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Rapport

Pays-Bas
THE IMPACT OF ARTICLE 6 (1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE PROCEDURES OF THE COUNCIL OF STATE AND OF THE OTHER ADMINISTRATIVE COURTS IN THE NETHERLANDS

Report submitted by the delegation of the Council of State of the Netherlands to the XVIIth Colloquium of the Supreme Administrative Courts and State Councils

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1. PRELIMINARY OBSERVATIONS CONCERNING DOMESTIC LAW

Introduction.

1.0. Recent years have brought considerable changes to the system of administrative procedure in the Netherlands. These changes concern the organization of the judiciary (§ 1.0.1) as well as the rules of administrative procedure (§ 1.0.2).

1.0.1. The organization of the administrative judiciary has remained rather complicated:

- From 1 January 1994 onwards, applications for review of administrative decisions are, as a rule, lodged with the (administrative sections of the) 19 District Courts (Arrondissementsrechtbanken) established throughout the country. For most cases the Administrative Jurisdiction Division (Afdeling bestuursrechtspraak) of the Council of State acts as an appellate court of final instance. Exceptions are to be found in the field of social security benefits and that of the labour relations of civil servants, and in the field of economic administrative law, where the appellate function is carried out by specialized supreme tribunals: the Central Appeals Tribunal and the Industrial Appeals Tribunal (Centrale Raad van Beroep and College van Beroep voor het Bedrijfsleven), respectively. For the time being, another exception is the field of immigration and asylum law, where no appeal lies from the decisions of the District Courts.

- For certain categories of administrative decisions, applications for review are not first lodged with the District Courts, but directly with the Administrative Jurisdiction Division of the Council of State. These categories concern mainly land-planning and zoning decisions, and the licensing of activities with an environmental impact.

- In specialized fields of administrative law, separate jurisdictions continue to exist without appeal, e.g. in the area of students' grants. The Industrial Appeals Tribunal, referred to above, decides in first and final instance on appeals against decisions of public industrial organizations.

- Finally, in certain fields administrative jurisdiction lies exclusively with the ordinary judiciary. Thus, in the case of tax law, jurisdiction is traditionally exercised by specialised Chambers of the Courts of Appeal (Gerechtshoven) with appeal in cassation to the Supreme Court (Hoge Raad). Another example are administrative traffic violation fines, from which appeal lies with the local courts (Kantongerechten) with appeal in cassation to the Supreme Court.

1.0.2. Whatever the competent administrative jurisdiction, its rules of procedure are now governed directly or indirectly - with minor modifications - by the General Administrative Law Act (Algemene wet bestuursrecht). This unification of administrative procedure is one of the main accomplishments of the recent administrative law reform. It is, however, not matched by an unification of the judicial organisation. As appears from § 1.0.1, there is no single judicial body with supreme jurisdiction. To cope with that situation as well as possible, an informal circuit of consultations among the highest administrative tribunals aims at bringing about uniformity in the interpretation and application of the General Administrative Law Act.

1.0.3. For the sake of simplicity, in this report the word "court" will be used as a general term to refer to the (administrative section of the) District Court, the Administrative Jurisdiction Division of the Council of State, or any other administrative jurisdiction whose procedures are regulated by the General Administrative Law Act.

Equally, unless necessary, no terminological distinction will be made between the Council of State as such and its Administrative Jurisdiction Division.
As to the questionnaire.

1.1. As a general rule, administrative courts have jurisdiction only in the case of appeals against decisions. In the present context, "decision" (besluit) means: a written decision by an administrative authority constituting a legal act under public law. Such decisions may relate to almost any field of public administration. They vary from building licences and immigration permits to grants and subsidies, social benefits, or the dismissal of a civil servant. Exceptionally, in some types of cases an appeal may also be lodged against other acts of administrative authorities, not being decisions. The main categories of administrative legal acts under public law which are not subject to review by an administrative court are the following ones:

- rules and regulations (algemeen verbindende voorschriften) of the central, provincial and local authorities;
- general policy rules (beleidsregels), by which administrative authorities regulate the exercise of their legal powers; and
- decisions in preparation of the performance of a legal act under private law. See also § 1.9.

Moreover, it should be noted that neither the legislature nor the judiciary comes under the definition of "administrative authority". Therefore, Acts of Parliament and court judgements are no "decisions" under the General Administrative Law Act.

1.2. As follows from § 1.0.1, appeal to the Council of State from judgements of a lower court lies only in the case of judgements of the (administrative sections of the) District Courts, and even then provided that those judgements do not concern immigration and asylum law and are not subject to appeal to one of the specialized appellate administrative courts. The Council of State may be called the "general" appellate administrative court in view of the broad categories of cases it deals with. However, it has no authority over any of the specialized appellate administrative courts (see § 1.0.2). On the other hand, no appeal lies against judgements of the Council of State.

1.3. If an appeal against a judgement of a District Court is successful, the Council of State will quash that judgement, either as a whole or in part. The case may then either be referred back to the District Court for a (partial) new judgement, or be decided by the Council of State itself. In the latter case, the Council of State may exercise all the powers which the District Court had: it may quash the decision of the administrative authority, direct that authority to make a new decision, impose a fine upon the administrative authority in case of non-compliance, or replace the quashed decision by its judgement. The power of the Council of State to stay the execution of an administrative decision or impose an injunction is exercised by the President of the Administrative Jurisdiction Division and requires a separate request from one of the parties.

1.4. As far as the competence of the Council of State is concerned, no distinction exists as to whether or not "civil rights and obligations" or "criminal charges" are at stake. Of course, the jurisdiction of the Council of State concerns the field of public administration and, more specifically, appeals against decisions of administrative authorities. Disputes under private law and criminal cases stricto sensu are both the exclusive domain of the ordinary judiciary. However, the classification under national law of decisions as legal acts under public law, does not preclude that such decisions touch upon civil rights and obligations, or constitute a criminal charge in the sense of Article 6 of the Convention. Examples of administrative decisions affecting civil rights and obligations which come under the jurisdiction of the Council of State, are environmental licences and land-planning regulations (cf the Benthem judgement of the European Court of Human Rights, Series A no. 97). An example of an administrative decision constituting a criminal charge, is the imposition of an
administrative fine" by the administrative authority in case of a violation of a law or regulation. Unless otherwise provided, the review of such a fine also comes under the jurisdiction of the Council of State. Until recently, administrative fines used to be relatively rare under Dutch law, but they are more and more used as an instrument of enforcement. Legislation is in preparation to provide a general basis for such fines in the General Administrative Law Act.

1.5. The appellate jurisdiction of the Council of State is limited to judgements of the (administrative sections of the) District Courts. For details, reference is made to § 1.0.1 and § 1.2.

1.6. In the rules of administrative procedure no distinction is made between cases that fall within the scope of Article 6 of the Convention and cases that do not. However, the Constitution provides for "generally binding provisions of treaties" to take precedence over domestic law. Consequently, Dutch courts are prohibited from applying any legal provision - even Acts of Parliament - that preclude or impair the proper fulfilment of the State's obligations under Article 6 of the Convention. This may also lead to certain rules of procedure laid down in the General Administrative Law Act not being applied or being interpreted differently, or - within the limits of the constitutionally determined judicial function - to the development of judge-made supplementary procedural safeguards by case-law.

1.7. The Constitutional provision referred to in § 1.6 applies to the appellate courts as well as to the lower courts. Moreover, the appellate courts will review the proper application of Article 6 of the Convention by the lower courts, including the necessary setting-aside of domestic law.

1.8. Reference is made to § 1.6 and § 1.7. It should be noted that precedence of provisions of international treaties over domestic law may at least in theory, only be effectuated on a case-by-case basis. This means that rules of procedure may only be set aside, modified or added/as the case may be, in order to comply with Article 6 of the Convention, if the circumstances of the case so require. In practice, however, the courts tend to interpret the national rules of procedure so as to make them conform to the requirements of Article 6 of the Convention in abstracto. Thus interpreted, they then most likely will be applied in all cases, regardless of whether the case in hand does or does not fall within the scope of Article 6. This suggests a recognition of the concept of fair trial-as developed under Article 6 of the Convention - as a general principle of administrative procedure, even beyond the limits of the determination of civil rights and obligations and of criminal charges as defined in the Strasbourg case-law.

1.9. There are several categories of administrative decisions from which no appeal lies with any administrative court. First of all, there are those decisions which do not qualify as "decision" in the sense of the General Administrative Law Act and which are not made subject to appeal by special legal provision, by way of exception. Secondly, there are those administrative acts, already mentioned in § 1.1, which contain rules and regulations or general rules of policy, or which are in preparation of the performance of a legal act under private law. In the third place, the General Administrative Law Act lists a number of decisions of a specific nature which - for a variety of reasons - are excluded from judicial review by an administrative court, e.g. decisions made under emergency powers, decisions concerning military-interests, and decisions concerning student examinations. Finally, decisions are excluded if they are based on one of the legal provisions contained in a list annexed to the General Administrative Law Act. These exclusions have various backgrounds.
1.9.1. It should be pointed out that in all of the cases mentioned in § 1.9 recourse may be had to the civil courts. In the words of the Oerlemans judgement (Series A no. 219): "Under Netherlands law a civil court can carry out a full examination of all acts of the administration in the light, inter alia, of principles of administrative law, can award damages for torts committed and can grant injunctions against the administration". This statement must be qualified to the extent that the civil courts will not, as a rule, judge on the lawfulness of an administrative decision or other act which comes under the jurisdiction of an administrative court. On the issue of lawfulness they will either defer to the judgement of the competent administrative court or, in cases where no appeal to such a court has been made in right time, hold the decision or act to be lawful without further review. The latter is true with very few exceptions and even if the decision or act, had it been reviewed by an administrative court, would evidently not have been upheld. However, in cases in which no appeal to an administrative court lies, the civil courts will carry out their own examination of the act or decision in question, in order to determine whether it constitutes a tort under private law. In doing so, they will apply principles of administrative law wherever necessary or appropriate. In this way, the civil courts act as a substitute for the administrative jurisdiction whenever an administrative decision or act cannot be reviewed by an administrative court.

1.10. The Dutch legal system does not provide for any specific remedies to be applied exclusively in cases falling within the scope of Article 6 of the Convention. As was explained in § 1.8, rules of administrative procedure tend to be interpreted and applied in the light of the requirements of Article 6 even beyond the scope of the Convention. Moreover, in enacting such rules, the legislature will endeavour to take the requirements of fair trial, as developed in the case-law concerning Article 6, into account from the early stages of drafting onwards. Again, this will not lead to specific rules for cases within the scope of Article 6, but rather to rules which are applicable in the field of administrative procedure in general. An example is the system of repudiation of judges, laid down in the General Administrative Law Act. Although neither the provision concerned nor the explanatory memorandum explicitly refers to Article 6 of the Convention, repudiation may be seen as a remedy put at the disposal of the parties to enable them to exercise their right to an independent and impartial tribunal, which right is also embodied in Article 6 of the Convention (cf. Hoge Raad, judgement of 30 November 1990, Stokkermans, NJ 1992, 94).

2. SCOPE OF APPLICATION OF ARTICLE 6

A The notion of civil rights and obligations in general.

2.1. The question whether a case falls within the scope of Article 6 § 1 arises very seldom only. The General Administrative Law Act as a whole is based on the assumption that applicants have the right of access to court and a fair trial. As has been pointed out before, access to court is made conditional on the timely lodging of an appeal by an interested party against a decision of an administrative authority (see § 1.1 and § 6.1.1). The applicant may also be an administrative authority, since in disputes between public authorities there is also access to court. All in all, the scope of the right of access to court and a fair trial under Dutch law surpasses the limits of the notion of civil rights and obligations as defined in the Strasbourg case-law.

More in particular, it is generally acknowledged that the concept of civil rights should be interpreted in a broad sense. Article 6 may apply despite the fact that under Dutch law the specific claim does not qualify as a right.
Moreover, its application is not restricted to determinations of rights of a traditionally private law character, such as contractuel and property rights, and claims deriving from tort. A number of rights which are not classified as private rights in the traditional sense, are assumed to be civil rights in the sense of Article 6, provided that they contain sufficient elements which can be traced to private law. To determine these elements the courts usually establish a link between the right claimed and the legal position of the person concerned under property law or the law of contracts (cf. the Benthem judgment of 23 October 1985, Series A no. 97). Consequently, Article 6 is considered to be applicable to a great many proceedings which in themselves have a public law character, but the outcome of which is of direct interest for the determination and/or content of a private right or private obligation.

With regard to cases in which a determination of rights and obligations which belong to an individual as a citizen is at stake, uncertainty still prevails as to the exact scope of Article 6 § 1 of the Convention. The Strasbourg Court is not yet clear on the question to what extent "civil" is to be equated with "private". Uncertainty exists for example, whether disputes about the right to vote, immigration and asylum cases, military service, the hiring and dismissal of civil servants and the right to personal freedom are within or beyond the scope of Article 6 § 1. Be this as it may, under Dutch law, in those cases too there is access to court and a right to a fair trial.

2.2. Disputes on the question of whether Article 6 is applicable on the ground that the determination of civil rights and obligations is at issue, do not very often arise for the reasons pointed out in § 2.1. However, due to the uncertainty as to the exact scope of Article 6 § 1, questions on the applicability of Article 6 do arise with regard to proceedings concerning the refusal of a residence permit and the expulsion of aliens (cf. the S.N. v. the Netherlands judgement of 4 May 1999, not yet published).

In fact, most disputes concern the issue whether paragraphs 2 and 3 of Article 6 are applicable, because of the alleged existence of a criminal charge. For example, applicants may hold that disciplinary procedures, extradition procedures, cut backs or refusals in compensation or social benefits, or measures involving administrative enforcement of a law or regulation, imply a determination of a "criminal charge" in the sense of Article 6.

2.3. If a dispute arises about whether the proceedings concerned fall within the scope of Article 6 § 1, the question may not always be answered expressly. In general, the court will review the lawfulness of the administrative decision concerned on the presumption that Article 6 § 1 is applicable, thus preventing a possible violation of that provision.

With regard to claims that the administrative decision under review should be qualified as a criminal charge, it is relatively easy in most cases to conclude that no determination of a criminal charge is at issue, by using the criteria developed by the Strasbourg Court (classification under domestic law, the scope of the violated norm, the nature and severity of the penalty; Engel judgement of 8 June 1976, Series A no. 22). The reason for this is that the administrative measure complained of, as a rule, is not intended to be deterrent and punitive. Its aim is rather to enforce the law and regulations and to remove the unwarranted consequences of their violation.

B. "Dispute on civil rights and obligations" and other particular circumstances of the case.

2.4.1. The question of whether a case forms a "dispute" over civil rights and obligations is not considered to be of much weight by the Dutch courts. For a dispute to exist it is usually sufficient that an interested party lodges an appeal against a decision of an administrative authority with the aim of having that decision quashed as being unlawful. If the appeal meets the
As has been pointed out in § 2.1, the question of whether the determination of a civil right is at stake in proceedings which in themselves have a public character, is answered on the basis of the private law elements of the right at issue and/or the link between that right and the legal position of the applicant under property law or the law of contracts. In so far, the question is answered on a case by case basis. However, once it has expressly been decided that a dispute of a certain kind falls within the scope of Article 6 § 1, it is, as a general rule, assumed that all similar cases in the same area of administration also fall within that scope.

2.5. Land planning, building regulations, management of efficient use of space

2.5.1. In the Netherlands there are several statutes regarding land planning, building regulations and the management of efficient use of space. Statutes like the Compulsory Land Purchase Act, the Town and Country Planning Act, the Housing Act, the Land Development Act and the Monuments Act give authorities (discretionary) powers to make decisions which have direct consequences for the legal position of owners and other entitled persons. The legislature has taken into account that all procedures under public law that involve a determination of the property-law or contractual-law position of a private party, including the scope of the rights involved, come in principle under Article 6 § 1. Most of the aforementioned statutes explicitly provide for judicial review of the decisions made in virtue of these statutes, such as the approval of a zoning plan, the grant or refusal of a building permit, the grant or refusal of an exemption under a zoning-plan regulation, the execution of an expropriation, and decisions on financial compensation of damage resulting from administrative decisions. Even if the decision appealed against does not directly encroach upon any of the rights of the applicant, it is accepted that the determination of such a right may be involved. For this it is sufficient that the outcome of the judicial proceedings may in one way or another be also decisive for the scope of such a right, or may at least affect it. Moreover, it is accepted that the refusal by an administrative authority to make a decision (for example to grant a building permit) may also have consequences for the way in which the applicant can use his property rights. Because access to court is widely opened and the proceedings, as a rule, meet the requirements of Article 6 § 1, in the areas here discussed the issue of whether a case falls within the scope of Article 6 § 1 of the Convention is not frequently raised.

2.5.2. Designation decisions like those concerning protected natural sites usually result in restrictions of property rights and rights of other users of the site. It is generally accepted that the determination of rights and obligations is not restricted to the determination of the existence or non-existence of a right or obligation, but may also concern its scope or modalities and the prohibition of or interferences with the exercise of a right. The Nature Protection Act provides for an extensive procedure for making designation decisions and offers opportunities for the involvement of interested parties. Designation decisions are decisions in the sense of the General Administrative Law Act. The separate administrative decisions which are the direct result of the designation are subject to judicial review on appeal.
An example of such a decision is the grant or refusal of the permission needed for acts that are damaging for or are visually degrading the site. If a right of the applicant is found to have been infringed upon, compensation may be awarded by the court. Consequently, designation decisions do not give rise to specific problems, since disputes concerning restriction of the use of one’s property or one’s right as a user fall within the scope of Article 6 § 1.

2.6. Environmentally hazardous activities - rights of neighbours to industrial plants in general

2.6.1. The jurisdiction and competences of the administrative courts, and the applicable procedural rules are described in § 1.0.1. and § 1.0.2. In that respect there are no distinctions between different fields of public administration or within such a field from the point of view of Article 6 § 1. Dutch law does not contain special rules of procedure for cases which fall within the scope of Article 6. Indeed, all rules tend to take the requirements of fair trial - as developed in the Strasbourg case-law concerning Article 6 - into account, since the concept of fair trial is deemed important even beyond the limits of the determination of civil rights and obligations. This may be illustrated by the right of appeal for those living in the vicinity of a nuclear power station against the (extension of the) licensing of such a power station. In fact, access to court is open to everyone who has stated his views in the preparatory proceedings; it is not made dependent on expectations about the well-foundedness of the appeal nor on a specific interpretation of the concept of “determination of civil rights and obligations”. Compare in this respect the Balmer-Schafroth judgement of 26 August 1997 (Reports 1997-IV, p. 1346), where the Strasbourg Court held that the connection between the administrative decision in dispute and the right invoked by the applicants (the right to have their physical integrity adequately protected from risks entailed in the use of nuclear energy) was too tenuous and remote. Article 6 § 1 was accordingly not deemed applicable in the case. Therefore, the fact that the decision could not be reviewed by an independent and impartial tribunal satisfying the requirements of Article 6, was not considered to constitute a violation of Article 6.

2.7. Tax matters.

According to the Strasbourg case-law, “pecuniary” obligations may exist via-à-vis the State or its subordinate authorities which, for the purpose of Article 6 § 1, are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of “civil rights and obligations”. Leaving apart fines imposed by way of “criminal sanction”, this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society (cf. the Schouten and Meldrum judgement of 9 December 1994, Series A no. 304). On the other hand, contributions and benefits under social-security schemes, including welfare benefits, are considered to constitute “civil rights and obligations” and therefore fall within the scope of Article 6 of the Convention (Feldbrugge judgement, Series A no. 99; Schouten and Meldrum judgement, Series A no. 304; Schuler-Zgraggen judgement, Series A no. 263).

2.7.1. Contributions and benefits under social-security systems do not come under the jurisdiction of the Council of State. Some of the contributions are levied together with the income tax as a percentage of the amount of the basic tax. As a consequence, these contributions come under the jurisdiction of the tax chambers of the Courts of Appeal and the Supreme Court.
The other social-security contributions, as well as the benefits under social-security schemes, come under the jurisdiction of the District Courts and the Central Appeals Tribunal. Reference is made to § 1.0.1. As a matter of course, these jurisdictions will take into account the applicability of Article 6 of the Convention set forth in § 2.7. Having the power (and duty) to set aside national legislation that is not in conformity with the Convention (see § 1.6), they have little need for special rules of procedure to comply with the Strasbourg case-law. Indeed, one of the very rare legislative actions in this field was the abolition of the so-called "medical-expert procedure" for the assessment of invalidity rates, where decisive weight was attached to the opinion of a medical expert appointed by the court. Substantive legislation may be needed in situations where the setting-aside of provisions of Dutch law is not sufficient to prevent or remedy a breach of the Convention and where providing a remedy by way of case-law would exceed the constitutional power of the judiciary. As far as Dutch case-law is concerned, the Central Appeals Tribunal tends to grant a reduction in social-security contributions by way of compensation for undue delay in the administrative procedure. The tax chamber of the Supreme Court has held that sanctions on violation of taxpayer duties are punitive in nature and, consequently, qualify as "criminal charges" in the sense of Article 6 of the Convention.

2.7.2. A distinction is usually made between taxes and "retributions", the latter being charges imposed in return for specific services rendered by the administration. Social-security contributions are not taxes. Nevertheless, for practical reasons some are levied by the revenue authority. As a consequence, the rules of procedure for taxes apply, including those on jurisdiction and competence. The remainder of these contributions come under the competence of those courts which also deal with cases concerning social-security benefits (see § 2.7.1.).

2.7.3. Since recently, the same rules of procedure apply in tax cases and social-security cases. Indeed, any differentiation in that respect would not make much sense since part of the social-security contributions are calculated as a percentage added to the income tax. The absence of differentiation is not considered to be a problem as the courts have a tendency to apply the standards laid down in Article 6 as general principles of administrative procedure, regardless of their scope under the Convention (see § 1.8).

2.8. Social security.

2.8.1. The Council of State does not have jurisdiction in social-security matters. Such matters are dealt with by the District Courts, from whose judgements appeal lies with the Central Appeals Tribunal. Some social-security contributions are treated procedurally as income-tax matters (see § 1.0.1 and § 2.7.1.).

2.8.2. There does not seem to be any special practice with respect to the rules of procedure in social-security cases with a view to Article 6 of the Convention. Again, reference is made to the general tendency to arrange judicial proceedings in such a way as to comply with Article 6 of the Convention, regardless of the specific nature of the case in hand (see § 1.8 and § 2.7.3).

3. MAIN PROBLEMS OF A FAIR TRIAL

3.1. Disputes arise mainly with regard to the right of access to court. Certain requirements have to be met in order to have such access. Examples of procedural failures which will result in inadmissibility of the appeal are: failure to (timely) pay a registry fee, failure to (timely) produce a written
authorization, failure to (timely) present the grounds of appeal, and failure to use the possibility during preparatory procedures to comment on a draft decision.

3.2. Most of the allegations of violations of the right of access to court are found to be manifestly ill-founded (see § 4.1). The case-law starts from the view that the right of access to court is not absolute. Certain restrictions regulating the access to court may be imposed and in doing so, the legislature is allowed a certain "margin of appreciation". The restrictions imposed are usually deemed not to impair the very essence of the right of access to court, to have a legitimate aim and to meet the proportionality test (cf. the Ashingdane judgement of 28 May 1985, Series A no. 93). A particular problem with regard to access to court may arise under the preparatory procedures, which are frequently used under the Environmental Management Act and under the Town and Country Planning Act (see also § 5.4.3). In his appeal against the decision the applicant can only raise objections based on views which he has brought forward against the draft decision during the preparatory procedure. New objections will usually be declared inadmissible in court. Consequently, judicial review is limited to facts and circumstances that have occurred prior to the determination of rights and obligations by the decision under review. According to the case-law as it stands such a restriction of access to court is in accordance with Article 6 of the Convention and the criteria just mentioned, serving as it does the interests of "good procedural order" and efficient administration of justice. In that context, it is also taken into consideration that the right of access to court is not absolutely denied in relation to new objections, because the court will examine whether the applicant may be excused for not having raised them previously. The mere fact that the applicant has not availed himself of legal assistance during the preparatory procedure, is usually not considered to be a sufficient ground for such an excuse, unless legal assistance is deemed indispensable for an effective access to court.

3.3. The Procola judgement of 28 September 1995 (Series A no. 326) has potentially a certain relevance for the Netherlands Council of State, which has an advisory function in the area of legislation and acts, at the same time, as supreme administrative tribunal. However, any party in proceedings before the Council of State may repudiate each of the members of the panel hearing the case, on the ground of facts or circumstances which may prejudice the judicial impartiality or independence of the member concerned. Repudiations based upon the Procola reasoning are raised very rarely. The Administrative Jurisdiction Division of the Council of State takes the view that it cannot be inferred from Article 6, nor from the Procola judgement, that the fact that the Council of State combines the two functions impairs, under all circumstances, the impartiality and independence of its members; it depends, on the one hand, on the legal issues put before the Council of State in its judicial capacity and the connection between these issues and the issues dealt with in the opinion given by the Council of State in its advisory capacity on the applicable law, and, on the other hand, on the involvement of the repudiated member in the advisory function at the relevant moment. In view thereof, the Administrative Jurisdiction Division has taken internal organizational measures to ensure that there is no ground for an objectively justified fear of partiality. If the legal issues at stake are (more or less) the same issues on which the Council of State has previously given an advisory opinion, the panel hearing the case will be composed of members who have not participated in rendering the advice. This solution is facilitated by the fact that the Administrative Jurisdiction Division has also members who do not take part in the advisory function of the Council of State.
As to other aspects of objective impartiality, it is regarded unsuitable for the President of a court (or his substitute) to hear both the request for a provisional measure and the appeal in the same case, although in the former case the President can only give a provisional judgement and, therefore, does not determine any right or obligation.

In general, judicial proceedings of administrative courts would seem to be in compliance with the principle of equality of arms. However, the Mantovanelli judgement of 18 March 1997 (Series A. no. 32) has raised certain questions with regard to examinations by experts in the course of such proceedings, in view of the adversarial principle. In cases concerning land-planning regulations and environmental licences the Council of State often appoints an expert to carry out an examination and advise the court. The answers given by the expert to questions put to him may have a great impact on the outcome of the case. Although the Council of State is not bound by the expert's findings, his report is likely to have a preponderant influence on the finding of the facts. Therefore, it is now general practice that the appointment of an expert is communicated to the parties and that they are offered the opportunity to state their views on the expert report in writing. And although it is decided by the Council of State on a case to case basis whether the parties are allowed to make suggestions concerning the examination to be performed by the expert, it favours a hearing of the parties by the expert during the examination.

4. ORAL PROCEDURE

4.1. The General Administrative Law Act provides that, as a rule, a hearing will be held. However, the court may render judgement without a hearing if it manifestly lacks jurisdiction, or if it holds the appeal to be manifestly ill-founded, manifestly well-founded, or manifestly inadmissible. In these cases the judgement is open to opposition, to be filed with the same court. If the opponent so requires, he is granted a hearing. If the court finds the opposition to be inadmissible or ill-founded, its previous judgement stands. If it finds that, after all, the outcome of the case is not manifest, it quashes the previous judgement and continues its examination of the case. For that purpose a hearing will usually be held at some later date.

4.2. Of the total number of cases brought before the Council of State, about 20% is decided upon without a hearing. These judgements are only rarely opposed. Some 30% of the appeals are withdrawn or otherwise disposed of, which leaves about 50% of the cases in which judgement is passed after a hearing.

4.3. The failure of the lower court to hold a proper hearing may lead the appellate court to quash that judgement and to refer the case back for further examination and judgement. Alternatively, the appellate court may decide the case itself (see § 1.3). In the latter situation the failure of the lower court to hold a hearing is considered to be repaired by the hearing held by the appellate court (cf. the De Haan judgement of 26 August 1997, Reports 1997-IV, p. 1379, and the De Cubber judgement of 26 October 1984, Series A no. 86).

4.3.1. However, if the lower court has declined to hold a hearing on the ground that it manifestly lacks jurisdiction or that the appeal is manifestly ill-founded, manifestly well-founded, or manifestly inadmissible (see § 4.1), no appeal lies either against this judgement or against the decision of the court taken on the opposition filed. An exception is made in case of serious procedural shortcomings (violation of fundamental principles of fair trial). In the latter situation Article 6 of the Convention may be at issue, but this is not required to make the appeal admissible.
4.4. The failure of the lower court to observe any other relevant rules of administrative procedure will, mutatis mutandis, be dealt with in the way described in § 4.3.

4.5. The Council of State tends to avoid referring the case back to the lower court after having quashed the latter's judgement (see § 4.3) if, having held a hearing itself on appeal, it reaches the conclusion that the case has been fully examined and is ready for final judgement. Referring the case back to the lower court - with the possibility of yet another appeal to the Council of State - is deemed to serve little or no purpose in such a situation. However, the Council of State always takes into consideration that in doing so it may in effect deprive the parties to the proceedings of one of the two instances of judicial review to which they are entitled.

4.6. No problems are experienced with respect to the access of the public to the hearing. Generally speaking, only those who are directly involved in the case will attend with their spokesmen and advisers which, especially in environmental cases and land-planning cases, may amount to a considerable number of people. In the average case, public interest is confined to one or two journalists. In addition, hearings are regularly attended by groups of students or other persons, but usually not in view of a particular case.

4.7. It is possible to waive the right to a hearing. Having obtained permission from the parties, the court may rule that no hearing is to be held.

5. RULES OF EVIDENCE

Introduction.

5.0. In Dutch administrative law - unlike private and criminal law - there are no specific written rules on evidence. There is also no requirement of proof beyond reasonable doubt. Disputed facts need to be made plausible to the satisfaction of the court, for which purpose, in principle, any available means of evidence may be used.

As to the questionnaire.

5.1.1. In Dutch administrative law there are no special legal regulations concerning the admissibility of illegally obtained evidence.

5.1.2. There is case-law to the effect that the administrative courts are not, as a rule, barred from using evidence which under criminal law would be considered to have been illegally obtained; the rules of criminal procedure do not apply. The ultimate test is, whether - all circumstances of the case considered - the administrative authority has been acting in accordance with the general principles of proper administration. Evidence may be excluded only if it has been "obtained in a manner contrary to what may be expected of a properly acting administration, to such an extent that its use has to be considered inadmissible under any circumstances whatsoever" (Hoge Raad, judgement of 1 July 1992, BNB 1992, 306). It should be noted that in tax matters this test is not only applied with respect to the settlement of the basic tax debt, but also in relation to the "increase" which may be imposed by the tax authorities in case of irregularities on the part of the tax payer. For all practical purposes, the "increase" serves as an administrative fine for the transgression of tax regulations. It is therefore considered to constitute a "criminal charge" under Article 6 of the Convention. This has given rise to the argument that the test concerning the admissibility of illegally obtained evidence should be more stringent in these cases. So far the courts have not adopted that view.
5.2. In Dutch administrative law there are no rules preventing the court from accepting evidence not put forward during the hearing. In practice, emphasis tends to be on the preparation of the case before it comes to the hearing. Most of the evidence is produced at that stage, in writing. Although the General Administrative Law Act does provide for compelling witnesses to appear, and for their examination under oath, these methods of obtaining evidence are rarely used in administrative proceedings.

5.3. The General Administrative Law Act provides for the appointment of experts and for their appearance at the hearing. An expert must attend the hearing if the court so orders. However, there are no specific provisions for the required impartiality and independence of experts. In land-planning and environmental licensing cases, the Council of State usually turns for expert advice to a specialized institution which originally was set up by the Government, but which operates in full independence. In other cases, the courts will discuss the desirability of appointing experts with the parties and consult them as to the person or persons to be designated. Since the Mantovanelli judgement of 18 March 1997 (Reports 1997-11 p 425), the parties are, as a rule, consulted on the instructions to be given to the experts and are given the opportunity to comment on the experts' opinion. An expert opinion may also be submitted to the court by each of the parties, but the court will then take into account the possibility of bias. In certain areas of administrative law, the law requires the administrative authority to obtain advice from an expert commission before making its decision. Apart from the proof of (serious) procedural faults, such a legally prescribed expert opinion may be set aside only on the basis of counter-evidence of another expert.

5.4.1. As the administrative courts generally rule on the lawfulness of decisions made by administrative authorities only, they have to restrict their examination to the situation ex tunc. That is to say that the decision may only be reviewed in the light of the circumstances prevailing at the time it was made, taking into account only such facts as were known to the administrative authority at that moment, or could have become known to it at that moment upon proper investigation. This puts restrictions on new facts being raised before the administrative courts. Facts can only be included in the review if they date back to a moment in time before the decision was made; later developments are excluded. A distinction is made, however, between new facts, which are inadmissible, and new evidence pertaining to old facts, which may be brought forward in court in due time (see § 5.4.3).

5.4.2. For completeness' sake, it should be added that, once the administrative decision is quashed on the basis of an ex tunc review, any decision made by the administrative authority concerned or the court to replace the decision (see § 1.3) will be based on the situation ex nunc, i.e. taking into account all the relevant circumstances at the time of the judgement.

5.4.3. Besides the ex tunc doctrine set forth in § 5.4.1, there are developments in the case-law concerning the latest moment in time at which the parties are allowed to raise new issues concerning the case or to bring forward new data. Limitations are put on attempts by the parties to introduce points of discussion they have failed to put forward - without good reason - before the lower court or before the administrative authority. More and more, the concept of "good procedural order" is used to prevent the parties from coming forward with arguments and evidence at a later stage in the procedure than would have been possible and appropriate. In this way, the parties are required to present their arguments at the earliest possible moment in time, in order to increase procedural efficiency and provide the other parties a real and timely opportunity to comment. However, the concept of "good procedural order" has come under criticism of those who place more emphasis on the need to allow the parties to make reparation for
previous procedural errors and omissions. In this respect it should be noted that, in administrative proceedings, the parties are allowed to present their case without legal council or representation. Generally speaking, this ought to justify at least some leniency towards procedural shortcomings.

6. PARTIES TO THE CASE

6.1.1. Under the General Administrative Law Act, access to legal remedies is generally restricted to "interested parties". An interested party is a person or body whose interests are directly affected by the challenged decision. To be directly affected, one must have a personal, specific, and objectively identifiable interest which is immediately related to (the consequences of) the decision and can be distinguished from the interests of the public at large.

6.1.2. Only interested parties have standing to appeal, or to intervene as a “third party” in proceedings initiated by another interested party. The judgement of the court will be binding on all the parties who took part in the proceedings. Indirectly, it may also affect those who could have appealed or intervened, but failed to do so. If a decision is quashed, this will have effect erga omnes. If the decision stands, an interested party who - without good reason - remained outside of the proceedings will no longer be able to challenge its lawfulness before a court, if only for the simple reason that the time within which he could have lodged an appeal of his own will have elapsed (6 weeks as a rule). As was already pointed out in § 1.9.1, a decision which has not been appealed against in due time is, save very few exceptions, held to be lawful.

6.2. In the case-law, no formal distinction is made between those whose "subjective rights" are involved, those whose legal position is otherwise at stake, or those who are merely affected in a factual manner. Far more weight is attached to the specific nature of one's interest, as distinguished from the interests of an unspecified number of other persons, and to the direct relationship between one's interest and the effects of the challenged decision. It may well be that those whose subjective rights are involved stand a better chance to be granted standing than others, but this is not a matter of principle but of facts. It may even be that a person whose rights are affected by a challenged decision, has no standing to lodge an appeal, because the way in which he is affected does not distinguish him from the general public, e.g. the decision to restrict the use a public road.

6.3. Generally speaking, the right to take part in the administrative procedure is subject to the same test as is applied to grant standing in administrative court proceedings. Under the General Administrative Law Act, the general pattern is for interested parties to be required first of all to raise an "objection" with the administrative authority itself or to appeal to a higher administrative authority, as the case may be. Only those who have done so may proceed to lodge an appeal with the court and only those who actually appealed to the lower court may appeal to the appellate court. In other words: there must be an unbroken chain of legal action. Exceptions to this rule will be made only if an interested party is able to show good reasons for failing to participate in previous stages. One such reason presents itself if a previous decision is overturned. Those who were favoured by the previous decision, and therefore had no cause to seek a remedy against it, will then be allowed to lodge an appeal against the decision to overturn the previous one.
6.4. The fact that fundamental rights and freedoms are at stake, does not in itself warrant access to the administrative courts. This does not, however, constitute a serious obstacle to judicial review. From § 1.9.1 it is clear that in cases where generally no remedy by administrative courts is available, recourse may be had to the civil courts, which may award damages or impose injunctions in accordance with the law on torts. In this way, even Acts of Parliament may be suspended if they are found to violate binding international provisions on human rights.

7. THE RIGHT TO PUBLIC PRONOUNCEMENT OF THE JUDGEMENT

7.1. There are no particular problems with respect to the obligation to pronounce the judgement publicly. The judgements are announced in a public hearing; only if anybody present shows an interest, the judgment is read out in full or in part.

7.2. There is no legislation that allows the courts not to pronounce the judgement orally when another form of public access is available. Additional systems to allow public access do exist, but under the General Administrative Law Act in its present form they cannot substitute for oral pronouncement. It would also follow from the system of the Act that additional access may only be given after the oral pronouncement has taken place. Some courts are already providing additional access to judgements by electronic means (e.g. on the Internet), or are experimenting with it. There do not seem to be any legal impediments to allow electronic access in principle. Restrictions may apply under privacy legislation as to the registration of personal data contained in the judgement: names, addresses and other sensitive information may have to be removed.

8. REASONABLE DELAY OF DEFINITIVE JUDGEMENTS

8.1. Present situation (considered from the point of view of judicial organisation).

a) As a general rule, the applicant must previously have raised an objection against the challenged decision before addressing the court. Raising an objection means seeking redress from the administrative authority which made the decision. In some cases, however, the applicant must previously have lodged an administrative appeal, by which he seeks redress from another administrative authority than the one which has made the decision. In other cases, as has been pointed out before, the applicant must have participated in an (extensive) administrative preparatory procedure by stating his views objecting against a third party’s application for a decision or against a draft decision.

b) Any delays which occur after an appeal to an administrative court has been lodged and which result from the action or inaction of a party come on his own account. If a party fails to comply with the obligation to appear, to provide information, to supply documents or to co-operate in an examination carried out by an expert, appointed by the court, the court may draw such conclusions from this as it sees fit. Some delays, such as those caused by not keeping the term for stating the grounds of the appeal after having lodged a pro forma appeal, may even result in summary dismissal of the appeal.

c) - For a description of the number of degrees of jurisdiction, reference is made to § 1.0.1
- As a general rule, each party whose interests have not been fully met by a judgement has a full right to appeal to the higher court. However, no appeal may be lodged against a judgement of a lower court if the applicant is to be blamed for not having raised an objection against the challenged decision.
The most far-reaching appeal will be considered first. This may have as a result that the other appeal does not need an extensive treatment.

- As a general rule the court of last resort, when quashing the judgement appealed against, decides itself on the merits of the case if the case has been fully examined and is ready for final judgement (see also § 1.3 and § 4.5). The court of last resort sends the case back to the lower court if the latter has wrongly held that it lacked jurisdiction or that the appeal was inadmissible. It will, however, decide itself on the merits of the case if it deems it unnecessary that the case is dealt with again by the lower court.

The Council of State has developed a priority system: (1) Requests for provisional measures may be deemed to be of a most urgent character and are given priority. They are dealt with by the President of the Administrative Jurisdiction Division or his substitute. (If further examination cannot reasonably be expected to contribute to the examination of the case, the President may give immediate judgement on the merits.) (2) In the other cases - appeals, requests for revision, objections against summary proceedings without hearing - if a case is considered to have a special urgency the President of the Chamber concerned may decide, on his own motion or at the request of (one of) the parties, that proceedings will be expedited. If it is so decided, the Chamber's President also determines the date on which the hearing will take place and immediately communicates this to the parties. (3) With regard to the remaining cases, as a general rule, the oldest cases will, if possible, be dealt with first.

8.2. Present situation (considered from the point of view of mechanisms for neutralising some effects of delays): instances.

a) If the court holds the appeal to be well-founded, it may, at the request of the applicant, if there are grounds for doing so, grant compensation for the damage suffered. The examination may be reopened in order to determine the extent of the damage and the amount of the compensation. However, the court may decide that recourse should be had to the civil court on the matter. Furthermore, the applicant may decide himself to bring an action for damages in the civil court. Moreover, the applicant may decide, in case the administrative court has quashed the challenged decision, to ask the administrative authority concerned for compensation. Against the decision on that request, and after having lodged an objection with the administrative authority which made the decision, the applicant may appeal again to the administrative court. The compensation granted by the court has to be paid by the designated public legal person to which the authority belongs that has taken the challenged decision.

b) A civil servant, too, has to first lodge an objection against the decision concerning his dismissal before appealing to the court. The court, in turn, reviews the decision that is taken on the objections raised against the original decision. If the court holds the appeal against that decision to be well-founded, two main options are available. (1) The court may direct the administrative authority to make a new decision or to perform another act in accordance with its judgement. This course of action does not automatically entitle the civil servant to payment of past salaries and restoration of position. (2) The court may also rule that its judgement takes the place of the quashed decision or the quashed part thereof in case the dismissal is found unlawful. This course of action does automatically entitle the civil servant to payment of past salaries and, if possible, restoration of position (or pecuniary damages). There is no internal procedure which allows individuals to recover damages caused by unreasonable delays in proceedings. The appellate court does not pass judgement on the alleged wrongful act or omission of the lower court which consists in not respecting the requirement of a hearing within a reasonable time. Alleged damages should be claimed before a civil court (Centrale Raad van Beroep, judgement of 24 December 1997, RSV 1998/101). However, the Supreme Court has up until now treated claims involving unlawful administration of justice with the utmost reserve.
8.3. **Present situation: statistics**

*Statistics of the Administrative Jurisdiction Division of the Council of State*

**Method**

* The registration of all cases is computerized (storage and retrieval). The system also provides statistical information (counts and processing time of cases).
* If more than one applicant has lodged an appeal against one and the same decision, all applicants will be registered under one case number. For statistical information the case counts for one, even if there are numerous applicants.

The processing time of each case is measured from the receipt of the appeal/request till the judgement is dispatched.

**Data**

a. **Average processing time in 1998**

a.1 Judgements in mayor cases with hearing

<table>
<thead>
<tr>
<th>Time</th>
<th>First instance</th>
<th>Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 1 year</td>
<td>11%</td>
<td>43%</td>
</tr>
<tr>
<td>1-2 year</td>
<td>42%</td>
<td>56%</td>
</tr>
<tr>
<td>2-3 year</td>
<td>32%</td>
<td>1%</td>
</tr>
<tr>
<td>&gt; 3 year</td>
<td>15%</td>
<td>0%</td>
</tr>
</tbody>
</table>

a.2 Decisions on requests for provisional remedies: 5 months

a.3 Judgements in simplified proceedings without a hearing: 4 months

a.4 Cases which do not end with a judgment or a decision on provisional measures (e.g. withdrawal of the appeal or forwarding the appeal to a competent jurisdiction) are, of course, less time consuming. They are not enclosed in the statistics just mentioned in order to prevent distortions.

b, c and f) **Number of cases in 1998: first instance**

<table>
<thead>
<tr>
<th>Category</th>
<th>Mayor Cases</th>
<th>Provisional Remedies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Still to be judged on January 1st</td>
<td>4698</td>
<td>631</td>
</tr>
<tr>
<td>Received</td>
<td>3033</td>
<td>1540</td>
</tr>
<tr>
<td>Settled *</td>
<td>3685</td>
<td>1687</td>
</tr>
<tr>
<td>Still to be judged on 31 December</td>
<td>4046</td>
<td>484</td>
</tr>
</tbody>
</table>

* with hearing                      | 1684        | 1034                 |
without hearing                     | 556         | 222                  |
other                               | 1445        | 431                  |

d, e and f) **Number of cases in 1998: appeal**
8.4. **Action to be taken by the Supreme Administrative Courts**

a) The computerized system does not only indicate the beginning and end of the period during which the case is under the Council of State, but also contains dates in between, like the request for and receipt of briefs, the invitation to a hearing, the date of the hearing etcetera. This means that the progress of each case can be statistically registered.

b) The computerized system does not only contain information on the progress of each case, but also on, for instance, the character of the case, its degree of difficulty etcetera. This means that the progress of cases of the same kind can be supervised and compared.

c) As the Jurisdiction Division and the Advisory Division of the Council of State are, to a large extent, composed of the same members, there are ample opportunities for drawing from experiences with the administration of justice when advising on procedural aspects of draft legislation.

9. **THE DECISION OF THE COUNCIL OF STATE**

9.1. - The most important restriction of review by the Council of State is the restriction to "decisions" in the sense of the General Administrative Law Act, referred to in § 1.1. Judgements of the District Courts that may not be appealed against for review by the Council of State are a) judgements in simplified proceedings without a hearing (on the ground that the court lacks jurisdiction or that the appeal is manifestly inadmissible, manifestly ill-founded or manifestly well-founded); b) judgements given on opposition against judgements as just mentioned c) decisions on applications for provisional measures.

- The Council of State has held that an explicit restriction of review, like the ones just mentioned, should be disregarded if the District Court has failed to comply with (fundamental) requirements of fair trial. Although the Convention and its Protocol No. VII only guarantee a right of appeal to a higher court against a judgment concerning a criminal charge, the Council of State has held that in certain cases the right to a fair trial may imply that serious non-compliance with the requirements of fair trial by a lower court requires review by an appellate court. In the category of cases dealt with by the Council of State in the first and final instance, the procedure of "review" of the final judgement will have to be used to remedy a violation of Article 6 of the Convention.
As far as the exclusion of appeal against decisions on applications for provisional measures is concerned, such rather drastic measures are not deemed necessary. The President may lift or alter the provisional measure at the request of one of the parties to the dispute. Furthermore, a provisional measure will cease to have effect as soon as the court has given its judgement on the merits. Because of its provisional character, a decision on an application for provisional measures does not result in a determination of civil rights and obligations. Therefore, Article 6 does not apply.

9.2. The General Administrative Law Act does not contain any specific provision as to changes in the composition of the Chamber hearing the case. It does provide for the names of the judges who heard the case to be included in the judgement. From this it is inferred that judgement must be given by the judges who attended the hearing. If there is a change in the composition of the Chamber after the hearing - for which there should be a compelling reason - a new hearing will have to be held.

9.3. Review by the administrative courts is restricted to the lawfulness of the challenged decision made by the administrative authority. This precludes any ruling as to the desirability or usefulness of that decision. Matters that belong to the realm of expediency or politics are beyond the competence of the judiciary. However, judicial review of the lawfulness of the decision does include a "marginal test" of the way the administrative authority has exercised its discretionary powers, if any. It is considered to be a principle of administrative law that discretionary power may not be lawfully exercised in an arbitrary or capricious way. Therefore, the court will quash the decision if it finds that the administrative authority, taking into consideration all the interests involved, could not within reason have come to the decision it has made.