

Protecting Equality as a Human Right in the Netherlands

From Specialised Equality Body to Human Rights Institute

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Introduction

This article describes the recent shifts in the structure of protection against discrimination of vulnerable groups in the Netherlands. This development in the Netherlands is not unique but resembles that which has taken place in some other countries, such as Britain, where the various equality bodies have been merged into the single Equality and Human Rights Commission.

Two approaches to the protection of equality can be seen in Europe. In some member states of the European Union (EU), specialised equality bodies exist as a result of the obligations emanating from EU equality directives.² These bodies deal only with equality and non-discrimination issues, having different mandates in various countries. In other member states, national human rights institutions (based mostly on the Paris Principles³) deal also with equality issues, but as part of a broader human rights mandate. At present, a trend is appearing whereby states merge equality bodies dealing with specific grounds of discrimination (especially gender, race and disability) into one single equality institution covering all grounds of discrimination, and also incorporate equality bodies into human rights institutions. Recently, Equinet – the European network

of equality bodies – published its perspective on the possible links between equality bodies and national human rights institutions, highlighting that “policy makers are increasingly exploring the potential overlap between human rights and equality and the links between the institutional infrastructures responsible for each area.”⁴ Equinet explains that several forms of such linkages exist, merger being the most complex one which demands most careful attention.⁵

This article addresses the very recent decision to merge the Equal Treatment Commission in the Netherlands (the ETC) into a national human rights institution (the NIHR). This development has seen the abolition of the equality body which has existed for almost 40 years in several forms. After ample experience with gender equality commissions, the Netherlands was one of the first countries to establish a single equality body in 1994 which, over the course of time, established a solid reputation. At the end of 2011, a bill was adopted to establish the NIHR, within which the existing ETC will be incorporated.⁶ A specific section within the NIHR will continue to hear and investigate individual complaints based on the national equality legislation.

This change can, on the one hand, be considered positively as a shift towards a more fundamental human rights approach to equality and discrimination, but, on the other hand, it can also give rise to concerns that the promotion of equality might get less attention. These concerns have, understandably, been heightened by the fact that the additional budget awarded to the NIHR is restricted, as was the case in Ireland where the budget of the human rights commission was recently severely cut, for example.⁷

This article attempts to provide a more positive view. The new situation seems to offer new opportunities for a more coherent human rights approach towards equality and non-discrimination, instead of a rather specific approach that is necessarily related to the tasks of a specialised body. It considers whether, after an initial stage, during which the concept of equality has been well-defined and applied in concrete cases, it is now the time to take a step forward.

1. Looking Back: A Short History of the ETC Since 1994

1.1 History

Equal treatment legislation in the Netherlands has been developed since the European Directives on equal pay for men and women (the Gender Equality Directives) came into force in the 1970s.⁸ The implementation of the Gender Equality Directives in Dutch national legislation began in 1975, with the enactment of the Equal Pay Act and the incorporation of the right to equal pay of men and women in the Civil Code (now Article 7:646).

Since 1975, special commissions have been established to monitor the implementation of these “equality laws” and each commis-

sion had the power to deal with individual complaints. For example, in 1975, the enactment of the Equal Pay Act created the Equal Pay Commission.⁹ In 1980, the Equal Treatment Act (on Equal Treatment of Men and Women at Work) (the Equal Treatment Act) was adopted and in the same year the specific Equal Treatment Act for the Public Service was also introduced.¹⁰ The Equal Treatment Act established the new Equal Treatment Commission on Men and Women, within which the existing Equal Pay Commission was incorporated. In 1989, the equal treatment legislation was revised and consolidated into a single Equal Treatment in the Workplace Act (ETWA) including equal pay and the civil service.¹¹ This new act covered gender discrimination and discrimination based on related grounds such as marital status. In the Civil Code, the relevant provisions on equal treatment of men and women were incorporated in the articles 7:646 and 7:647. Thus, specific acts covered the public sector and at the same time similar provisions were incorporated in the civil code, to cover private contracts.

1.2 Merging European and Constitutional Frameworks in 1994

A far more fundamental change took place in 1994, with the enactment of the new and expanded Equal Treatment Act (ETA), which marked an interesting coincidence of constitutional and European developments. In 1983 the new Constitution of the Netherlands (the Constitution) had come into force.¹² Article 1 of the Constitution contains the principle of equality and the prohibition of discrimination. In the parliamentary debates on the new Constitution, it was established that this provision has third party effect and therefore also covers acts of non-state actors.

It was decided, however, that the interpretation of the constitutional equality and non-discrimination provision could not be left entirely to the judiciary, in particular because of the need to establish a fair balance in cases of conflict between the prohibition of discrimination and other fundamental rights guaranteed in the Constitution of 1983. For example, conflicts were foreseen between the principle of equality and the freedom of education, the freedom of religion, and the right to privacy. The ETA was therefore enacted in order to regulate the content and scope of the prohibition of discrimination in the most important horizontal relationships, e.g. in the field of labour and the provision of goods and services.¹³ Its structure followed the system adopted in the pre-existing Equal Treatment Act as revised in 1980, based on the Gender Equality Directives. In its Article 1 § 1, the ETA contained a closed and limited list of prohibited grounds of discrimination (being the eight grounds mentioned in Article 1 of the Constitution: religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status). The ETA system also included (i) a restricted scope of the prohibition of discrimination (limited to employment¹⁴ and the provision of goods and services¹⁵), (ii) a system of exceptions to the principle of non-discrimination for religious institutions¹⁶ and for genuine occupational qualifications,¹⁷ (iii) limited possibilities for affirmative action,¹⁸ (iv) the demand for an objective justification in case of indirect discrimination,¹⁹ and (v) the possibility for religious institutions to make specific demands related to their convictions as long as these do not amount to discrimination on any other ground.²⁰

The ETC was established to monitor the implementation of the ETA and other existing equality laws, thus creating a specialised equality body with powers to consider and

investigate individual complaints and to give non-binding opinions.²¹ Article 12 of the ETA provides that individual plaintiffs, organisations, workers' councils or employers, and also judges or others dealing with dispute settlement have the power to bring a case to the ETC.

The provisions on equal treatment of men and women in the workplace in the Civil Code and the Equal Treatment Act remained in force separately, but the new ETC replaced the previous Equal Treatment Commission on Men and Women and assumed all of its powers.

Following the coming into force of the Constitution in 1984, it took a further 10 years before the ETA was enacted. Various drafts preceded the final bill. Initiatives were taken by the government (the usual initiator of legislation), members of Parliament and non-governmental organisations (NGOs) and a very intensive public debate took place. Why? The core issues under discussion were the proposed exceptions to the prohibition of discrimination in relation to the freedom of education and the freedom of religion. This debate was closely related to the pillarised structure of Dutch society where the different religious groups had rights to establish their own institutions, such as schools and hospitals, based on their specific doctrines, with public funding. Therefore, the ETA reflects a very specific national history but also embodies European influences, in particular through the adoption of the closed normative structure. The prohibited grounds of discrimination, the scope of the legislative protection and the permitted exceptions are precisely defined in the ETA itself and leave no room for interpretation.

The mandate of the ETC, established by Article 12 of the ETA, is explicitly restricted to

the interpretation of the ETA and other specific equality legislation in existence prior to the ETA's enactment, i.e. the Equal Treatment Act, the relevant provisions in the Civil Code and the ETWA dealing with gender discrimination. Following the enactment of the ETA, the EU normative framework was expanded²² and new national laws were enacted on other grounds, such as disability, age, and working hours.²³ Competences based on these specific acts were added to the mandate of the ETC.²⁴ The new statutes essentially implemented the provisions of the new European equality directives (the Equality Directives), and the mandate of the ETC was thus extended in order to cover these additional grounds and areas in line with the legislation.

Where the Equality Directives contained different structures for the different grounds of discrimination, the specific national laws followed these specific structures and the mandate of the ETC also varied accordingly. This was particularly the case in relation to the nature of the exceptions relating to the different grounds. The ETA and the disability legislation both contained a strictly closed system for all grounds covered by their provisions, whilst the legislation on the other grounds (such as age, religion, part time work and temporary contracts) has a more open structure of exceptions and permits the use of reasonable justification in cases of both direct and indirect discrimination.

The result has been a rather complex compilation of separate equality laws, each with a different scope and a different approach to exceptions, but all having the competence of the ETC as a common aspect.²⁵ The competence of the ETC is defined in each specific law, therefore it is bound to apply different interpretative frameworks depending on the legislation it is acting under in a particular

case, and it lacks a general mandate to investigate complaints or give advice on non-discrimination and equality. Therefore, as Richard Carver has argued, "in the impeccably monist Netherlands, where international law is regarded as a superior part of national law, the mandate of the Dutch Equal Treatment Commission refers only to national law".²⁶

Further, in terms of accessibility and transparency, the complex structure of equality laws in the Netherlands can be seen as a barrier to an effective enforcement mechanism. It is often difficult to explain to individuals or NGOs that the ETC is competent to consider a complaint of discrimination against a minority ethnic group by a housing corporation (in the context of providing goods and services) but not competent to give an opinion on the refusal to give a member of the same group a building permit by the authorities, because in the latter case there is an administrative act which is not caught by the scope of Article 7 of the ETA which covers goods and services in a more restricted sense.²⁷

These problems have, however, been identified and action is gradually being taken. Recently, steps have been taken to integrate the various equality laws into one single Equality Act²⁸ and a bill to adapt the terminology of direct and indirect discrimination in various laws was passed by the House of Representatives and the Senate and entered into force at the end of 2011.²⁹

2. Present Situation Regarding Equal Treatment Law³⁰

The very specific situation of the Dutch equality law, resulting from its combined European Union law and constitutional background, has been evaluated regularly. The ETA itself contains an obligation that every five years, calculated from the date on which

it entered into force, the ETC is required to draw up a report of its findings on the operation of the ETA.³¹ The most recent report of the ETC was published in 2011 and covered the period from 2004 to 2009.³² The various evaluations provided by the ETC have resulted in minor adaptations of the legislation, but only recently, in 2010, was a bill published for consultation³³ by the government to integrate the most important of the existing equality laws into a new single Equality Act (the Equality Bill).³⁴ The Equality bill has yet to be presented to Parliament, but this will hopefully take place in 2012. This proposal will not, as such, impact on the mandate and tasks of the ETC, but the consultation draft of the Equality Bill did suggest that the position of the ETC will be reconsidered in the light of the recent developments relating to the NIHR.

3. Towards a National Human Rights Institution

3.1 First steps

The establishment of the NIHR in the Netherlands has a long history. In 1999, the Dutch section of the International Commission of Jurists³⁵ celebrated its 25th anniversary with a seminar on the question of whether the Netherlands needs a national human rights institution, and the presentations and reactions were subsequently published.³⁶ During this seminar, the history and meaning of national institutions were analysed in the light of the Paris Principles and Recommendation No. R (97) 14 of the Committee of Ministers of the Council of Europe (the CoE Recommendation), and the question was discussed as to whether the various independent institutions existing in the field of human rights in the Netherlands covered the tasks required of such national institutions. The Paris Principles were adopted by the Gen-

eral Assembly of the United Nations,³⁷ and are closely related to the 1993 World Conference in Human Rights, held in Vienna, where the important role of national institutions was reaffirmed.³⁸ The CoE Recommendation adopted a similar perspective, emphasising the role of non-judicial bodies in the protection of human rights.³⁹

The contributions to the 1999 seminar emphasised the positive role played by various existing institutions in the Netherlands and also identified some gaps.⁴⁰ The contributions also showed that it is difficult to define the tasks and position of a new institution without impacting on the much appreciated work of the existing bodies, such as the National Ombudsman, the Privacy Institution (named *Registratiekamer* at that time), the ETC, the Advisory Committee for Human Rights, the National Bureau on Combating Racism and other governmental and non-governmental institutions.⁴¹

The conclusion was that gaps exist, but that more research was needed to identify exactly the most suitable mandate of a national institution. Although there was little or no open disagreement on the idea that the establishment of a national human rights institution was necessary, it was clear that different options existed varying from a “platform” of existing institutions to the establishment of an entirely new body.⁴²

Following the seminar, concrete actions remained forthcoming.⁴³ Several parliamentary resolutions and petitions by NGOs and human rights scholars resulted in governmental promises that steps would be taken to present a proposal for a future national institution⁴⁴. Subsequent NGO actions that insisted that an independent institution should be established, however, met little enthusiasm from the government.⁴⁵

Disappointed by this lack of action on the part of the government, a consortium of four independent institutions in the field of human rights decided to take the lead. In 2004, the Dutch Data Protection Authority, the National Ombudsman, the ETC and the Netherlands' Institute for Human Rights at Utrecht University (probably better known under its Dutch abbreviation SIM) (the Consortium), met to discuss the establishment of a national institution. From the outset, NGOs most involved in the debate – NJCM (the Dutch section of the International Commission of Jurists) and the Netherlands' Helsinki Committee – also attended the meetings, as did a representative from the Home Office, without formal mandate.

In March 2005, a memorandum was signed by the four members of the Consortium in the presence of the Minister of Interior, in which they expressed their intention to investigate the possible options for a national human rights institution.⁴⁶ The results of this joint investigation were presented to the Minister of Interior in September 2005 in a report entitled *The Action to the Word*.⁴⁷ This report analysed the mandate and structure of the existing institutions, and presented three models to fill the gaps in the protection of human rights: (i) an informal platform; (ii) the establishment of an entirely new organisation; or (iii) the assignment of the tasks of a national institution to one of the existing organisations.⁴⁸ The last option was seen as the preferred option. The report emphasised the requirements laid down in the Paris Principles in relation to the mandate and independence of the future institution and the necessity of a legal foundation.⁴⁹ These elements needed to be fulfilled in order for the new institution to acquire the “A-status” granted by the UN to fully compliant national institutions.⁵⁰ Previously, the ETC had been recognised as

observer (“B-status”) in the absence of a fully competent independent body. At this stage, the Consortium expressed a preference for attribution of the tasks and powers of a national institution to SIM, the Netherlands' Institute of Human Rights at Utrecht University.⁵¹ The Consortium proposed to appoint an “architect” who would further elaborate the final structure and mandate of the proposed national institution, in due consultation with all relevant stakeholders, including NGOs.⁵²

In the same period, international developments supported the need to fill the gap in the national human rights protection system in the Netherlands. After the adoption of the Paris Principles by the UN General Assembly in 1993, and the CoE Recommendation, the European Parliament adopted in 2005 a resolution on the role of national institutions (including the Fundamental Rights Agency of the EU itself), urging the member states to establish such institutions.⁵³ Further, in 2005, the Netherlands stood for a seat in the newly established UN Human Rights Council and, in the pledge, stated that a national institution was to be established - a statement that was repeated at the candidacy in 2006.

Thus, the international action of the Dutch Foreign Office, the international pressure imposed by the EU Parliament and the UN Human Rights Council, and the initiative of the Consortium, mutually reinforced each other. The establishment of a national institution meeting the requirements to obtain the A-status at international level had become a common goal. In 2006, a resolution was accepted by the House of Representatives to summon the Dutch government to take all necessary steps to establish a national institution.

3.2 Towards Realisation

Despite the apparent consensus, it took more than another five years before the law to establish a national institution was adopted.⁵⁴ Whilst awaiting the necessary legislative developments, the Consortium decided in 2006 that it was time to establish a foundation as a pre-structure for a national institution established by law. The former National Ombudsman and member of the Council of State, M. Oosting, was appointed as the independent chair. Although the authority, expertise and commitment of M. Oosting were of great importance in this next stage of the Consortium's work, the foundation remained "in formation".

In preparation for developing the necessary legislation, the Minister of Interior financed an explorative study by two "architects", who proceeded to hold broad consultations and to produce an extensive report, which was published by the Consortium in a more concise advice paper in 2007 – *Human Rights Connect and Oblige: A National Human Rights Institution... also in the Netherlands*.⁵⁵ Once again the gaps in the human rights structure in the Netherlands were explained.⁵⁶ The report stated that the starting point was the need to establish an institution that meets the requirements of the "A-status" prescribed by the Paris Principles, including having an independent structure with a legal basis and a broad mandate including advice, monitoring of implementation, international cooperation, training and education, and research/investigation.⁵⁷ The report did not foresee an individual complaint mechanism, but it did envisage that individual complaints were to be referred to the competent institutions.⁵⁸ This is based on the assumption (which was also held in the first report of the Consortium of 2005), that the existing institutions (such as the National Ombuds-

man, the Data Protection Authority and the ETC and several more specific independent commissions) already covered a broad field in which individual complaints were possible and that there was first and foremost a need to assist people who wanted to lodge a complaint in finding their way to the most appropriate institution.

It took more than another four years before the bill establishing the *College voor de Rechten van de Mens* – the National Human Rights Institution of the Netherlands – was adopted by Parliament.⁵⁹ The delay was caused mainly by changes of government and an ongoing debate on (i) the preliminary conditions for the independence of the institution, including the necessary budget, and (ii) the best way to incorporate the national institution into the existing structure.

Whereas in the first report of the Consortium, SIM was mentioned as a possible home for the institution, in the course of time, other options were also considered. In 2008, the cabinet proposed a system of "twinning" or "shared services" at the office of the National Ombudsman, with a structure involving the other partners of the Consortium.⁶⁰ This option was criticised in the associated parliamentary debates, because it was feared that it would still entail the establishment of a new institution instead of incorporation within an existing one. The cabinet was invited to investigate other options and after another round of intensive deliberations within a steering committee, where the relevant departments and the Consortium were involved, the cabinet opted in 2009 to incorporate the national institution within the ETC.⁶¹ The steering committee had proposed two options, one being the National Ombudsman hosting the national institution, the other being the integration of the national institution in the ETC. The steering commit-

tee ultimately opted for the latter of the two options, because the alternative expansion of the National Ombudsman's mandate lacked support and merging the new institution into the existing ETC satisfied the preference that no new institutions should be established.

This decision finally paved the road towards the enactment of the Act on the Establishment of the Netherlands' Institute of Human Rights (the NIHR Act).⁶² The bill which preceded the NIHR Act (the NIHR Bill) was published on the internet for consultation at the end of 2009, and was subsequently sent to Parliament in August 2010. In November 2011, the NIHR Bill was finally accepted by the Senate and the NIHR Act was enacted in December 2011. The date when the NIHR Act enters into force has yet to be determined, but it is expected to be in mid-2012.

4. Structure and Mandate of the NIHR

4.1 Independence

As the acquisition of the "A-status" as a national human rights institution was the ambition of the government (with some NGOs complaining that this ambition and the related international prestige seemed more important than the protection of human rights itself⁶³), the Minister of Justice obtained advice from the National Institutions and Regional Mechanisms Section of the Office of the High Commissioner for Human Rights in Geneva (NIRMS) to ensure that the NIHR Bill reflected the requirements of the Paris Principles and subsequent recommendations of the International Coordinating Committee (ICC) of National Human Rights Institutions' Sub Committee of Accreditation (the Sub Committee of Accreditation).⁶⁴

National human rights institutions with A-status are required to participate fully in

the UN as a national institution and also in the ICC.⁶⁵ The Sub Committee of Accreditation has developed mechanisms to consider all institutions in order to evaluate whether they (still) meet these requirements.⁶⁶ More specific than the general provisions concerning equality bodies in the Directives, the requirements for national human rights institutions are elaborated in the Paris Principles, which prescribe a pluralist composition and independent membership.⁶⁷ In the UN *Handbook for the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, the elements of independence are identified as legal and operational autonomy, financial autonomy and independence through appointment and dismissal procedures restricting the involvement and influence of the government.⁶⁸

Prior to enactment of the NIHR Act, the ETC had been granted "B-Status" because its mandate does not cover "human rights" in general but only equality. Paragraph 2 of the Paris Principles states that "[a] national institution shall be given as broad a mandate as possible". Further, the procedures of appointment of the members of the ETC may not guarantee full independence as its members are appointed by the relevant Ministers.⁶⁹

In June 2010, when the decision to merge the ETC and the NIHR had already been taken, but the NIHR Bill had not yet been presented to Parliament, the ETC had obtained the confidential advice of the National Institutions and Regional Mechanisms Section (NIRMS) of the Office of the High Commissioner for Human Rights which had resulted in the provision of some recommendations, particularly in relation to the independence of the proposed NIHR. It was advised that such independence must be reflected in the activities, the composition and the exercise of the ETC's powers and functions. Concerns, based on the draft

that had been published for consultation on the internet, were raised at this stage regarding the role of the Minister of Justice in the selection of the members and staff of the ETC, given that it would ultimately be transformed into the NIHR. The selection procedure is required to be open, objective and transparent, involving broad consultations. In the Act as it was presented in August 2011, these recommendations have been implemented. Article 4 of the NIHR Act reaffirms the independent performance of the duties of the institution and provides safeguards for the independence of the members and staff. The members of the NIHR are to receive their commission from the government by Decree, and the commission is to be proposed by the Advisory Council consisting of the National Ombudsman, the President of the Data Protection Authority, the President of the Council for the Judiciary and members from civil society, thus guaranteeing their independence.⁷⁰ The staff is to be appointed by the NIHR itself.⁷¹

4.2 Scope of Responsibility

The NIHR Act does not give an exhaustive definition of “human rights” but simply refers to the scope of responsibility of the NIHR as “human rights, including the right to equal treatment”.⁷² Explicit reference to the principle of equal treatment is not repeated in the other provisions where human rights are mentioned, because, as the Explanatory Memorandum⁷³ states, “equal treatment as laid down in the Equal Treatment Act, is also a human right”.⁷⁴

Article 3 of the NIHR Act enumerates the tasks of the Institution to be as follows:

- investigating the protection of human rights;
- reporting and making recommendations on the protection of human rights including annual reports;

- providing advice;
- providing information and coordinating and encouraging human rights education;
- encouraging research;
- encouraging national and international cooperation;
- pressing for ratification, implementation and observance of human rights treaties and other international resolutions and for withdrawal of reservations; and
- pressing for observance of European and international recommendations on human rights.

The Office of the High Commissioner’s recommendation to the Minister of Justice of 15 October 2010 that the NIHR Act should explicitly include reference to the “promotion” of human rights wherever reference in the text is made to “protection” has not been followed and there has been no further debate.

The nature of the “advisory task” of the NIHR has been further elaborated in Article 5 of the NIHR Act, which states that advice can be given either on the request of a Minister or Parliament or on the initiative of the NIHR itself on all types of laws, regulations and draft international decisions. In the parliamentary debate preceding enactment, two aspects of the “advisory task” were discussed more extensively. The first was the question of whether the power to lodge legal proceedings and/or *amicus curiae* briefs in court should not be included. The Minister did not see any added value to grant this kind of legal capacity to the NIHR as it could always be called to act as an “expert witness” in court proceedings by one of the parties to the proceedings.⁷⁵

In any event, and irrespective of the decision reached in this regard prior to enactment, it can be held that the capacity to submit *amicus curiae* briefs does not need any legal ba-

sis: it is for the court in question, be it European, international or national, or any other relevant body, to choose whether to accept such third party interventions or not.⁷⁶

The other subject of discussion was the power included in Article 7 of the NIHR Act which enables the NIHR to institute an on-site investigation and to gain access to all places, with or without permission (except for places designated by law as secret places). Doubts were raised as to both the necessity and the desirability of such competence being given to the NIHR. In relation to “free access”, fears were expressed that the NIHR would also be authorised to enter a church, mosque or any other religious place where services are held. The Minister of Justice affirmed in an explanatory letter that this power is necessary to enable the NIHR to meet the requirement in the Paris Principles of having access to all relevant information in order to conduct proper investigations.⁷⁷ In the same letter he explains that fears of violations of the constitutional freedom of religion are not justified because the General Act on the Entrance of Dwellings (*Algemene wet op het binnentreden*) contains restrictions related to places where religious services are held,⁷⁸ and these are applicable to the actions of the NIHR too.⁷⁹

4.3 Staff

The independence of members and staff of the NIHR is safeguarded by the provisions in Chapter 3 of the NIHR Act on the composition and procedure of the NIHR. The members shall be appointed by Royal Decree on the Recommendation of the Minister of Justice, with the advice of the Advisory Council.⁸⁰ Article 15 provides for the establishment of the Advisory Council consisting of three *ex officio* members, being the National Ombudsman, the President of the Data Protection Author-

ity and the President of the Council for the Judiciary, and a minimum of four and a maximum of eight members representing (i) civil society organisations involved with human rights protection, (ii) employers’ organisations, (iii) employees’ organisations, and (iv) academics, appointed by the Minister of Justice after he is informed of the membership of the NIHR and the three *ex officio* members. The relevant provisions that guarantee independence and protect against dismissal of the Judicial Officers (Legal Status) Act apply to the members and substitute members of the NIHR (Article 17 enumerates these provisions explicitly) who are appointed for a period of 6 years allowing re-appointment.⁸¹ The staff is appointed by the NIHR itself.

4.4 Budget

One of the preconditions for an effective national human rights institution is access to substantial and sufficient resources. Although both the Consortium and the “architects” had stated a necessary budget of 1.15 million Euros (in addition to the existing budget of the ETC of over 5 million Euros), due to financial constraints, the additional budget has been determined to be 600,000 Euros, giving an additional 300,000 Euros for each of the first two years to enable the NIHR to make the necessary initial investments, after which the budget will be evaluated.⁸²

4.5 The End of an Era

The establishment of the NIHR in which the ETC will be incorporated thus implies the end of the existence of a specialised equality body in the Netherlands. The choice to incorporate the ETC into the NIHR is not only justified by the reluctance to establish new institutions, but the Explanatory Memorandum also mentions the importance of the accessory character of the principle of

equality, being inextricably bound up with all other fundamental rights, as expressed in major human rights documents.⁸³ Thus, the incorporation of the institution responsible for protecting the principle of equality in the Netherlands into an institution with a broader remit may also reinforce the promotion and protection of equality and the fight against discrimination.⁸⁴

Moreover, the abolition of the ETC as a specialised body does not mean that specific provisions on equal treatment entirely disappear. For example, Chapter Two of the NIHR Act contains provisions on the specific mandate to hear and investigate individual complaints in the field of equal treatment.⁸⁵ These provisions replace similar provisions in Chapter 2 and Article 33 of the ETA.

5. A Different Future: From Specialised Body to a Specialised Branch

In the Explanatory Memorandum to the NIHR Bill, the importance and relevance of the ETC as a specialised equality body (in conformity with the obligations of the EU Directives) was re-emphasised. It explained, therefore, that the tasks thus far performed by the ETC must continue to be carried out by the new NIHR. As the advisory and investigatory powers of the ETC coincide with the duties of the NIHR, a special provision was required for the hearing of complaints regarding discrimination, and this was included as Article 3 § 1 of the NIHR Act. Chapter 2 of the NIHR Act (comprising Articles 9-13) deals with “Investigations and Findings Relating to Equal Treatment”. According to Article 9, a separate division of the NIHR is responsible for these activities. The Explanatory Memorandum holds that:

“It is up to the Institute itself to decide how the other duties should be di-

vided among the different members and among the staff of the office. This means that some members may be concerned only with hearing complaints and some only with preparing advice and reports whereas others may be involved in both sets of activities.”⁸⁶

The relevant provisions of the ETA related to the complaints procedure are repeated in Articles 10-13 of the NIHR Act. The competence of the NIHR remains restricted to complaints based on the specific equality laws that invest the ETC with the power to consider complaints. That means that the NIHR has no competence to hear complaints in the field of discrimination which fall outside of the specific equality law provisions, such as a case involving discrimination against women in an Orthodox Christian party (because this is not related to work or the provision of goods and services)⁸⁷ or the refusal to allow disabled people to enter a restaurant (because disability discrimination thus far is only prohibited in relation to work).⁸⁸

As a consequence of the new structure with a specific division for complaints and investigations on discrimination, the decree determining the procedures of the ETC⁸⁹ will require amendment; a draft was submitted for an internet-consultation in early 2011,⁹⁰ and will result in a new decree. The proposed decree does not entail fundamental changes in the existing procedure. The proposed amendments are described as a codification of the existing practice and would result in:

- more discretion for the NIHR to attach conclusions to the fact that one of the parties does not attend a hearing after being summoned;
- the amplification of the potential for complaints to be settled without hearings;

- more discretion for the NIHR to publish opinions in individual cases without mentioning the full names of the parties.

5. Concluding Remarks

Thus, after 18 years of successful existence, the ETC, the specialised equality body, will cease to exist in 2012. Do we have to regret this or is the incorporation in the new NIHR a step towards a broader human rights approach of the principle of equality? This approach may be broader in the sense that (i) equality issues may be considered in a context beyond that of the rather restrictive specific equality laws and the prohibition of discrimination, and (ii) the right to equality may be applied in relation to other fundamental rights.

The answer to the question of whether the replacement of the ETC by the NIHR represents a positive step or not cannot be a simple yes or no. There is always a risk, of course, when a solid structure is abolished. The ETC is an institution which has gained its reputation by developing specialised knowledge on the principle of equality, in particular because the many individual cases which it has considered reveal the specific problems in the field of investigation and interpretation of equality law and in the implementation thereof. Discrimination takes place in many forms, which are often related to patterns of dominance within society. Thus the inclusion of harassment as a form of discrimination,⁹¹ the duty to provide reasonable accommodation,⁹² the occurrence of discrimination by association⁹³ are concepts that have been developed as a result of the concentration on equality. It demands a very thorough knowledge of the manifestations of discrimination and the impact of inequality and the meaning of difference to conceptualise these aspects. Not all human rights experts are also experts

in this field, and the inclusion of the responsibilities of the ETC within the remit of the NIHR brings with it a certain risk that the specific equality expertise developed by the ETC will get less attention.⁹⁴

In the first stage of its existence, the ETC focused on the development of a solid body of case law through which it clarified the complex character of equality norms. The quality of the opinions given in such cases needed to be convincing for both parties concerned and for the legal profession, but also for civil society and employers' and employees' organisations which had responsibility for implementing and adopting their content. Once this body of case law had been developed, it became possible to pay more attention to strategic issues, such as active "follow-up policies" (although these have been in place since the establishment of the ETC, albeit less openly than in the latter periods), education, independent investigations and international cooperation. Active "follow-up policies" include frequent contacts with the parties concerned after the decision, in order to explain the implications of the individual decisions and to endeavour to provide a more structural implementation to individual decisions by involving all relevant organisations in its implementation. At all stages, the ETC had to explain time and again that it was bound and limited by a restrictive legal framework, which (i) attributed to the ECT competences only in relation to the specific field of equality protection, (ii) provided a "closed system" in most specific laws, (iii) allowed no extra-legal exceptions to direct discrimination, and (iv) provided no general human rights test to be applied in cases where the principle of equality conflicted with other human rights. These restrictions did, however, allow the ETC to concentrate on the interpretation of the equality provisions and

to establish very clearly the implications and contents of the principle of non-discrimination. It was then the task of the judiciary (competent to consider the full scope of a case) or others to use this interpretation in their work. The restrictions placed on its potential impact can thus be seen as both a weakness and a strength of the ETC.

Of course there are also fears that, within the broad mandate of the NIHR, the protection of equality will be pushed aside and the protection of vulnerable groups against discrimination would be negatively impacted. Also, concerns exist that the expertise in the field of non-discrimination would fade away in the NIHR which is required to cover a much broader scope of work.

On the other hand, the opportunities offered by the NIHR for the promotion of equality and the fight against discrimination and exclusion cannot be underestimated. More and more exclusion is taking place as a result, for example, of the failure to protect the human rights of vulnerable groups, the restriction of the rights of immigrants and the reduction of facilities for disabled people in times of crisis.⁹⁵ These acts constitute violations of the human dignity of affected persons, who disproportionately belong to disadvantaged groups.⁹⁶ Such violations of dignity are closely related to the need for the protection of equality as an intrinsic part of all human rights.

The NIHR will have more effective tools at its disposal in order to deconstruct and reveal these forms of substantive inequality. Of course this demands an awareness of and expertise on the complex manifestations of exclusion and the contents and scope of international human rights obligations, with specific knowledge of those obligations which are intended to increase the protection of

vulnerable groups and minorities. Therefore it is important that the protection of equality has been mentioned explicitly in the law and that a special division of the NIHR with responsibility for investigations and findings relates to equal treatment, and that the necessary expert knowledge on equality law has been established.

In addition to equality law expertise, however, it is also necessary for general human rights expertise to be available to those within the NIHR responsible for implementing equal treatment norms. National and also European equality provisions can no longer be seen in isolation. More and more, international and regional human rights systems reinforce and influence each other. The European Union is not only bound to observe the European Charter of Fundamental Rights; it is also a party to the UN Convention on the Rights of People with Disabilities and is soon to become a party to the European Convention of Human Rights (ECHR). The provisions in the EU equality directives thus have to be applied and interpreted in conformity with these legal instruments which may demand a different interpretative framework in addition to that of the specific equality laws.⁹⁷

In the field of the existing restrictions imposed by the specific equality laws, it can be maintained that these still persist in the field of individual complaints and investigations. However, the fact that these specific duties are now embedded in a broader institution will allow the NIHR to take up cases and issues that are not admissible under the strict equality laws but still pay attention to the underlying issues in their advisory and other tasks, thereby disclosing the various forms of discrimination and, where possible, proposing remedies. This may also be effective in cases where the “closed system” of Dutch equality law does not allow for a specific jus-

tification which might be prescribed by other fundamental rights. This approach may be more effective than an artificial broadening of the scope of the “closed system” embodied in the ETA. An example may clarify this. Recently, the ETC ruled that the ETA could not be applied in a case where specific reactions of a political nature were removed from an interactive internet site of a weekly because the editors held that these did not go with the image of the weekly. The editors based their defence against the complaint of discrimination on the basis of political conviction on their freedom of expression, protected by Article 10 of the ECHR. However, this was not a defence, or exception, foreseen in the ETA. As a result of the “closed system” established in the ETA, the ETC, strictly speaking, had no competence to consider this defence of the editors of the internet site in question. However, the ETC held that the ETA could not be applied if it was not in accordance with international human rights treaties. The ETC therefore accepted the extra-legal exception of the defendants.⁹⁸ It would not be possible here to discuss the implications and possible pitfalls of this decision, but the first commentaries have identified the obvious risks, particularly because the ETC (and the future equal treatment division of the NIHR) becomes vulnerable to the criticism that it lacks the competences to oversee the full implications of such complex case law in the broader field of human rights.⁹⁹ This is in particular true when it concerns a controversial issue like freedom of expression where the case law of the European Court of Human Rights is all but clear, particularly when the protection of minorities is involved; and the judgments have often been based on narrow majorities.¹⁰⁰ In the future context of the NIHR, this pitfall may be escaped by giving, on the one hand, an opinion on the implications of the strict normative framework of Dutch equality laws, and on the other hand,

advice on the compatibility of the ETA with the ECHR in a broader context, with both due expertise and authority.

Thus the new structure might combine the best of two worlds. Provided that the NIHR combines general human rights knowledge and experience with more specific expertise in the complex field of equality and non-discrimination, the institutional combination of the continued specialised division dealing with opinions and investigation related to individual cases and the NIHR with a broad mandate in the field of human rights may be well-equipped to tackle complex human rights issues whilst incorporating equality as an independent and accessory right.

Summing up these comments, the provisional conclusion is positive. The conclusion cannot be anything other than provisional, as the proof of the pudding is in the eating: the practice of both the NIHR generally, and the equality division thereof particularly, will demonstrate whether such optimism is justified or not. The Equinet publication mentioned above provides guidance on how to ensure an effective cooperation between equality bodies and national human rights institutions which deserves attention in this case. The recommendations are based on the experiences of others, and “Principles and Factors for Success” (the Principles) are defined.¹⁰¹ These recommendations emphasise the linkage between equality and human rights, but also make clear that this linkage alone is not sufficient to ensure that a joint body is successful. The Principles emphasise that cost considerations should not be decisive, and that the balancing of resources is also important. Support and commitment of stakeholders with a remit of equality is required as much as that of human rights stakeholders, which may also demand a merge of cultures.

The existence of the new NIHR provides an opportunity for a more inclusive protection against discrimination. In order to realise fully this opportunity, it is essential that the members and staff of the NIHR have (i) profound expertise, experience and authority in the fields of both human rights and non-discrimination, (ii) a solid basis in civil society, either because they have experience in civil society organisations or because they have already established good relations with, and have a strong reputation among, such organisations, and (iii) good working relations with, in particular, human rights NGOs. Finally, the NIHR will require a budget that

enables its members and staff to perform this task. Fernhout and Wever emphasise that the NIHR must be courageous from the outset. A restricted budget cannot justify a “low profile start”. On the contrary, the NIHR must select issues and topics for its first actions that attract public attention and give it maximum visibility.¹⁰²

Of course, the existing body of specific equality laws still needs due attention to integrate the complex system of separate acts and to harmonise the core concepts to bring them in accordance with the recommendations of, amongst others, the European Commission, but that is another story!

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2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 13; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20.

3 UN General Assembly, *Resolution 48/134: National Institutions for the promotion and protection of human rights*, UN Doc. No. A/RES/48/134, 1993.

4 Equinet, *Equality Bodies and National Human Rights Institutions: Making the Link to Maximise Impact*, November 2011, p. 5.

5 *Ibid.*, p. 8.

6 Wet College voor de rechten van de mens (National Human Rights Institution Act) van 24 November 2011, Staatsblad 2011, 573.

7 Council of Europe Commissioner for Human Rights, *Ireland: “Budget cuts put human rights at risk”*, 15 September 2011, available at: http://www.coe.int/t/commissioner/news/2011/110915reportireland_EN.asp.

8 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 Staatsblad 1975, 129.

10 Staatsblad 1980, 384.

11 Staatsblad 1989, 168.

12 The Constitution of the Netherlands, Staatsblad 1983, 70.

13 Staatsblad 1994, 230.

14 Equal Treatment Act 1994, Articles 5 and 6.

- 15 *Ibid.*, Article 7.
- 16 *Ibid.*, Article 3.
- 17 *Ibid.*, Article 2 § 2, § 4 and § 5.
- 18 *Ibid.*, Article 2 § 3.
- 19 *Ibid.*, Article 2.
- 20 *Ibid.*, Article 5 § 2 and Article 7 § 2.
- 21 Equal Treatment Act 1994, Chapter 2.
- 22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ; and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
- 23 See the Equal Treatment (Disability and Chronic Illness) Act of 3 April 2003 (DCI Act); the Equal Treatment in Employment (Age Discrimination) Act of 17 December 2003 (AD Act); the Act on Equal Treatment on the Ground of Working Hours of 3 July 1996 (WH Act); and the Act on Discrimination Between Persons with a Flexible and Fixed Labour Contracts of 7 November 2002 (FFLC Act).
- 24 DCI Act, Article 12; AD Act, Article 14 ; WH Act, Article III, Para 3; and FFLC Act, Article 2, Para 3.
- 25 For further information on the Equal Treatment Commission, see Commissie Gelijke Behandeling, *Equality law and the work of the Dutch Equal Treatment Commission*, Undated, available at: <http://www.cgb.nl/english/about>.
- 26 Carver, R., "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law", *Human Rights Law Review*, Vol. 10(1), 2010, pp. 1-32.
- 27 On the complications that the legal structure entails for the work of the Equal Treatment Commission, see also: Goldschmidt, J.E., "Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Developments in the Supervision of Equality Law in the Netherlands", *Maastricht Journal of European and Comparative Law*, Vol. 13(3), 2006, pp. 323-337.
- 28 A draft bill was published for consultation in 2010, with the process ending in November 2010. No further action has been taken. The draft bill is available at: <http://www.internetconsultatie.nl/integratiewetawgb>.
- 29 Parliamentary Documents 31 832, Staatsblad 2011, 554.
- 30 For Dutch readers, a very helpful factsheet on the state of the legislation has been published by E-Quality, available at: <http://www.e-quality.nl>.
- 31 Equal Treatment Act 1994, Article 20 § 2.
- 32 Commissie gelijke behandeling, *Derde evaluatie AWGB, WGBm/v en artikel 7:646 BW*, May 2011.
- 33 See above, note 28.
- 34 Ruygrok, W. and Kroes, M., *Conceptwetsvoorstel Integratiewet AWGB*, Tijdschrift Arbeidsrechtpraktijk, 2011, pp. 4-10.
- 35 Het Nederlands Juristen Comité voor de Mensenrechten (NJCM).
- 36 Van Emmerik, M.L. and Smals-van Dijk, C. (eds.), *Een nationale mensenrechtencommissie in Nederland? Handhaving van mensenrechten op nationaal niveau*, Leiden Stichting NJCM Boekrij, 2000.
- 37 See above, note 3.
- 38 United Nations Centre for Human Rights, *Professional Training Series No. 4: National Human Rights Institutions: A Handbook for the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, United Nations, 1995, p. 5.
- 39 Council of Europe: Directorate of Human Rights, *Non-judicial Means for the Protection of Human Rights*, 1998.
- 40 See above, note 36.
- 41 *Ibid.*
- 42 *Ibid.*
- 43 For a description of the developments from 1999-2005, and the advice of the Consortium in 2005, see Hendriks, A., "Mogelijkheid instelling van Nationaal mensenrechteninstituut krijgt concrete vormen", *NJCM-Bulletin*, 2005, p. 1157-1165. This paragraph is mainly based on Hendriks' publication.
- 44 Parliamentary Documents, 27 400 VI, nr. 38.
- 45 See above, note 43, p. 1158.
- 46 The memorandum has not been published.

- 47 College bescherming persoonsgegevens et al., *Mensenrechten in Nederland: De Daad bij het Woord: Advies inzake de oprichting van een Nederlands Nationaal Instituut voor de Rechten van de Mens (NIRM)*, 2008, available at: http://www.cbprecht.nl/downloads_med/med_20050908_advies_nirm.pdf.
- 48 *Ibid.*, p. 8 ff.
- 49 *Ibid.*, p. 38 ff.
- 50 Further information on the organisation of national institutions at the UN level and the accreditation procedure is available at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.
- 51 See above, note 47, p. 41.
- 52 *Ibid.*, p. 42.
- 53 European Parliament, *Resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency*, 2005/2007(INI), 26 May 2005.
- 54 For further information about the developments which took place between 2005 and 2007, see Loof, J.P., "Oprichting nationaal mensenrechteninstituut een stapje dichterbij?", *NJCM-Bulletin*, 2007, pp. 544-549.
- 55 Nationaal Instituut Voor de Rechten Van de Mens, *Mensenrechten verbinden en verplichten*, 2007, available at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2007/04/18/mensenrechten-verbinden-en-verplichten/mensenrechtenverbindenenverplichten-def-29maart07.pdf>.
- 56 *Ibid.*, p. 17 ff.
- 57 *Ibid.*, p. 18.
- 58 *Ibid.*, p. 22.
- 59 Staatsblad 2011, 573. Parliamentary debate and related documents: nr. 32 467.
- 60 Parliamentary Documents 2007/0831, 200 VII, nr. 75.
- 61 Parliamentary Documents 2008/09, 31 700, nr. 95.
- 62 As the reader may notice, the name used in the official English version coincides with the name of SIM, being the Netherlands' Institute of Human Rights. Confusion will most likely be avoided because of the reputation of the acronym SIM and because the institute itself uses the name Dutch Human Rights Institute, or by referring to the National Human Rights Institution of the Netherlands. Further information about the National Human Rights Institution (NIHR) is available at: <http://www.naarenmensenrechteninstituut.nl/62/english/>.
- 63 Unpublished Report of Meeting at the Ministry of Justice with Civil Society Organizations and the Steering Committee on 15 December 2009.
- 64 Parliamentary Documents 32 476, nr. 6 appendix.
- 65 Statute of the Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Articles 24(1) and 38.
- 66 UN General Assembly, *Report of the Secretary-General: Process currently utilized by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights to accredit national institutions in compliance with the Paris Principles*, UN Doc. No. A/HRC/16/77, 2011.
- 67 See above, note 3.
- 68 See above, note 38.
- 69 Equal Treatment Act 1994, Article 16 § 3.
- 70 National Institute of Human Rights Act 2011, Articles 15 and 16.
- 71 National Institute of Human Rights Act 2011, Article 18.
- 72 National Institute of Human Rights Act 2011, Article 1 § 3.
- 73 Parliamentary Documents 2009/10, 32 467, nr. 3, p. 23.
- 74 *Ibid.*
- 75 Parliamentary Documents, 32 467, nr. 6, p. 7.
- 76 For example, in relation to the European Court of Human Rights, Rule 44 § 3 of the Rules of Court (April 2011) provides as follows: "(a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing."

(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.”

77 Parliamentary Documents, 32 467, nr. 24.

78 Algemene wet Binnentreden van 1994, Article 12.

79 See above, note 77.

80 The National Institute of Human Rights Act, Article 16.

81 *Ibid.*, Article 17.

82 See above, note 77, p. 19.

83 Parliamentary Documents 32 467, nr. 3, p. 9-10.

84 *Ibid.*

85 The National Institute of Human Rights Act, Articles 10-13.

86 Parliamentary Documents 32 467, nr. 3, p. 8.

87 Equal Treatment Act 1994, Article 7.

88 *Ibid.*

89 Decree on Procedures of Equal Treatment Commission, 1994.

90 Draft Decree on Procedures on Equal Treatment investigation and opinion, Concept-Besluit onderzoek en oordeel Commissie gelijke behandeling, 24 January 2011, available at: <http://www.internetconsultatie.nl/onderzoek-gelijkebehandeling>.

91 Equal Treatment Act 1994, Article 1a.

92 Act on Equal Treatment on the Grounds of Handicap or Chronic Disease 2003, Article 2.

93 *Coleman v Attridge Law and Steve Law*, Case C-303/06, Court of Justice of the European Union, 17 July 2008.

94 Fernhout, R. and Wever, R.G.A., “College voor de rechten van de Mens, Van gelijke behandeling naar mensenrechten”, in Forde, C.J. (ed.), *Gelijke behandeling, Oordelen en Commentaar. Oordelenbundel 2010*, Utrecht, 2011, p. 352.

95 For further information regarding the concerns expressed at the 2011 European Day of Persons with Disabilities Conference, held on 1-2 December 2011 in Brussels, see: European Union Agency for Fundamental Rights, “The economic crisis threatens participation and inclusion of people with disabilities”, 2 December 2011.

96 Kjaerum, M., “Protecting human rights is an obligation, not a choice”, 10 December 2008, available at: http://fra.europa.eu/fraWebsite/material/pub/speeches/Dir_hr-day08-stat_en.pdf.

97 Goldschmidt, J.E., “Positieve verplichtingen als bijdrage aan gelijkheid”, in Gerards J.H. (ed.), *Gelijke behandeling: oordelen en commentaar 2009*, Wolf Legal Publishers, 2010.

98 Equal Treatment Commission, Opinion 2011-69, 28 April 2011.

99 Terlouw, A.B., “De CGB en de algemene mensenrechtentoets”, *NTM/NJCM-Bulletin*, 2011, pp. 656-671.

100 Van Noorloos, M., *Hate Speech Revisited, A comparative and historical perspective on hate speech law in the Netherlands and England & Wales*, Intersentia, 2011, p. 119.

101 See above, note 4, pp. 12-13.

102 See above, note 5, p. 357.