<sup>7</sup> Before 1994 it was called the 'Afdeling rechtspraak van de Raad van State'; *Judicial Devision of the Council of State*.

<sup>8</sup> Mainly in the writings of Frank Vlemminx, like *Een nieuw profiel van de grondrechten. Een analyse van de prestatieplichten ingevolge klassieke en sociale grondrechten*, third edition, BJu The Hague 2002 and *De autonome rechtstreekse werking van het EVRM. De Belgische en Nederlandse rechtspraak over verzekeringsplichten ingevolge het EVRM* (preadvies Nederlandse Vereniging voor Rechtsvergelijking) Kluwer Deventer 2002.

### Question 1

f) *Does your country consider the rights in CESCR just as equal as the civil and political rights?*

Answer: in the Netherlands social and economic rights usually are not considered as equal in law to civil and political rights.

## 2.3 The right to food in the Dutch Constitution

The right to food as such is not set out in the Dutch Constitution. The government found it unnecessary to mention it separately as it was considered to be implicit in the right to means of subsistence laid down in Article 20.

### Article 20 of the Constitution of the Netherlands

1. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.
2. Rules concerning entitlement to social security shall be laid down by Act of Parliament.
3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to aid from the authorities.

This low-key approach is somewhat surprising. Discussion on human rights in the Netherlands was strongly influenced by the traumatic experience of the German occupation during World War II. A substantial part of the population suffered during the infamous 'winter of famine' of 1944. A few decades later food as an issue of human rights discussion seems to have been all but forgotten.

### Question 1

d) *Is the Covenant implemented in national law?*

e) *How is CESCR implemented?*

- i) *Constitutional*
- ii) *Judicial*
- iii) *Administrative*

Answer: the Covenant is implemented in Dutch national law. The Constitution of the Netherlands has a chapter on fundamental rights including social and economic rights. The right to food is considered to be a part of the right to means of subsistence.

## 2.4 Human rights education in the Netherlands

All law faculties in the Netherlands teach courses in Constitutional Law of which human rights law is an important part. The European Convention for Human Rights and Fundamental Freedoms is treated in a variety of courses ranging from administrative to civil and criminal law. The reason is that the Dutch courts often apply this convention. Also, in International Law, attention is given to the UN and to human rights. Usually, however, CESCR is mentioned in passing only.

There is a graduate school devoted to human rights. Several universities work together in this graduate school, the secretariat of which is at Utrecht University.<sup>9</sup> Outside the

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<sup>9</sup> Website: <http://www.uu.nl/uupublish/homerechtsgeleer/onderzoek/onderzoekscholen/rechtenvandemens/english/20494main.html>.

Universities, the T.M.C. Asser Instituut<sup>10</sup> (in The Hague) is involved in the study and promotion of human rights.

NJCM<sup>11</sup> publishes a journal (NJCM-Bulletin) on all aspects of human rights.

At present Wageningen University is the only university in the Netherlands that teaches Food Law. The right to food is treated in this context.<sup>12</sup>

#### **Question 1**

*i Does your country give education in the rights in CESCER in general, and the right to food in particular?*

*ii Are the rights in CESCER in general, and the right to food in particular discussed in academic fora?*

Answer: all universities teach and discuss human rights. Little attention is given to CESCER in general and the right to food in particular, with the exception of Wageningen University.

*iii Are the rights in CESCER in general, and the right to food in particular discussed in other fora?*

Answer: Asser Instituut and NJCM are strongly involved in discussing human rights in general.

### **3. The right to adequate food in Article 11 CESCER**

#### **3.1 Introduction**

The Netherlands is a state party to the CESCER. The Covenant took effect in the Netherlands on 11, March 1979, a little over three years after it entered into force on 3, January 1976 and more than twelve years after it was concluded.

#### **Question 1**

*a) Is your country a state party to the The International Covenant on Economic, Social and Cultural Rights (CESCR)?*

Answer: the Netherlands is a state party to CECR.

In the Netherlands, the lot of all rights in the ICESCR ('the Covenant'), including the right to food contained in Article 11, has been intertwined from the outset with that of the equivalent rights in the Dutch Constitution. Under Article 91 of the Constitution a treaty should be approved by parliamentary act. When the Covenant was submitted for approval to Parliament in the mid-Seventies, the government in the explanatory memorandum on the bill described the nature of the Covenant as follows, using Article 2 of the Covenant as example:<sup>13</sup>

'The first paragraph clearly shows that the drafters of the Covenant have considered that the economic, social and cultural rights in terms of nature and contents because

<sup>10</sup> Website: [www.asser.nl](http://www.asser.nl).

<sup>11</sup> Nederlands Juristen Comité voor de Mensenrechten; Netherlands' Lawyers Committee for Human Rights (NJCM@Leidenuniv.nl).

<sup>12</sup> For the Wageningen approach to food law see: B.M.J. van der Meulen, *The Right to Adequate Food. Food Law Between the Market and Human Rights* (inaugural address) isbn 90 5901 9628, Elsevier 2004, and B.M.J. van der Meulen and M. van der Velde, *Food Safety Law in the European Union*, Wageningen Academic Publishers, 2004 (<http://www.wageningenacademic.com/foodlaw>).

<sup>13</sup> Parliamentary Documents II 1975-1976, 13 932 (R 1037), no. 3, page 45.

of their generality do not offer a fixed standard for the rate and degree of realisation of those rights.'

In the government's opinion the Covenant solely contained open standards whose contents should be defined by politics and policy. In particular with regard to Article 11 of the Covenant the government pointed out:<sup>14</sup>

'that in particular in developing countries the living conditions of large population groups are far below an acceptable level and that in those countries the realisation of ever-improving living conditions is an urgent necessity for many years to come.'

During virtually the same period Parliament was considering the inclusion of economic, social and cultural rights in the Dutch Constitution and the government provided those rights with similar comments. From the edit of the constitutional articles in question:<sup>15</sup>

'an ample policy margin has been left for the bodies entrusted with regulations or care. The policy margin means primarily that the rate and speed of realisation of the interests phrased in the provisions are left to the government body concerned.'

The government further took the position that the implementation of the economic, social and cultural rights in the Constitution had been almost realised.<sup>16</sup> For this reason the government dismissed the judicial control of compliance. Only in very exceptional cases would the Court be able to establish a violation of the rights. The government considered the possibility that such a case would arise virtually academic.<sup>17</sup> In brief, the government lumped together the rights contained in the Covenant and in the Constitution. That the wording of the rights contained in the Constitution was extremely vague where the Covenant was rather detailed on many points escaped notice or was considered irrelevant.

#### **Question 2 (b)**

i) *Does your country consider the right to food as a justiciable right?*

Answer: The Dutch government does not consider the right to food as a justiciable right.

### **3.2 The Rights Contained in the Constitution and in the Covenant in Legal Practice**

The government's position about the justiciability of the economic, social and cultural rights contained in the Constitution has had a huge effect on legal practice. Since the rights were embedded in the Constitution in 1983 the courts have established just two violations.<sup>18</sup> In addition the National Ombudsman has held once that a right was being violated.<sup>19</sup> This does not mean that the government carefully honours the rights, for in almost all cases the courts dismiss evaluation against the rights with a reference to the government. As will be shown below the rights contained in the Covenant do not fare any better.

Of course the significance of the economic, social and cultural rights contained in the Constitution does not depend on the possibility of judicial control. It is conceivable that the rights are incorporated into legislation and administration entirely voluntarily. An extensive

<sup>14</sup> Parliamentary Documents II 1975-1976, 13 932 (R 1037), no. 8, page 26.

<sup>15</sup> *Algehele grondwetsherziening (Overall constitutional revision)*, Deel Ia Grondrechten, Den Haag 1979, page 258.

<sup>16</sup> *Algehele grondwetsherziening*, Deel Ia Grondrechten, Den Haag 1979, page 255.

<sup>17</sup> *Algehele grondwetsherziening*, Deel Ia Grondrechten, Den Haag 1979, page 258.

<sup>18</sup> Summary proceedings President of the Judicial Division of the Council of State, 10 May 1989, AB 1989, 481 on the right to education in Article 23 Constitution and Court of Utrecht, 18 June 1991, NJ 1992, 370 on the right to housing in Article 22 (2) of the Constitution.

<sup>19</sup> No 18 July 1995, report no. 95/271 on the right to health of Article 22 (1) Constitution.

evaluation study has been performed, which showed that the economic, social and cultural rights contained in the Constitution play absolutely no role in the legislation process and administrative actions.<sup>20</sup> Later, but less extensive studies point in the same direction.<sup>21</sup> Although the significance of the Covenant for legislation and administration was not studied separately, it is safe to assume that this gloomy picture applies just as much to the rights contained in the Covenant.

### 3.2.1 Direct Applicability of the Covenant

The answer to the issue of judicial control of compliance with the Covenant should first of all consider the manner of reception of the Covenant's provisions. The Netherlands applies a monistic system. This was decided by the Supreme Court as early as 1919.<sup>22</sup> This means that within the Dutch judicial system treaty provisions can be invoked if they have direct applicability. The Netherlands, however, applies a special term in connection with this direct applicability. This is the concept 'binding on all persons' that was included in Article 94 of the Constitution in 1956. It is a rather obscure phrase, and besides the question whether the provisions of the Covenant award discretionary powers to the legislator and/or administrator, other factors play a role as well.<sup>23</sup> These other factors aim at evading direct applicability.

#### Question 1

c) *Does your country have a monistic or dualistic approach to international law?*

Answer: the Netherlands has a monistic approach to international law. The courts can apply treaty provisions that are 'binding on all persons'.

First of all, especially when the Covenant is at stake, the courts place great value on the position taken by the government in its explanatory memorandum on the approval act about direct applicability. In view of earlier remarks it will come as no surprise that the government dismisses direct applicability of the Covenant:<sup>24</sup>

'In general the provisions contained in this Covenant will not have direct applicability.'

When the Covenant is invoked the courts usually refer to this comment.

A second characteristic of the phrase 'binding on all persons' implies that direct applicability may require that the provision of the covenant addresses citizens directly. The word 'may' already shows that this requirement is certainly not always set. However, partly for this reason direct applicability of the Covenant is often dismissed.

Especially with regard to the Covenant a third characteristic of the phrase 'binding on all persons' is that direct applicability is assessed in an extremely abstract manner. The case to be resolved by the Court does not play any role whatsoever in the considerations. For instance, direct applicability of the right to adequate food contained in Article 11 of the Covenant may be denied because in the Court's view the term 'adequate food' is too vague, while in the case at issue *no food at all* is supplied and Article 11 is undeniably violated.<sup>25</sup>

<sup>20</sup> Tj. Gerbranda and M. Kroes, Grondrechten evaluatieonderzoek, final report, Leiden 1993, page 334.

<sup>21</sup> F. Vlemminx, Een nieuw profiel van de grondrechten, The Hague 2002, pages 20-22.

<sup>22</sup> Supreme Court, 3 March 1919, NJ 1919, page 371; F.M.C. Vlemminx and M.G. Boekhorst, Article 93, in: A.K. Koekkoek (ed.), De Grondwet, Een systematisch en artikelsgewijs commentaar, Deventer 2000, pages 456-457.

<sup>23</sup> See about this subject: F. Vlemminx, Een nieuw profiel van de grondrechten, The Hague 2002, page 207-210.

<sup>24</sup> Parliamentary Documents II 1975-1976, 13 932 (R 1037), no. 3, page 13.

<sup>25</sup> Court of The Hague, 6 September 2000, RAwb 2001, 55.

This specific approach to direct applicability of the Covenant implies that the General Comments of the Committee on Economic, Social and Cultural Rights on the assessment of direct applicability appear to play no role at all. No matter how much the Committee emphasises that the policy freedom is restricted or even absent, this does not make a difference for the Dutch courts with regard to direct applicability. Not the issue of policy freedom but the other factors mentioned above are decisive. Even the discussion of direct applicability in General Comment 3 on the nature of States parties obligations (paragraph 3) and General Comment 9 on the domestic application of the Covenant do not change this. The effect seems nil. The same applies to the typology of obligations, whose relevance has been stressed for years by Dutch science.<sup>26</sup>

#### **Question 2 (b)**

ii) *Is the right to food immediately applicable or is there any law in order to put this right into practice?*

Answer: the right to food is not considered immediately applicable in the Netherlands.

### **3.3 Case Law of the Central Appeals Court**

During the 25 years that the Covenant has been in force in the Netherlands, the courts have established a violation just once. This concerned a cutback measure that affected the right to equal remuneration (Article 7 of the Covenant) of public officials.<sup>27</sup> This ruling was set aside by the Central Appeals Court five years later, in 1989, because of the absence of direct applicability.<sup>28</sup>

Not only is the Central Appeals Court the highest civil servants tribunal, it is also the highest court with regard to social security. Of all tribunals the Central Appeals Court is the one most likely to be faced most frequently with reliance on the Covenant. For that reason the case law of this highest tribunal deserves special attention.

In the same ruling in which the violation of Article 7 of the Covenant was 'undone', the Central Appeals Court held that the direct applicability of any provision of the Covenant constituted a total exception from the Covenant's general character. In other words, the main rule is formed by the absence of direct applicability. With this ruling the Central Appeals Court also responded to a ruling that it delivered three years earlier, in 1986. In 1986 the Central Appeals Court created the possibility of direct applicability by ruling that it need not be excluded in advance that the right to equal remuneration by its nature would be suitable for direct applicability.<sup>29</sup> In 1989 the Central Appeals Court backed off. In 1991 direct applicability of the right to equal remuneration was dismissed definitively.<sup>30</sup>

In 1995 the Central Appeals Court took a new route, primarily with regard to Article 11 of the Covenant and the right to subsistence. The Central Appeals Court did not state whether or not Article 11 had direct applicability and established that the right compelled the government to guarantee an adequate minimum. The Appeals Court then assessed whether the cutback measure had an adverse effect on that minimum. Because no such adverse effect occurred and Article 11 had therefore not been violated, the direct applicability issue need not be considered.<sup>31</sup> Various later rulings, concerning not only

<sup>26</sup> F. Vlemminx, *Een nieuw profiel van de grondrechten*, The Hague, 2002.

<sup>27</sup> Civil Servants Tribunal Amsterdam, 12 March 1984, NJCM-Bulletin 1984, page 245 et seq.

<sup>28</sup> Central Appeals Court, 16 February 1989, AB 1989, 164. This contribution does not cite all court rulings denying the direct applicability of the Covenant. The picture evoked by the rulings cited is sad enough as it is.

<sup>29</sup> Central Appeals Court, 3 July 1986, AB 1987, 299.

<sup>30</sup> Central Appeals Court, 17 December 1991, RSV 1992, 164.

<sup>31</sup> Central Appeals Court, 31 March 1995, JB 1995, 161.

issues regarding the Covenant<sup>32</sup> but also issues regarding the European Social Charter and ILO Conventions, confirmed this new approach. This again opened up the possibility of the Covenant's direct applicability.

Unfortunately, the Central Appeals Court backed off for a second time. On 25 May 2004<sup>33</sup> the Central Appeals Court argued, further to reliance on Article 11 of the Covenant, among other things, that given the wording and the purport this Article contains generally formulated objectives rather than a right that can be invoked by citizens. With reference to the explanatory memorandum on the approval act of the Covenant direct applicability was denied. The same happened on 18 June 2004 with regard to Article 9 of the Covenant.<sup>34</sup> At present the Central Appeals Court therefore is back to square one as far as the direct applicability of the Covenant is concerned.

#### **Question 2 (b)**

- i) Does your country consider the right to food as a justiciable right?*
- ii) Is the right to food immediately applicable or is there any law in order to put this right into practice?*
- iii) Does your country have any enforcement mechanisms relating to the right to food?*

Answer: in its case law the Central Court of Appeal considers the right to food to be neither justiciable nor directly applicable, therefore it does not provide an enforcement mechanism.

### **3.4 Case Law of the Civil Courts**

Not only the Central Appeals Court's approach should be discussed, but the civil court's views as well. It appears that the Central Appeals Court's backing off was caused in part by the persistently dismissive strategy of the civil courts. When in 1990 the Central Appeals Court definitively dismissed direct applicability of the right to equal remuneration contained in Article 7 of the Covenant, it did so with reference to a similar negative ruling of the highest civil court, the Supreme Court.<sup>35</sup> A similar picture emerges for Article 11 of the Covenant. In 1995 and 1997 the Central Appeals Court held that the direct applicability need not be considered and that Article 11 compelled the state to guarantee a minimum. On 6 September 2000 the Court of The Hague held that Article 11 was worded so generally that no minimum could be distilled and that the Article therefore did not have direct applicability.<sup>36</sup> As mentioned earlier the Central Appeals Court in recent case law abandoned the approach of 1995 and 1997.

It is clear that the civil courts have never been enamoured of the Covenant's direct applicability, not even if a freedom of citizens is undeniably at stake and for that reason non-interference is expected of the state. For instance, in 1983 the right to strike contained in Article 8 of the Covenant was denied direct applicability because the Article, given the words 'The States Parties to the present Covenant undertake to ensure', does not address citizens directly, but the state.<sup>37</sup> The civil courts also strongly stress the importance of the government's position in the explanatory memorandum on the act adopting the Covenant. Partly because of this explanatory memorandum the Supreme Court in 1989 did not award

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<sup>32</sup> Central Appeals Court, 22 April 1997, JB 1997, 158.

<sup>33</sup> Central Appeals Court, 25 May 2004, LJN: AP0561.

<sup>34</sup> Central Appeals Court, 8 June 2004, LJN: AP4680.

<sup>35</sup> Supreme Court, 20 April 1990, AB 1990, 338.

<sup>36</sup> Court of The Hague 6 September 2000, Rawb 2001, 55.

<sup>37</sup> Supreme Court, 6 December 1983, NJ 1984, 557.

direct applicability to Article 13 of the Covenant,<sup>38</sup> explicitly stating a year later that definitely some meaning should be attached to the explanatory memorandum.<sup>39</sup>

Worth mentioning is also that in 1993 the Supreme Court determined that the right to equal remuneration contained in Article 7 of the Covenant could be awarded direct applicability to some extent if it were combined with Article 26 of the International Covenant on Civil and Political Rights.<sup>40</sup> In that dispute the Supreme Court ruled that the discrepancy in remuneration between married and unmarried persons was incompatible with Article 7 of the Covenant and Article 26 of the International Covenant on Civil and Political Rights. The direct applicability of Article 7 of the Covenant through Article 26 of the International Covenant on Civil and Political Rights appears to be practised consistently. On 30 January 2004 the Supreme Court placed great value on the combination of Article 7 of the Covenant and Article 26 of the International Covenant on Civil and Political Rights but at the same time, referring to the ruling from 1990, repeated that Article 7 of the Covenant by itself does not have direct applicability.<sup>41</sup>

#### **Question 2 (b)**

- i) Does your country consider the right to food as a justiciable right?*
- ii) Is the right to food immediately applicable or is there any law in order to put this right into practice?*
- iii) Does your country have any enforcement mechanisms relating to the right to food?*

Answer: The civil courts do not consider the right to food to be either justiciable or directly applicable and therefore do not provide an enforcement mechanism.

There may be an exception if Article 26 ICCPR is applicable at the same time as Article 11 CESCR.

### **3.5 The Attitude of the Dutch Government**

With regard to the reporting duty imposed on the State Parties by Articles 16 and 17 of the Covenant, it should be noted first of all that the last report of the Netherlands was submitted in 1996.<sup>42</sup> As reports should be filed every five years, and the next report therefore should have been submitted in 2001, it appears that the obligations under the Covenant are not taken very seriously. In the 1996 report the government's comment on the right to food is very brief:

#### **Question 1**

- a) How does your country report to the UN on the right to food?*

Answer: superficial; see here below.

#### **'Adequate food**

235. Food production in the Netherlands greatly exceeds the population's requirements.

<sup>38</sup> Supreme Court, 14 April 1989, AB 1989, 207.

<sup>39</sup> Supreme Court, 20 April 1990, NJ 1992, 636.

<sup>40</sup> Supreme Court, 7 May 1993, NJ 1995, 259. More than ten years earlier the administrative court had already introduced this approach, but with regard to Article 11 of the Covenant and Article 26 of the International Covenant on Civil and Political Rights; see for instance summary proceedings judge of Arnhem, 19 October 1978, tB/S III, 97.

<sup>41</sup> Supreme Court, 30 January 2004, LJM: AM2312.

<sup>42</sup> Second periodic report, 05/08/96, E/1990/6/Add. 11.

During recent decades food production and agricultural production in general have increased rapidly and the production and import/export statistics show that the Netherlands is one of the countries with a large net export of food. There are, however, substantial imports of food and cattle feed from various industrial and developing countries.

236. Product quality (e.g. in terms of hygiene, residue levels, contaminants and nutritional quality) is high and meets legal as well as other consumer requirements.
237. The prices of common foodstuffs are relatively low. Low-income groups are able to buy adequate amounts of food. In periods of severe recession extra attention is paid to the low-income groups. Specific measures may be taken. At the moment there are no programmes to secure the food supply of special groups. An important consideration in this respect is the percentage of income that is spent on food. This decreased from 37 per cent in 1960 to 14.9 per cent in 1993. There are no regional differences which would be relevant here.
238. The foregoing shows that food and nutrition policy in the Netherlands focuses on food quality and the promotion of healthy eating habits by the various population groups, rather than on the supply of food as such. General policy is described in the Food and Nutrition Policy report presented to Parliament in 1984, which was followed by progress reports in 1989 and 1993.
239. Nutrition surveys covering 6,000 people were made in 1987 and 1992. The next one will most probably take place in 1997. The figures show an adequate supply of micro and most macronutrients. However, from the health point of view, fat consumption and to a lesser degree energy intake are considered to be too high.
240. In 1986 a long-term campaign aimed at reducing fat consumption was started. A positive downward trend (fat represented 40 per cent of total calorie consumption in 1987 and 38 per cent in 1992) has been noted. The campaign will continue in the next few years, and will include both a direct and an indirect approach to lowering fat consumption till the optimum of 35 per cent is reached.
241. Nutritional education is an important instrument of food and nutrition policy in the Netherlands. The leading organization in this field is the Food and Nutrition Information Office. This organization is mainly financed by the Government, that is to say the Ministries of Health, Welfare and Sport and the Ministry of Agriculture. The Office directs its activities at the public, educational and information institutions and industry.
242. Environmental considerations are of growing importance in food production and consumer choice. Important topics are the use of pesticides and a more balanced use of fertilizers. Attention is particularly focused on organic farming, both nationally and by the EU. The area under cultivation and the number of organic farmers are slowly increasing. High prices, due to lower production levels and distribution problems, prevent organic farming from expanding any faster.'

When the report was considered in 1998<sup>43</sup> Mr Ahmed of the Committee on Economic, Social and Cultural Rights remarked:

'that, according to the Netherlands section of the International Commission of Jurists, 240,000 households, or almost 1 million persons, were living on an income below the social minimum and some 250,000 children belonging to poor families participated very rarely in recreational and cultural activities. He was surprised that a country as wealthy as the Netherlands was unable to solve those problems.'

To this Mr Potman of the Dutch delegation replied:

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<sup>43</sup> E/C.12/1998/S.R. 14.

'There seemed to be no basis for the allegation that 250,000 children were unable to exercise the rights provided for in the Covenant.'

That this figure of 250,000 children was taken from the second annual report on poverty issues<sup>44</sup>, which had been presented to the Minister of Social Affairs and Employment in 1997, was not mentioned. It should further be noted that three years later the official study by the Social and Cultural Planning Office and the Central Bureau for Statistics revealed that one out of seven households in the Netherlands were living below the poverty line.<sup>45</sup> To all appearances the Dutch government, or the delegation representing the government, has deliberately provided the Committee on Economic, Social and Cultural Rights with incorrect information. The same seems to apply to the direct applicability issue. When the report was considered in 1998 members of the Committee:<sup>46</sup>

'said they knew Dutch courts incorporated international law references in court decisions, in particular in the field of human rights, and that was admirable. Had there been any recent court decisions in which the Covenant had been mentioned?'

The Dutch delegation replied:

'The direct application of the covenant was not needed in the Netherlands as such because whoever had problems with one of the rights enshrined therein could refer to the other instruments the Government had ratified, including International Labour Organisation conventions and the European human rights convention.'

Where the ILO conventions are concerned, this answer is also misleading. Almost always the courts deny direct applicability, as with the Covenant. But there have been exceptions. In 1996 the Central Appeals Court awarded direct applicability to a provision of the ILO Convention 102 and established that a violation had occurred.<sup>47</sup> The government then terminated a similar European convention on social security (ILO Convention 102 could not be terminated because the applicable term had not yet arrived).<sup>48</sup> Fortunately Parliament refused to approve the termination.<sup>49</sup> This affair occurred shortly before the delegation gave the above response. The delegation knew or should have known that the government did not appreciate and would not accept the establishing of a violation of an ILO Convention, but did not mention this. On 14 March 2003 the Central Appeals Court further awarded direct applicability to a provision contained in ILO Convention 118 and again a violation was established.<sup>50</sup> Again the government wanted to terminate the convention and a bill to approve the termination was submitted to parliament. This time Parliament conceded. The termination of ILO Convention 118 was effected retroactively as from 14 March 2003!<sup>51</sup>

The manner of reporting, like the case law of the courts on the Covenant, clearly shows that every effort is being made to minimise the significance of this convention for the Netherlands.

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<sup>44</sup> G. Engbersen, J.C. Vrooman and E. Snel (ed.), *De kwetsbaren, Tweede jaarrapport armoede en sociale uitsluiting*, Amsterdam 1997, pages 9-10, 130, 147 and 154.

<sup>45</sup> Social and Cultural Planning Office and Central Bureau for Statistics, *Armoedemonitor 2000*, The Hague 2000, p. 16-17.

<sup>46</sup> DPI-Press Releases, Committee on Economic, Social and Cultural Rights starts consideration of report of the Netherlands, 5 May 1998.

<sup>47</sup> Central Appeals Court, 29 May 1996, RSV 1997, 9.

<sup>48</sup> Parliamentary Documents II 1996-1997, 25 524.

<sup>49</sup> Acts II 1997-1998, page 4381.

<sup>50</sup> Central Appeals Court 14 March 2003, RSV 2003, 114.

<sup>51</sup> Act of 9 December 2004, *Staatsblad* 715.

**Question 2 (b)**

- i) *Does your country consider the right to food as a justiciable right?*
- ii) *Is the right to food immediately applicable or is there any law in order to put this right into practice?*
- iii) *Does your country have any enforcement mechanisms relating to the right to food?*

Answer: the government of the Netherlands considers the right to food to be neither justiciable nor directly applicable, therefore it does not provide an enforcement mechanism.

### 3.6 The right to be free from hunger in Dutch foreign policy

Dutch foreign policy seems to show two different faces. On the one hand positions are taken in support of the right to food on the other hand the Netherlands are not willing to enter into binding obligations.

#### 3.6.1 *Human rights and development co-operation policy*

Dutch policies on human rights and development co-operation touch on the right to food. Human rights policy is a part of development co-operation policy. The latter focuses on poverty reduction. In this respect the Netherlands take the Millennium Development Goals (MDGs) as guideline. The Netherlands are convinced that eradication of poverty will contribute to the eradication of hunger, which is seen as an indicator of poverty.

#### 3.6.2 *Bilateral co-operation*

In bilateral development relations, the Netherlands opt for 'unbound' food aid. This is to say that, as far as possible, food is purchased locally. This approach is intended to stimulate the local economy and the local possibilities to generate an income. In the Dutch view food shortages usually are not caused by an absolute lack of food, but by a lack in means to purchase the food that is available.

#### 3.6.3 *Multilateral level*

At the multilateral level, the Netherlands support initiatives to enhance food security by WHO, UNHCR and FAO. Here also the MDGs are leading.

#### 3.6.4 *FAO Voluntary guidelines*

Against the backdrop of the foregoing, one would expect staunch Dutch support for any initiative to promote the realisation of the right to food. Such expectations meet with disappointment.

With a view to implementing the Plan of Action of the 1996 World Food Summit, in 2002 the Council of FAO instituted an 'Intergovernmental Working Group For The Elaboration Of A Set Of Voluntary Guidelines To Support The Progressive Realization Of The Right To Adequate Food In The Context Of National Food Security' (IGWG). Some 200 representatives from 90 FAO Member States took part in the four IGWG meetings that took place between March 2003 and September 2004. On the fourth meeting the Council of the FAO adopted the guidelines.<sup>52</sup> 'The objective of these Voluntary Guidelines is to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security'.<sup>53</sup>

Already in 2002 the European Commission cautioned the EU Member States about the possible implications if the Guidelines would have to be implemented on the international

<sup>52</sup> See: <http://www.fao.org/legal/rtf/rtf-e.htm>.

<sup>53</sup> Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security, § 6.

plane. The Member States' policies on agriculture, trade and finance might not be compatible with these guidelines.<sup>54</sup>

The EU did not disposed to agree to binding obligations to ensure food security within its own jurisdiction, and even less an obligation to provide humanitarian aid, including food aid, to any country in need that would ask for it.<sup>55</sup> At the time of the negotiations, the Netherlands held the EU presidency.

The Netherlands instructed its negotiators to take a 'constructive' approach in order to control damage as far as possible.

Four positions were taken:

1. Human rights conventions give the member states obligations vis-à-vis there own population;
2. Voluntary guidelines are not to be considered as legally binding documents, but practical tools to help realise the right to adequate food at the national level;
3. The voluntary guidelines do not bind;
4. The voluntary guideline do not address 'obligations' of states in international relations.

Despite opposition from developing countries, all four positions were upheld.

### **Question 3: The right to be free from hunger**

a) *International obligations:*

i) *How is the right to food effect on your country's foreign policy?*

(1) *Trade?*

(2) *development aid?*

(3) *other international aspects?*

Answer: in its development policy the Netherlands advocate a rights-based approach to development. Nevertheless, in the international arena it opposes the creation of third party possibilities to claim food aid.<sup>56</sup>

## **4. Dutch food law outside the context of CESCR**

### **4.1 EU/Dutch food safety law**

We have seen above that Article 11 has little or no impact on the Dutch legal system. The government presumed that the right to adequate food had already been fulfilled in national law. We now turn to the national provisions on food that are not connected to article 11 CESCR.

### **Question 2 (a) iii: Are the regulations connected to the right to food?**

Answer: the regulations discussed in this paragraph are not connected to the right to food.

Dutch legislation does not recognise an enforceable right of access to food as such. However there exists a large body of social security legislation that ensures in most cases a minimal financial standard of living.

<sup>54</sup> EC, Issues Paper, The Right to Adequate Food, 16 December 2002.

<sup>55</sup> Neither did the USA.

<sup>56</sup> The wording is taken from General Secretariat of the Council, Doc. No. 9/03 (ALIM), Brussels, 25 February 2003.

**Question 2: are there regulations related to:**

ii) *The accessibility of such food*

(1) *Economic*

(2) *Physical*

Answer: There are no regulations specifically about access to food. There exists however a social security system on the basis of which those in need are provided with financial aid.

Furthermore, the Netherlands has a body of food law consisting of EU regulations and national legislation modelled on EU directives, that addresses questions of food quality – especially food safety – and nutrition.

## 4.2 Framework legislation

Dutch food law can be characterised as economic regulatory law. The current legislative situation dates back to 1919 when the first national Commodities Act<sup>57</sup> (*Warenwet*) was published. This act is a framework act that contains the legal basis for statutory legislation in the form of Orders in Council<sup>58</sup> and Ministerial Orders<sup>59</sup> on both food and non-food<sup>60</sup>. Before 1919 provisions of food law were issued at municipal level. At present, the 1919 Act is still used, but it has been considerably amended and expanded. The major objectives of the act are the protection of public health, safety, fair trade and proper information about products.<sup>61</sup>

To a large extent, statutory legislation implements European directives and is thus harmonised with food legislation elsewhere in the European Union. As from the 2000 White Paper on Food Safety,<sup>62</sup> European food law is under review. The core of modern European food law no longer consists of directives, but instead the regulation is chosen as most important legislative instrument. As a consequence, national food law is more and more often replaced by directly applicable European legislation. First amongst these regulations is Regulation 178/2002, the so-called General Food Law (“GFL”).

## 4.3 The system of food law

For the sake of analysis the heterogeneous body of food legislation can be categorised as follows.

First a distinction can be made in substantive and procedural food law.

Substantive law focuses on the content of legal relations. Procedural law focuses on how to realise this content. These include procedures concerning pre-market approval of food products, inspection, monitoring and enforcement - including provisions that attribute the necessary powers to public authorities – and legal protection against measures of the authorities.

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<sup>57</sup> Act of 28 December 1919, Statute Book (Staatsblad) 1935, 793, lastly amended by Statute Book 2004, 164. Sometimes translated as: Food and Commodities act.

<sup>58</sup> Usually referred to as: ‘Warenwetbesluiten’.

<sup>59</sup> Usually referred to as: ‘Warenwetregelingen’.

<sup>60</sup> Such as toys and cosmetics.

<sup>61</sup> Article 3 Commodities Act.

<sup>62</sup> Com (1999) 719 final.

It appears that most of the substantive rules and regulations can be categorised in a limited number of ways. Three<sup>63</sup> types are easily distinguished: (1) rules concerning the substance of food, (2) rules concerning the handling of food, and (3) rules concerning communication about food.

The distinction between these three types is not watertight. Often one can argue whether a certain rule is of one type or another<sup>64</sup> but that does not diminish the usefulness of the distinction.

## 4.4 The composition of food

### 4.4.1 Food safety

Generally speaking, food producers are free in their choice of ingredients.<sup>65</sup> Exceptions apply to food additives, genetically modified foods and (other) novel foods. These need to pass a safety assessment before it is permitted to bring them to the market.

Besides raw materials that the producer intentionally includes in a food product, many kinds of chemicals or (micro) organisms may unintentionally find their way into the final product before it reaches the consumer.

This situation is covered to a certain extent by the general rules on food safety, which insist that no dangers to the consumer be present.<sup>66</sup> However, there are also more specific rules. First amongst these is the Framework regulation (EC) no. 315/93. This Regulation opens the possibility to establish maximum content levels for certain substances in food. If these levels are surpassed, the food may not be brought to the market. 'Contaminant' is defined as:

'any substance not intentionally added to food which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of environmental contamination. Extraneous matter, such as, for example, insect fragments, animal hair, etc, is not covered by this definition.'

Regulation (EC) no. 466/2001 gives maximum levels for a whole range of contaminants, for instance for nitrates in lettuce and spinach, and aflatoxines in nuts, dried fruit, grain, herbs and milk.

A particular kind of contaminant is residue from veterinary medicine, or from additives in feeding stuffs (in animal products like meat, milk or eggs), or crop protection products (in plants). For these products maximum residue levels (MRLs) can be established. If these levels are surpassed, the food may not be brought to the market.

#### **Question 2 (a) Are there regulations concerning**

- ii) *The availability of food in a quantity and quality:*  
(2) *free from adverse substances,*

Answer: the presence of residues and other contaminants is restricted.

<sup>63</sup> In its definition of food law, German literature distinguishes some more different types: extraction, production, composition, quality, labelling, packaging and designation.

<sup>64</sup> For instance, the rule that a product must comprise of at least 35% of cacao to be called chocolate can be considered a rule on content (35%) or a rule on communication, 'if you want to call it chocolate...'.

<sup>65</sup> However if they want to use certain protected names of designations they may have to adhere to vertical compositional standards legislation. In the Netherlands there exist for instance Warenwetbesluiten giving standards for the composition of honey, chocolate, jam and bread.

<sup>66</sup> Article 14 GFL.

#### 4.4.2 Nutritional quality

At present no mandatory requirements exist with regard to the nutritional quality of food. In the Netherlands, government activity in this field is restricted to providing the public with information through the Food and Nutrition Information Office (*Voedingscentrum*)<sup>67</sup>.

There is no obligation for food business operators to adhere to nutritional quality standards, nor to give nutrition information on the label. Some rules do exist, however, in case such information is provided voluntarily.<sup>68</sup>

#### **Question 2 (a) Are there regulations concerning**

- i) *The availability of food in a quantity and quality:*
  - (1) *sufficient to satisfy the dietary needs of individuals?*

Answer: in the Netherlands there are no regulations concerning the quality of food to satisfy the dietary needs of individuals. Government policy is limited to providing information.

### 4.5 Food handling

According to article 17 of the General Food Law, food business operators are responsible for meeting the relevant (food safety) requirements at all stages of production, processing and distribution of food.

There are several kinds of rules addressing the handling of food. There are those that aim to prevent food safety problems from occurring, those that aim to be prepared if food safety problems might occur and those that give obligations and instruments to deal with food safety problems when they occur.

#### 4.5.1 Preventing problems

##### *Hygiene*

The safety of food products when they reach a consumer's plate depends largely on the way they have been produced. For this reason rules have been set to ensure that safe methods of production are used.

Regulation (EC) No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs,<sup>69</sup> was published in the Official Journal of the European Union on 30 April 2004. Its entry into force depends on some legislative measures that have to be taken, but will not be sooner than 1, January 2006. It will then replace existing national legislation in the Member States.<sup>70</sup>

The word 'hygiene' is taken in a broad sense. It means measures and conditions necessary to control hazards and ensure the fitness for human consumption of a foodstuff taking into account its intended use.

The Regulation imposes a general obligation on food business operators to ensure that in all stages of production, processing and distribution food under their control satisfies the relevant hygiene requirements.

At the heart of these requirements is the so-called HACCP (Hazard analysis and critical control points) system. This is a system of self-regulation in which the food business operator must analyse the processes in his or her business in order to identify the hazards

<sup>67</sup> [www.voedingscentrum.nl](http://www.voedingscentrum.nl).

<sup>68</sup> Directive 90/496/EC; Warenwetbesluit Voedingswaarde-informatie levensmiddelen.

<sup>69</sup> And Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin.

<sup>70</sup> In the Netherlands for instance the 'Warenwetbesluit Bereiding en behandeling van levensmiddelen', Staatsblad 1992, 678; and 'Warenwetregeling Hygiëne van levensmiddelen', Staatscourant 1994, 245.

that may occur. Then s/he has to identify the critical control points and the limits at those points that separate acceptability from unacceptability. The operator must implement monitoring procedures at the critical control points and prepare for corrective actions if a control point is not under control. Finally, everything that is undertaken must be documented and recorded and the information must be made available to the public authorities.

The application of the HACCP principles can be facilitated and encouraged by national or Community guides for good practices.

In its annexes the Regulation gives general hygiene requirements for primary production and for all food business operators. Most of these requirements are concerned with cleanliness and prevention of cross contamination.

#### *4.5.2 Preparing for problems*

##### *Traceability*

The General Food Law<sup>71</sup> requires that food and food ingredients be traceable. This means that Food business operators must be able to identify (upstream) any person from whom they have been supplied with a food, a feed, a food-producing animal, or any substance intended to be, or expected to be, incorporated into a food or feed; and (downstream) to identify the other businesses to which their products have been supplied.

This information shall be made available to the competent authorities on demand.

The intention of the traceability system is to enable food safety problems to be identified at the source, and across the food chain.

#### *4.5.3 Dealing with problems*

##### *Withdrawal and recall*

Food business operators may not bring food to the market if it is unsafe.<sup>72</sup> If unsafe food nonetheless is discovered to have made it to market, then the product must be withdrawn from downstream businesses or recalled from the consumer.<sup>73</sup>

The food business operator, who considers or has reason to believe that a food it has imported, produced, processed, manufactured or distributed, is not in compliance with the food safety requirements, has at least four duties.

First there is the duty to immediately initiate procedures to withdraw the food in question from the market.

Second the operator must immediately inform the authorities that s/he has reason to believe that an unsafe food has been placed on the market. The operator must also inform the authorities of all actions taken to deal with the problem.

Third, in case the product may have already reached consumers, the operator shall effectively and accurately inform those consumers of the reason for its withdrawal, and recall products already supplied when other measures are deemed insufficient to achieve a high level of health protection.

Fourth, the food business operator has a duty to collaborate with the competent authorities on actions taken to avoid or reduce risks posed by foods, which they supply.

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<sup>71</sup> Article 18 GFL.

<sup>72</sup> Article 14 GFL.

<sup>73</sup> Article 19 GFL.

## 4.6 Labelling

An important issue in consumer protection is to ensure that the consumer is aware of what s/he consumes. Many rules exist concerning the obligation of food business operators to provide the consumer with adequate information by labelling.

The most important codification of these rules is to be found in Directive 2000/13 of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs: the so-called 'Labelling directive'.<sup>74</sup> This directive has been implemented in the Netherlands in the 'Warenwetbesluit Etikettering van levensmiddelen'.

Labelling means 'any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff'. Labelling may not be misleading.

All pre-packaged food products must be labelled in a language that is easily understood. Usually this means in the national language of the Member State. Other information is mandatory, restricted or forbidden.

There are ten required (mandatory) pieces of information:

- (1) the name under which the product is sold;
- (2) the list of ingredients;
- (3) the quantity of certain ingredients or categories of ingredients;
- (4) in the case of pre-packaged foodstuffs, the net quantity;
- (5) the date of minimum durability or, in the case of foodstuffs which, from the microbiological point of view, are highly perishable, the 'use by' date;
- (6) any special storage conditions or conditions of use;
- (7) the name or business name and address of the manufacturer or packager, or of a seller established within the Community.
- (8) particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff;
- (9) instructions for use when it would be impossible to make appropriate use of the foodstuff in the absence of such instructions;
- (10) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume.

Specific labelling requirements demand that the presence of allergens, additives, novel ingredients and GMOs be mentioned on the label.

These labelling requirements are rather extensive. In most cases information that is relevant from the point of view of acceptability of the food product for certain cultural groups in society, will therefore be available.

## 4.7 Legal protection

Individuals have several opportunities to bring proceedings contesting infringements of their rights under food law to court.

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<sup>74</sup> OJ 6.5.2000 L 109/29.

#### 4.7.1 Judicial review

Interested parties can challenge all administrative decisions by administrative bodies on the basis of the General Administrative Law Act (*Algemene wet bestuursrecht*)<sup>75</sup>. If for instance subsistence under social security legislation is denied, this decision can be contested first through lodging an objection with the body that took the decision and after that through lodging an appeal with the competent administrative court.

##### Question 2b

- iv) *Can individuals bring any of the following cases to the court when:*
- (4) *there is no means to get access to adequate food (physical or economic) (ref. Lawsuit in India)*

Answer: if the lack of means to get access to adequate food can be translated in a claim to social security, individuals in the Netherlands can bring such a case to court. For examples see the account of case law above.

#### 4.7.2 Tort law

Individuals can bring any case to the civil courts if they claim that they suffer damages from someone else's unlawful behaviour.<sup>76</sup> It is irrelevant whether this behaviour has been committed by private parties or public authorities.<sup>77</sup>

Behaviour is considered unlawful if the perpetrator neglects his legal obligations, infringes on the victim's legal rights or does not exercise sufficient diligence with regard to the victim's legitimate interests. Furthermore the perpetrator must be at fault.

At present there does not seem to exist a rule obliging a restaurant to provide meals that provide a balanced diet or to warn clients in case the meals offered are nutritionally unbalanced. It seems unlikely therefore that a lawsuit holding a restaurant responsible for obesity, like the one against McDonalds, could be won at present. The poor quality of fast food from a nutritional point of view is considered to be known to the general public. This makes it everybody's individual responsibility to vary in food intake.

##### Question 2b

- i) *Can individuals bring any of the following cases to the court when:*
- (1) *the food is insufficient to satisfy the dietary needs of individuals (ref. Lawsuit in Am. Against McDonalds for not warning against their unhealthy food)*

Answer: technically individuals in the Netherlands can bring such a case to court, but it seems highly unlikely that they would win the case. There are no examples in Dutch case law.

In the European Union, discussions are ongoing whether a system of mandatory nutrition labelling should be introduced in order to combat obesity. If such requirements are correctly followed, it would help the food business operator in his defence to show that the consumer was in a position to make informed choices.

If, on the other hand, the consumer suffers damages because the labelling requirements have not been adhered to, s/he has an easy case. In case of financial damage – which may occur if allergens were not mentioned on the label, the victim may sue for compensation. In

<sup>75</sup> For an English translation see: [http://www.justitie.nl/Images/11\\_11380.doc](http://www.justitie.nl/Images/11_11380.doc).

<sup>76</sup> Article 6:162 Civil Code.

<sup>77</sup> However, if the interested party has recourse to a procedure under administrative law, the civil courts will not hear the grievance.

case of non-material damages, as will be the case when cultural problems (GMO, pork) are omitted on the label, it seems more adequate to ask for an injunction.

In the case of novel foods it is mandatory to indicate the presence of materials which gives rise to ethical concerns.<sup>78</sup> The presence of GMOs must be labelled. In other cases it will depend on the general rules on labelling if cultural concerns must be apparent from the label.

#### **Question 2b (iv)**

*Can individuals bring any of the following cases to the court when:*

- (3) *the food is not acceptable within a given culture (e.g. not labelling content like pork, GMO etc.)*

Answer: the failure to follow mandatory labelling requirements can be brought to court by interested parties. We are not aware of any examples in case law.

#### **4.7.3 Product liability law**

The food business operator who, by bringing unsafe food to the market causes a customer to suffer damages, can be held liable under tort law if it can be proven that he was at fault.

Besides tort law, a more specific regime concerning defective products also exists and covers food products as well.<sup>79</sup>

#### **Question 2b**

*iv) Can individuals bring any of the following cases to the court when:*

- (1) *the food is not free from adverse substances (product liability)*

Answer: Dutch product liability law applies to the situation where a food product is not free from adverse substances.

The rules on product liability have been harmonised in the European Union by Directive 85/374<sup>80</sup>. The Dutch civil code follows this directive to the letter. Directive 85/374 lays down the principle of strict liability of the producer, which means that a producer may be held responsible for a damage caused by a defective product he has put on the market even in the absence of fault.

The producer within the meaning of the directive is not only the manufacturer of the final product, but also any other person in the chain who has produced raw materials or a component of the product, or any person who, "by putting his name, trade mark or other distinguishing feature on the product, presents himself as its producer". All these persons bear their own liability, and consequently the victim may make a claim against any of these persons for complete compensation. The *supplier* is not responsible, except in cases when s/he does not, or cannot inform the victim of the producer's identity.

The plaintiff (victim) must prove three conditions:

1. a damage to the person (death or personal injury) or to the person's private property (damages to professional property are not covered by the directive nor the civil code). For the food sector, this implies that only the final consumer can invoke product liability.

<sup>78</sup> Article 8 (1)(c) Regulation (EC) 258/97.

<sup>79</sup> In writing this paragraph, use has been made of Nicole Coutrelis, Product Liability in the Food Sector, [http://europa.eu.int/comm/internal\\_market/goods/docs/liability/1999-greenpaper-replies/046.pdf](http://europa.eu.int/comm/internal_market/goods/docs/liability/1999-greenpaper-replies/046.pdf) and of Bernd van der Meulen, Productaansprakelijkheid voor onveilige levensmiddelen, *Journaal Warenwet 2004* (2), pp 3-8 and (3) pp. 3-11.

<sup>80</sup> As amended by Directive 1999/34.

2. a defect of the product, which is established when the product does not provide the safety that one is entitled to expect, taking into account particularly its presentation, the use which could be reasonably expected and the time the product has been put into circulation. A mere lack of conformity to specifications (stemming from regulations or from a contract) is not sufficient to declare a product defective if safety is not at stake.

In the field of food, due to the amount of food safety requirements, consumers are entitled to expect a high degree of safety. The producer can influence the expectations of the consumer by providing specific information, instructions on use and storage on the label.

3. a causal relationship between the defect and the damage.

Consumers of unsafe food may experience some difficulty in proving the causal relationship between a specific food and the (health) damages that have been suffered. The food disappears by its very use and usually people use large varieties of food. This renders the cause of a food borne damage difficult to determine.

In order to disclaim liability, a producer has to prove the existence of one (or several) of the following circumstances:

- s/he did not put the product in circulation;
- the product was not defective when put into circulation;
- the product was not manufactured by the producer for sale or any form of distribution;
- the defect is due to compliance with mandatory regulations issued by public authorities;
- the state of scientific and technological knowledge at the time when the product was put into circulation did not allow the existence of the defect to be discovered (“development risk”);
- the defect of the final product (in case the manufacturer of a raw material or component is held liable) is attributable to the design of the final product or to the instructions of the manufacturer;
- the damage is caused, totally or in part, by the fault of the victim.

In practice few product liability cases occur in the food sector. On the one hand it is difficult for consumers to prove their case and often damages are too low to bother trying. On the other hand, food business operators do not like the bad publicity that may be involved in a court case and go to some length to keep their consumers happy by dealing with complaints in a generous way.

## 4.8 Influence on commerce

Only in so far as food safety aspects are concerned does the right to adequate food influence commerce. The above-mentioned General Food Law (Regulation EC/178/2002), which is directly applicable in the Netherlands, holds food business operators responsible for adherence to food safety law. The General Food Law takes a so-called holistic approach. This means that food (safety) law applies to all the players in the entire food chain (‘from farm to fork’).

### Question 3

- a) *Is the right to adequate food important for and how does it affect the conditions for*
- i) *the farmers*
  - ii) *the processing industry*
  - iii) *the distributive trade?*
- b) *How is the right to food effecting on the area administration?*
- c) *Are the farmers themselves responsible for food safety and security in any way according to national law?*

Answer: food safety law applies 'from farm to fork'. All food business operators are bound by it. In particular they have to organise their working mode according to the principles of HACCP or similar systems.

The inclusion of primary production in the ambit of food law is a recent development. The European Union puts pressure on farmers to adhere to food law by including Regulation 178/2002 in a list of regulations that can be sanctioned by loss of subsidies. This is the so-called 'cross compliance'. The name indicates that there is no connection between these regulations and the subsidies, other than that the subsidy is used as sanctioning mechanism.

The General Food Law holds the Member States responsible for the enforcement of food law. This has been further elaborated by some regulations concerning official controls.<sup>81</sup>

## 5. Conclusion

The research for writing this report did little to enhance our feelings of chauvinism. The Netherlands enjoys wealth that would, in comparison to many other countries in the world, make it rather easy to develop a working system of respect for the human right to food. Nevertheless, we found that in this respect Dutch law and politics leaves much to be desired.

Dutch food law has developed outside the scope of the right to food. It is modelled after European directives and to some extent replaced by European regulations. Dutch food law is more concerned with food safety than with availability or nutritional quality of food.

## 6. Literature

### 6.1 Sources quoted from

AB	Administratiefrechtelijke Beslissingen; Review on administrative law case law;
tB/S	ten Berge / Stroink, loose leaf-collection of case law in administrative law edited by Gio ten Berge and Frits Stroink;
JB	Jurisprudentie bestuursrecht; Review on administrative law case law;
LJN	Landelijk Jurisprudentienummer; indication of case law published on the Internet on <a href="http://www.rechtspraak.nl">www.rechtspraak.nl</a> ;

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<sup>81</sup> Regulation (EC) No 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ L 191/1 28.5.2004; Regulation (EC) No 854/2004 of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption, OJ L 226/83 25.6.2004.

NJ	Nederlandse jurisprudentie, Review on civil and criminal law case law;
NJCM-Bulletin	Journal of the Netherlands' Lawyers Committee for Human Rights;
OJ	Official Journal of the European Union;
Rawb	Rechtspraak Algemene wet bestuursrecht, loose leaf-collection of case law on the General Administrative Law Act;
RSV	Rechtspraak Sociale Verzekeringen, Review on case law in social security;
Staatsblad	Statute Book, official journal for the publication of legislation in the Netherlands;
Staatscourant	official gazette, journal for the publication of delegated legislation in the Netherlands; <sup>82</sup>
Handelingen II	Acts of the Second Chamber of Parliament; verbatim account of all discussions in the Netherlands' house of commons;
Kamerstukken II	Documents of the Second Chamber of Parliament; series of all documents presented by the government to the Netherlands' house of commons;
Algehele	publication of all parliamentary documents concerning the latest grondwetsherziening
redrafting of the Netherlands' constitution.	

## 6.2 Suggestions for further reading

### 6.2.1 In English

#### *On Dutch law in general*

- Leonard F.M. Besselink, Constitutional Law in the Netherlands, Ars Aequi Libri Nijmegen, 2004;
- Fred J. Bruinsma, Dutch Law in Action: <http://www.uu.nl/content/dutchlawinaction2003.pdf>;
- Jeroen Chorus (c.s. eds.) Introduction to Dutch Law, 3<sup>rd</sup> ed. Kluwer Law International 1999;
- Oswald Jansen and George Middeldorp, Researching Dutch Law <http://www.llrx.com/features/dutch.htm#top>);
- Sanne Taekema (ed.) Understanding Dutch Law, BJu (www.bju.nl) The Hague 2004;

#### *On right to food and food law*

- The European Institute for Food Law provides a useful portal to Internet sources on right to food and food law: [www.food-law.nl](http://www.food-law.nl);
- Nicole Coutrelis, Product Liability in the Food Sector, [http://europa.eu.int/comm/internal\\_market/goods/docs/liability/1999-greenpaper-replies/046.pdf](http://europa.eu.int/comm/internal_market/goods/docs/liability/1999-greenpaper-replies/046.pdf)
- B.M.J. van der Meulen, The Right to Adequate Food. Food Law Between the Market and Human Rights (inaugural address) isbn 90 5901 9628, Elsevier 2004;

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<sup>82</sup> All Dutch legislation – in Dutch language – can be found at [www.overheid.nl](http://www.overheid.nl).

- B.M.J. van der Meulen and M. van der Velde, Food Safety Law in the European Union, Wageningen Academic Publishers, 2004 (<http://www.wageningenacademic.com/foodlaw>).

### 6.2.2 *In Dutch*

#### *On human rights*

- Tj. Gerbranda en M. Kroes, Grondrechten evaluatieonderzoek, Eindrapport, Leiden 1993;
- G. Engbersen, J.C. Vrooman en E. Snel (ed.), De kwetsbaren, Tweede jaarrapport armoede en sociale uitsluiting, Amsterdam 1997;
- A.K. Koekoek (ed.), De Grondwet, Een systematisch en artikelsgewijs commentaar, Deventer 2000;
- Sociaal en Cultureel Plan Bureau en Centraal Bureau voor de Statistiek, Armoedemonitor 2000, Den Haag 2000;
- F.M.C. Vlemminx, Een nieuw profiel van de grondrechten, derde druk, BJu Den Haag 2002;
- F.M.C. Vlemminx, De autonome rechtstreekse werking van het EVRM. De Belgische en Nederlandse rechtspraak over verzekeringsplichten ingevolge het EVRM (preadvies Nederlandse Vereniging voor Rechtsvergelijking) Kluwer Deventer 2002

#### *On food law*

- Hugo van Buuren, Etikettering van levensmiddelen, Sdu The Hague, 2004;
- M.J. Lugt (e.a.) Hoofdlijnen levensmiddelenrecht, Sdu The Hague, 2003;
- Heereluurt Heeres, Productaansprakelijkheid voor levensmiddelen, Sdu The Hague, 2004;
- Bernd van der Meulen, Productaansprakelijkheid voor onveilige levensmiddelen, Journaal Warenwet 2004 (2), pp 3-8 and (3) pp. 3-11.