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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

THE NETHERLANDS

OPINION

ON THE LEGAL PROTECTION OF CITIZENS

Adopted by the Venice Commission
at its 128th Plenary Session
(Venice and online, 15-16 October 2021)

On the basis of comments by

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Ms Claire BAZY MALAURIE (Member, France)
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I. Introduction

1. By letter of 25 February 2021, Ms Khadija Arib, the Speaker of the House of Representatives of the States-General of the Netherlands, requested the opinion of the Venice Commission, to address two questions in relation to the Childcare Allowance Case:

1) What laws, what implementation or what practices have contributed to the fact that power and countervailing power worked insufficiently in this case and that the citizen was crushed in the middle? What possible solutions are there to repair this and to prevent its occurrence in the future?
2) Is administrative law in the Netherlands, including the Council of State, sufficient, and what checks and balances should be added to the law or the implementation of administrative justice (and possibly adjoining branches of the law), to give citizens adequate protection, including effective access to justice and to legal aid?

2. Mr Richard Barrett, Ms Claire Bazy Malaurie, Mr Eirik Holmøyvik and Ms Jasna Omejec acted as rapporteurs for this opinion.

3. On 24 and 25 June 2021, Mr Richard Barrett, Ms Claire Bazy Malaurie, Mr Eirik Holmøyvik and Ms Jasna Omejec, assisted by Mr Schnutz Dürr from the Secretariat, had online meetings with representatives of the Dutch Parliament, the Ministry of Social Affairs and Employment, the Ministry of Justice and Security, Ministry of the Interior and Kingdom Relations, the Ministry of Finance, the Supreme Court *(Hoge Raad),* Council of State *(Raad van State)* and the Council for the Judiciary *(Raad voor de rechtspraak),* as well as the Ombudsman, investigating lawyers, investigating journalists, representatives of the academic community and the Dutch Taxpayers Association *(Bond voor Belastingbetalers)* (hereinafter "the interlocutors").

4. This opinion was prepared in reliance on the English translation of the 2020 Report of the Childcare Allowance Parliamentary Inquiry Committee entitled "Unprecedented injustice" (*Ongekend onrecht*) (hereinafter "the 2020 PIC Report") (CDL-REF(2021)073). The translation may not accurately reflect the original version on all points. The Commission also had access to unofficial translations of the 2017 Report of the National Ombudsman "No power play but fair play" (*Geen powerplay maar fair play*) (hereinafter "the 2017 Ombudsman Report)[1] and various other texts.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 24 and 25 June 2021. On 12 October 2021, the Permanent Representative of the Netherlands to the Council of Europe submitted factual comments on the draft opinion. The draft opinion was examined at the joint meeting of the Sub-Commissions on the Rule of Law and Democratic Institutions on 14 October 2021. Following an exchange of views with Ms Judith Tielen and Mr Pieter Omtzigt, Members of the House of Representatives, it was adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021).

II. Background

6. The presentation of the background to the Childcare Allowance Case below draws from the 2020 PIC Report and the 2017 Ombudsman Report.

[1] Report of the National Ombudsman "No power play but fair play. Disproportionately harsh approach to 232 families with childcare allowance"(*Geen powerplay maar fair play. Onevenredig harde aanpak van 232 gezinnenmetkinderopvangtoeslag*) of 9 August 2017, Report number: 2017/095. The original version of the Report is available at https://www.nationaleombudsman.nl/system/files/onderzoek/Rapport%202017-095%20Geen%20powerplay%20maar%20fair%20play_0.pdf (the Venice Commission had access to an unofficial translation)

7. On 23 June 2005, the Dutch Parliament adopted the Act on the harmonisation of income-related schemes (General Act on Income-Related Schemes or General Act on Means-Tested Scheme – hereinafter "the AWIR"), which established a complex childcare allowance system in which parents buy specific preschool and out-of-school childcare services on a regulated market from a registered childcare centre (*kindercentrum* - e.g. a kindergarten) or childminder (*gastouder*). Under this scheme, the parents are reimbursed for part of the cost, depending on their income, as an allowance.

8. That "allowance" (*toeslag*) is a provisional and conditional "advance" paid by the State to the applicants in advance. The State covers only part of the costs of childcare. Parents must always pay the remainder themselves. Their personal contribution is mandatory, and they must be able to demonstrate that they provided it with relevant bank statements.

9. Contrary to "general welfare benefits" designed to secure a minimum level of subsistence, including "child benefit" (*kinderbijslag*) which is available to all citizens, the childcare allowance is a "means-tested allowance", which is made dependent on proof that one's income is below a certain level and which is paid only upon request. With the passing of the AWIR in September 2005, means-tested allowances relating to childcare, healthcare and housing were harmonised.[2]

10. The new system also implied a transfer of the function to pay the allowance from social services to the Tax and Customs Administration in the Ministry of Finance *(Belastingdienst/ Toeslagen*).

11. It took until 2011 for the Tax and Customs Administration to build its capacity and to introduce an ICT system that made it possible to carry out checks on a greater scale. Within that ICT system, the applications that were considered suspect were selected on the basis of a risk-classification model, based on Artificial Intelligence (AI), which was an algorithm that "self-learned" from examples of correct and incorrect applications. One of the many indicators used to identify fraud cases was citizenship and applicants with foreign origin were selected by the system for detailed scrutiny of their applications.

12. In 2013, it was revealed that in a large-scale fraud a criminal scheme had been put in place to systematically defraud the Dutch state of social aid payments for years. The ringleaders of the scheme had recruited individuals to travel to the Netherlands where they registered as residents and then applied for housing and healthcare subsidies. They then returned to their home country, withdrew the allowance from cash machines and they shared the proceeds with the ringleaders.

13. The system was so designed that the allowance was paid upon an application by the parents setting out an estimate of the childcare costs for the following year. Due to minimal initial verification, nearly everyone who applied would receive "advances" for the allowance. Verifications would then be carried out. Until 1 January 2021, Article 26 of the AWIR, entitled "Recovery owed by interested party", read as follows: *"If a revision of an allowance or a revision of an advance results in an amount to be recovered or if a settlement of an advance with an allowance leads to this, the person concerned shall owe the entire amount of the recovery."* This provision was interpreted by the Tax and Customs Administration as the so-called "all or nothing approach", so that even if a parent had acted in good faith but neither the parent or the childminder could provide proof of hours used or parental contribution etc., the parent had to repay the full amount for the whole year. The "all or nothing approach" contributed to high repayment demands, as was the case with 15% of the parents.[3] The requests for repayment could go back to the previous five years. Any minor discrepancy between the payments announced in advance of the year and those actually made during the year was interpreted as

[2] The 2020 PIC Report.
[3] The 2020 PIC Report, p. 57.

fraudulent and led to the obligation to refund the allowance in full (the so-called “all or nothing approach”).

14. This strict approach was not attenuated by any proportionality test or a hardship clause. In fact, while the Advisory Division of the Council of State[4] warned against adopting the relevant law without a hardship clause, the Council for the Judiciary who were consulted on the draft pointed out that the inclusion of a hardship clause could be a source of conflict and, for that reason, could give rise to frequent appeals to the administrative court.[5] In the end the law was adopted with an impractical hardship clause relating only to the effects of the assets test.[6] Only in June 2020 did the legislator enact the new AWIR Hardship Adjustment Act. It extended the existing clause and introduced a so-called hardship scheme in the AWIR.[7]

15. The “all or nothing approach” led to massive claims for reimbursement from parents. In some cases, the annual amount paid had been some 30.000 Euros and the whole amount had to be repaid, for several years back, even though the amount of incorrect claims was much smaller.

16. Many parents appealed to administrative courts and some of them won their cases at first instance.[8] In these cases Tax and Customs Administration appealed to the highest administrative court, the Administrative Jurisdiction Division of the Council of State, which however confirmed the “all or nothing approach”.

17. Parents found it very difficult to receive any explanations for this approach as the system was highly centralised. Local social services were not competent as the administration had been centrally attributed to the Tax and Customs Administration and complaints could be made only via a telephone call centre. It would seem that internal instructions were provided since 2013 that no assistance would be given to the parents concerned.

18. The revelation of this large-scale fraud gave significant impetus to the Government's anti-fraud policy. Under pressure of public opinion and politicians, Tax and Customs Administration adopted a rigorous method of fighting fraud.

19. In order to fight fraud, in 2013 Tax and Customs Administration had set up a special anti-fraud management team at the Ministry of Finance, the *"Combiteam Aanpak Facilitators"* (CAF). Employees from every division of the ministries involved could pass on signals of possible facilitators of fraud to the CAF. The CAF team started the so-called “CAF 11” investigation against a childminder centre, resulting in numerous visits to the centre and administrative checks. According to the 2020 PIC Report the allowance for whole groups of parents in the CAF 11 affair were unlawfully stopped, there was no fair play, and the time taken to deal with objections was far too long. Eventually, no fraud was found. It turned out that CAF had worked on the assumption that 80% of the recipients were "bad" and 20% were "good", despite the fact that such an approach meant that even people who had not committed any wrongdoing would be sanctioned. This was called the “80/20 approach” or group approach.

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[4] See VI.C below for the structure of the Council of State.

[5] Explanatory Memorandum of the 2005 AWIR of the 2005 AWIR – *Memorie van toelichting - Harmonisatie van inkomensafhankelijke regelingen (Algemene wet inkomensafhankelijke regelingen)*, Kamerstukken II, 2004/05, 29764, no. 3, https://zoek.officielebekendmakingen.nl/kst-29764-3.html. On 19 October 2011, the Council for the Judiciary objected against further tightening the sanctions policy for social welfare and labour legislation.

[6] *Gewijzigd amendement van de leden OMTZIGT en WEEKERS ter vervanging van dat gedrukt onder nr. 13 (nr. 32)*, available at https://zoek.officielebekendmakingen.nl/kst-29764-32.html.

[7] Act of 1 July 2020 amending the General Income-related Schemes Act in connection with the extension of the hardship clause and the introduction of the hardship scheme, a safety net provision, the basis for a compensation scheme as well as an O/GS-compensation scheme (AWIR Hardship Adjustment Act), available at https://wetten.overheid.nl/BWBR0043785/2020-07-07.

[8] It would seem that general instructions were withheld from the case files that were given to the courts.

20. The CAF 11 affair led to the 2017 Ombudsman Report "No power play but fair play. Disproportionately hard-line action against 232 families with childcare allowance". Despite the recommendation by the Ombudsman in 2017, compensation was not actively offered to those parents whose allowance had been unjustly stopped. Parents were themselves supposed to submit an application for damages.

21. In 2017 the Chief Legal Advisor of Tax and Customs Administration wrote an internal memo pointing out serious problems in the childcare benefit system (the “Palmen memo”). According to the 2020 PIC Report, that memo was not added to the file as it should have been, and it was not included in a series of factsheets prepared in the Ministry of Finance for the Secretary of State in 2019. Only upon specific request, a redacted version, leaving out the most important passages, was transmitted to Parliament in October 2020 and Parliament received the full memo only in December 2020.

22. After strong efforts of lawyers representing parents led to media coverage and further questioning by the Ombudsman and individual Members of Parliament, the Advisory Committee on the Implementation of Allowances at the Tax Authorities (known as "Donners Committee") proposed a compensation scheme for parents in the CAF 11 case.

23. Finally, on 23 October 2019, the Administrative Jurisdiction Division of the Council of State radically changed its interpretation of the AWIR and adopted two judgments that applied general principles of good administration and the principle of proportionality (CDL-REF(2021)076).[9]

24. On 15 January 2021, the Prime Minister sent a letter to the President of the House of Representatives[10] in which he apologised on behalf of the Government for unprecedented hardship that the parents and their children had to endure. He announced a series of reforms concerning the benefit system but also general measure to improve how warning signals can be taken more seriously, on improving access to administration improving legislation, avoiding discrimination, providing information to Parliament. The same day the Government stepped down. Subsequently, elections took place. At the time of the preparation of this opinion the Netherlands still have a care-taker government.

25. On 17 July 2020, the Data Protection Authority published a report pointing out that the Tax and Customs Administration’s risk assessment system, based on Artificial Intelligence, had not respected the EU General Data Protection Regulation (GDPR) and had relied on discriminatory data on citizenship.[11]

26. According to the 2020 PIC Report, it was later revealed that that between 2012 and 2019, some 25,000 to 35,000 people had been deemed to be guilty of malice or of gross negligence but it appeared that in 94% of such cases, the designation of malice or gross negligence was unjustified, “because the reason had not been properly recorded, because there was no clear evidence of malice or gross negligence, or because the grounds for being so designated had not been given to the parents in question”.[12]

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[9] In response to the Parliamentary Inquiry Report (see below), the President of the Administrative Jurisdiction Division of the Council of State published an article: Bart Jan van Ettenkoven, Tussen wet en recht (Between law and justice, https://www.njb.nl/media/4119/098-107_njb02_art02.pdf) – available in English translation.

[10] https://www.rijksoverheid.nl/documenten/kamerstukken/2021/01/15/kamerbrief-met-reactie-kabinet-op-rapport-ongekend-onrecht (the Venice Commission had access to an informal translation).

[11] Belastingdienst/Toeslagen, De verwerking van de nationaliteit van aanvragers van kinderopvangtoeslag (Tax authorities / Allowances: The processing of the nationality of applicants of childcare allowance), Onderzoeksrapport z2018-22445, https://www.autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/onderzoek_belastingdienst_kinderopvangtoeslag.pdf.

[12] Parliamentary document II 2019/20, 31 066, no. 613, referred to in the 2020 PIC Report, p. 25.

27. The 2020 PIC Report concluded:

"The committee notes that, in the implementation of the childcare allowance, the basic principles of the rule of law were breached. This reproach not only concerns the implementation – specifically by Tax and Customs Administration/Benefits – but also the legislator and the judiciary.'

[…]

'Without wishing to comment on individual court judgements, the committee notes that for many years the administrative justice system also made a significant contribution to maintaining the ruthless application of the legislation on childcare allowance, beyond that imperatively provided for by law. In doing so, the administrative justice system neglected its important function of safeguarding the legal rights of individual citizens. The committee was particularly struck by the reasoning away of the general principles of good governance that are supposed to act as a buffer and protective blanket for people in need, which continued right up to October 2019."

III. General remarks / standards

A. Scope of the opinion

28. The questions that the House of Representatives put to the Venice Commission mentioned childcare allowance (*kinderopvangtoeslag*) only. The 2020 PIC Report similarly deals with childcare allowance only. However, in the very same Report, the Inquiry Committee pointed out:

> *"[T]wo weeks before the publication of this report, a letter was sent to the House of Representatives stating that the compensation scheme was to be extended to people who had been wrongly treated in relation to healthcare allowance, housing benefit and the child-based budget (kindgebonden budget), even though during the public hearings it had been stated that there were no indications that any errors had occurred in relation to any other benefits."*[13]

29. During the video meetings, interlocutors confirmed that the 2020 PIC Report does not provide a comprehensive picture of the problem under consideration. As it seems, there has also been a debate in the House of Representatives about this broader problem in the area of social benefits (and perhaps taxes) in the Netherlands.

30. Despite that, this opinion focuses on the clarification of the legal background on the Childcare Allowance Case in order to disclose crucial problems in the field of administrative law and practice in the Netherlands. The proposals of this opinion might however be relevant also for other areas of administrative law.

31. The Venice Commission is not in a position to investigate and to establish causal links between specific facts and shortcomings in the rule of law protection. As for the facts, the opinion is based upon information provided by the Dutch authorities, notably the Parliament's report, as well as information provided by the interlocutors and through public sources.

B. Rule of law

32. It should be made clear from the outset that, in general, the Venice Commission is of the opinion that the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law.

33. Tackling fraud in relation to welfare benefits and taking measures to promote efficiency in public administration are both legitimate aims which are not to be contested. However, any measures taken to achieve those aims must respect the rule of law.

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[13] The 2020 PIC Report.

34. The rule of law is realised through successive levels achieved in a progressive manner. Full achievement of the rule of law remains an ongoing task, even in the well-established democracies.[14] For all countries, complying with the requirements of the rule of law is a continuous process, which must keep up with changing political, social, economic, cultural, and technological circumstances. In this respect, maintaining the rule of law is not only about institutions and formal legal safeguards, but also about maintaining an enabling environment for the rule of law through the political and legal culture within the society.[15] This requires a political culture with a high degree of awareness of the rule of law consequences of political decisions and exercise of self-restraint when politically desired measures are contrary to the rule of law. It also requires a legal culture in which the rule of law is accepted as a framework for and limit to democratic decisions and policies.

35. Almost all of the problems related to the Childcare Allowance Case could be analysed by reference to the Venice Commission's Report on the Rule of Law and the Rules of Law Checklist guidelines (some of which are addressed to the legislature, some to the executive, and some to the judiciary branch) contained in the Venice Commission's 2011 Report on the Rule of Law (footnotes not cited):

> *"46. Legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. […]*
> *47. In addition, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual vis-à-vis the state and its organs and agents.*
> *48. Legal certainty also means that undertakings or promises held out by the state to individuals should in general be honoured (the notion of the 'legitimate expectation').*
> *49. However, the need for certainty does not mean that rules should be applied so inflexibly as to make it impossible to take into account the dictates of humanity and fairness. […]*
> *51. Legal certainty - and supremacy of the law - imply that the law is implemented in practice. This means also that it is implementable. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking a posteriori whether it may effectively be applied is very important. This means that ex ante and ex post legislative evaluation has to be considered when addressing the issue of the rule of law."*[16]

36. The Venice Commission's Rule of Law Checklist lists a number of principles to consider in relation to the Childcare Allowance Case. Particularly relevant are *legality*, including the existence of effective judicial review, *legal certainty*, *legal safeguards against arbitrariness and the abuse of power,* and *non-discrimination*.[17]

37. The European Court of Human Rights recognises the rule of law not only as expressed in specific rights and in the enforcement of rights, but also at the legislative level. The importance of the foreseeability of legislation for the rule of law has been recognised by the ECtHR since 1984 Malone decision[18] and later decisions have cautioned against granting the executive too wide discretion since that may lead to arbitrary decisions.[19] One may argue that the lack of discretion afforded to the administrative authorities by the law was the root cause of the problem

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[14] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, I.A para. 29.
[15] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, I.A para. 42.
[16] Venice Commission, CDL-AD(2011)003rev, Report on the rule of law.
[17] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.
[18] Malone v. The United Kingdom, no. 8691/79, § 67: Domestic law must "be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention … and this follows from the object and purpose of Article 8 (art. 8) - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1)".
[19] See e.g. Amman v. Switzerland [GC], no. 27798/95, para. 56, Rotaru v. Romania, no. 28341/95, para. 55.

under examination. However, the harshness of the legislation was exacerbated by the "all or nothing approach" applied by the Tax and Customs Administration. This approach was not the only possible interpretation of the rigid law but rather a choice of the authorities in the interpretation and application of the law.

C. Examples of similar cases in other countries

38. It should be noted that some of the key elements in the Dutch Childcare Allowance Case, such as rigid legislation to prevent welfare fraud and insufficient internal and external control of administrative agencies, were prominent features in a similar case of large-scale wrongful sanctioning of recipients of welfare benefits uncovered in Norway in 2019.[20] In that case, successive governments attempted to combat social security fraud and reducing exports of such benefits. Due to a failure to align the National Insurance Act correctly with EEA[21] law, the Labour and Welfare Administration (NAV) misapplied the law for years by requiring recipients of certain benefits of staying in Norway and not travelling to other EEA countries. A large number of people were refused benefits they were legally entitled to, many were served with wrongful claims of repayment, and some also served prison terms for fraud to which they should not have been sentenced. The official inquiry noted that the management culture within NAV did not promote questioning established truths, circulars were incorrect as to the law, the Ministry lacked systems to control NAV's practice, and both prosecutors and the courts, including the Supreme Court, largely relied on NAV's interpretation of the law. The report concluded: "The case illustrates what the outcome can be when the institutions that are supposed to ensure that public authorities do not cause injustices to individuals do not have the resources required to do so, are not substantively up to date and do not react or communicate adequately."[22]

39. Another example is the Irish Long Stay Care Affair, which concerned the unlawful charging of elderly care residents in Ireland for a period of nearly three decades. This practice subsisted despite the fact that there were repeated and growing doubts raised about the legal basis underpinning these charges. After that event a report (the Travers Report) noted an overreliance on the capacity of legislation to address all situations. As with the Childcare Allowance Case, there appears to have been an overreliance on the law as it was decided by a court without any thought towards making a policy decision to change the position. In the case of the Irish Long Stay Care Affair, this was a totally unfounded belief in the capacity of the law to address the situation at issue, despite numerous advices to the contrary.

40. These few examples show that the Dutch Childcare Allowance Case is not unique. Many of the suggestions developed in this opinion may apply also to other countries.

IV. The legislative level

A. General remarks

41. The Netherlands has an elaborate and comprehensive system for evaluating draft laws. But in this case this system did not work well. Certain risks in the law were not seen or when seen they were discounted. The Advisory Division of the Council of State had identified the need for a way to exercise discretion to alleviate hardship, but the proponents of the law discounted that risk, preferring efficiency in the fight against fraud.

42. It was known that the payment of the allowance up-front to people with limited resources, before proper checking for eligibility, meant that cases of repayment would arise and some of those cases would involve hardship.

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[20] See Norwegian Official Report, NOU 2020: 9, *Blindsonen,* pp. 26-29 (English summary).
[21] European Economic Area, comprising all EU member states, Norway, Iceland, and Lichtenstein.
[22] See Norwegian Official Report, NOU 2020: 9, *Blindsonen,* p. 29 (English summary).

43. Perhaps there was also a problem of structural design in separating the policy role of the ministries to promote the social advantages of the benefit, from the implementation role of the Tax and Customs Administration which brought experience of efficiency in the collection rather than disbursement of funds.

44. The rule of law must be applied at all levels of public power, starting with Parliament as the legislative power in the state. Indeed, Parliament as the legislative power has a primary responsibility in safeguarding the rule of law. Parliament's responsibility in this respect is three-fold. Firstly, Parliament is responsible for enacting legislation and providing sufficient funding to courts and other bodies designated by the Constitution and the law to safeguard the rule of law, so that they can fulfil their functions efficiently.[23] Secondly, Parliament should in its law-making capacity also ensure that material laws respect rule of law requirements in terms of foreseeability[24] for those affected, precision and scope in the executive's discretion,[25] and respect for human rights. Thirdly, Parliament has a scrutiny function vis-à-vis the executive and to hold it accountable. Parliamentary control goes hand in hand with judicial control.

B. Legislation

45. The Childcare Allowance Case concerns the principle of legal certainty, which is a fundamental rule of law requirement, and includes both the foreseeability of laws and legitimate expectations. The childcare allowance scheme was construed so that parents did not receive benefits and thus a legal right, but were rather provisionally granted advances, and payments were conditional. While such a legal structure is acceptable, it is vulnerable for misunderstanding in the context of welfare allowances, which often are considered legal rights. Confusion as to the legal nature of childcare allowance appears to have been aggravated by the fact that there was little or no verification at the time of application and demands of repayment came only years later. Further, until 7 July 2020, the law in question did not contain a general hardship clause, but only a limited one.

46. It is the responsibility of the legislator to ensure that laws are foreseeable and have effects that meet the individuals' legitimate expectations. It is also the responsibility of the legislator to balance the public administration's interests of efficiency with the individual's interest in legal certainty.

47. While the Council of State's Advisory Division warned against adopting the relevant law without a hardship clause, others objected to the inclusion of a hardship clause pointing out that the inclusion of the hardship clause could be a source of conflict and, for that reason, could give rise to frequent appeals to the administrative court. In the end the law was adopted with an impractical hardship clause relating only to the effects of the assets test.[26] Only in June 2020 did the legislator enact the new AWIR Hardship Adjustment Act. It extended the existing clause and introduced a so-called hardship scheme in the AWIR.[27]

48. The Venice Commission is of the opinion that, as such, the danger of appeals against legal provisions should not be grounds for rejecting that legislation. Generalised hardship provisions

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[23] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.E.1.a.x., para 75.
[24] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.B.3.
[25] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.C.ii.
[26] *Gewijzigd amendement van de leden OMTZIGT en WEEKERS ter vervanging van dat gedrukt onder nr. 13 (nr. 32)*, available at https://zoek.officielebekendmakingen.nl/kst-29764-32.html.
[27] Act of 1 July 2020 amending the General Income-related Schemes Act in connection with the extension of the hardship clause and the introduction of the hardship scheme, a safety net provision, the basis for a compensation scheme as well as an O/GS-compensation scheme (AWIR Hardship Adjustment Act), available at https://wetten.overheid.nl/BWBR0043785/2020-07-07.

can indeed result in a large number of cases and could leave it to the judges to make policy decisions. Hardship clauses should be tailored to the specificities of the law. This is where Parliament may have failed, as the first hardship clause turned out to be impractical.

49. In order to ensure foreseeability, conditional welfare allowance schemes with little *ex ante* verification should be accompanied with adequate information and guidance to the public by the administrative bodies. Also, the element of timing is vital. If the verification and challenge is early, then the hardship is reduced.

50. From the Dutch authorities, the rapporteurs learned of several initiatives aimed at adapting legislation better to citizens' real-life conditions in the future. One initiative will address the framing of social legislation and emphasise a simple and non-technical wording. The rapporteurs were told that while all draft bills are screened by the Ministry of Justice before being presented to the cabinet, these screenings have taken on a more technical character over the years. Strengthening the input from civil society in the preparation of bills was presented as a possible solution for raising the awareness of rule of law issues on the drafting stage. The rapporteurs also learned of a new system of pilot legislation, where legislation is introduced provisionally to collect experiences before final adoption. Another initiative is the introduction of review clauses in legislation. Furthermore, new draft legislation will require to include citizen input on the implementation of legislation. These initiatives are welcome and appear practical and suitable.

51. The Dutch authorities may also consider other measures for addressing legal certainty in relation to legislation. Legislation could include in the introductory chapter or in relevant chapters, basic principles of good administration. The aim of such provisions would be to inform practitioners that the law must be interpreted in light of certain basic principles and to guide administrative bodies in the implementation and enforcement of the law.[28] To do this in a coherent manner, the executive should review its Instructions on legislation and amend them as necessary to ensure that its internal assessment of the quality of legislation includes effective monitoring for compliance with basic principles of good administration and the rule of law, such as legal certainty, legitimate expectations, non-discrimination, individual assessment and proportionality.

52. Parliament has a particular responsibility of enabling courts and other institutions to exercise their role as safeguards for the rule of law. According to the interlocutors the Venice Commission met with, save for international human rights instruments, there appears to be no general instrument of administrative law for Dutch judges to set aside formally lawful administrative decisions with manifestly unreasonable or disproportionate effects. In the Childcare Allowance Case, the Council of State's Administrative Jurisdiction Division refrained from reviewing the proportionality of the legislation due to the specific construction of the proportionality clause in Article 3-4 of the General Administrative Act. This clause is framed so that its application is dependent on the material law providing the administration with discretion in the application of the law. For childcare allowance, the law was intentionally framed so that it did not provide discretion, and thus Article 3-4 failed as a safeguard until its re-interpretation by the Council of State's Administrative Jurisdiction Division in 2019.[29]

53. How Parliament as law-maker approached this legislation shows two problems from a rule of law perspective: first, Parliament intentionally adopted harsh legislation without hardship clauses. Secondly, Parliament severely restricted the courts' capacity to limit the adverse consequences of the law by not allowing them to consider proportionality in individual cases. The combination of these two elements did not contribute to an enabling environment for the rule of law in relation to the Childcare Allowance Case.

[28] In Norway, following long-lasting wrongful interpretation of EU/EEA law in relation to welfare benefits abroad, an expert commission has recommended to include legal markers in domestic legislation referring to relevant EU law, see Norwegian Official Report, NOU 2021: 8, p. 287-290.
[29] See the judgements of 23 October 2019, ECLI:NL:RVS:2019:3535, and ECLI:NL:RVS:219:3536.

54. The Venice Commission is not in a position to recommend a general proportionality review or the scope of such review, which should take into account the specificities of the Dutch legal system. In any case it is important to note that proportionality review by the judiciary should not be confused with a necessity review and can be contingent on specific conditions so that judicial review does not intrude too much on administrative discretion and policy considerations. The Dutch legislator should strike a balance between proportionality review and administrative discretion.

55. As for institutional issues, the Dutch Parliament already can ask the Advisory Division of the Council of State for advice. In addition, improving the "in-house" legislative scrutiny may be considered, for instance by ensuring that a standing committee has specific responsibility for effective scrutiny of laws and their application for compliance with general principles of good administration and the rule of law.[30]

C. Parliamentary scrutiny of the executive

56. The Venice Commission recalls that *"of the basic functions that almost all parliaments fulfil besides adopting laws and budgets, one of the most important is that of supervision and scrutiny of the executive – sometimes also referred to as parliamentary oversight, inquiry or control."*[31]

57. The opposition should participate in the supervision, scrutiny and control of the action and policy of the government; and it should play an important role in this supervision. As the Parliamentary Assembly has pointed out, *"By overseeing and criticising the work of the ruling government, continuously evaluating government action and holding the government to account the opposition works to ensure transparency of public decision and efficiency in the management of public affairs, thereby ensuring the defence of the public interest and preventing misuse and dysfunction."*[32]

58. The Dutch constitutional and legal framework appear to provide important instruments for parliamentary scrutiny, such as a duty for the government to provide information to Parliament, even upon request by an individual Member of Parliament (Article 68 of the Constitution), or the right of 30 MPs to request interpellations (see below).

59. As the 2020 PIC Report shows, parliamentary control of the government was not efficient in the Childcare Allowance Case. Actions taken in Parliament before 2019 appear to be limited to a few individual MPs, despite Parliament being informed already in September 2014 on the high level of repayments being made by parents and the Ombudsman report in August 2017.[33]

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[30] For instance, similar to the bicameral Joint Committee of Human Rights in the UK. Parliamentary bodies to assist MPs in scrutinizing the combability of draft laws with the Constitution and international law, including basic rule of law requirements, such as the Law Council in Sweden and the Constitutional Law Committee in Finland.

[31] "Of the basic functions that almost all parliaments fulfil besides adopting laws and budgets, one of the most important is that of supervision and scrutiny of the government and the administration (the executive) – sometimes also referred to as parliamentary oversight, inquiry or control", Venice Commission, CDL-AD(2010)025, Report on the role of the opposition in a democratic Parliament, adopted by the Venice Commission, para. 116; see also CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist, para. 25.

[32] PACE Resolution (2008)1601, Guidelines on the rights and responsibilities of the opposition in a democratic parliament point 3; see also Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, , para. 122 seq.

[33] Parliamentary document 35 510, no. 3, Childcare Allowance Parliamentary Inquiry, p. 17.

60. Several interlocutors blamed the ineffective parliamentary scrutiny on the high degree of fragmentation in the Dutch Parliament leading to a strong consensual model of politics (the so-called polder model).[34] While a consensual political culture is generally positive, interlocutors argued persuasively that the specific Dutch version has led to a political culture where criticism of the government from MPs from the governing parties is strongly frowned upon, and which may have a chilling effect on MPs from the government coalition in participating in parliamentary scrutiny. Criticising the executive seems to have been strongly discouraged for Members of Parliament from the governmental majority. Due to the Dutch proportional election system, there are many parties in Parliament (currently 19). As a result of that, the governmental majority in the Netherlands is often very tight, the vote of every single MP counts. Several interlocutors pointed out that the difficulty of forming a government in the Netherlands leads to a very tight control of the parties over their Members of Parliament and dissent is strongly discouraged. This in turn, seems to lead to strong pressure on MPs, who raise critical of points in the administration, as such criticism can be seen as an attack on the governmental majority.

61. The Venice Commission notes that in light of a strong culture of coalition-based consensualism in the Netherlands, parliamentary scrutiny and accountability mechanisms may have limited effect since they usually require majority decisions. If these mechanisms are to be effective in a parliamentary system with majority governments, the political culture should accept a certain institutional separation between the government and parliament and its individual members. While there is less clear political separation between the government and Parliament in parliamentary systems, they have nonetheless different functions. It should be accepted that MPs from government parties also represent Parliament as an institution and that participation in parliamentary scrutiny of the government is not an act of disloyalty.

1. Institutional measures

62. If in the current Dutch context parliamentary scrutiny of the government is found to have shortcomings, certain institutional measures can be taken to empower the opposition vis-à-vis the government majority in Parliament.

63. Some parliamentary systems provide the opposition with certain minority powers with regard to the control function of parliament. In the Dutch Parliament, the so-called 30-member rule is the basic rule, or more correctly a set of rules, with the aim to ensure debate and scrutiny for the opposition. The Rules of Procedure for the House of Representatives allow 30 MPs, which amount to 1/5 of the total number of representatives, to take certain procedural steps. Section 54a allows 30 MPs to demand a debate in Parliament. Sections 124-127 allows 30 MPs to demand the Parliament to approve treaties. Section 130c allows 30 MPs to call for a subject be laid down in law. Section 133 grants 30 MPs the power to hold an interpellation.

64. The minority powers seem not to extend to committee hearings or parliamentary investigations. According to section 27 of the Rules of Procedure, committees have the powers to hold hearings, but such measures require a majority decision. While there is no European consensus on whether parliamentary minorities should have special powers and to what extent, the Parliamentary Assembly of the Council of Europe has recommended that a qualified minority should have the power to set up a committee of inquiry or a parliamentary mission of information, and to hold committee hearings.[35] The Venice Commission too is in principle in favour of granting such special powers to parliamentary minorities.[36] While such minority powers are not

[34] See Ruby B. Andeweg & Galen A. Irwin, *Governance and Politics in the Netherlands,* 4th edition, Palgrave Macmillian: London 2014.

[35] PACE Resolution 1601 (2008), Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, 2.2.8 and 2.5.4.

[36] Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, Part II, G.2, para 131 seq; Venice Commission, CDL-AD(2010)025, Report on the Role of the opposition in a Democratic Parliament, para. 121-124.

widespread in Europe, several countries do allow parliamentary minorities to instigate inquires and hearings.[37] Such minority rights must be carefully circumscribed so that they are not abused. Given the specific Dutch context of coalition politics and its negative effect on the parliament's scrutiny function, extending the 30-member rule to hearings and to parliamentary investigations should be considered.

65. In addition to formal powers, effective parliamentary control is also dependent on time and resources for MPs to exercise their scrutiny function in addition to their political functions. This also applies to scrutiny of draft laws prepared by the government. Increasing the staff and resources for Parliament and its individual members might have positive effects, provided that these resources are devoted to and earmarked for scrutiny of the government and laws.[38]

66. Another possible measure may be to elevate the scrutiny function in the internal working methods in Parliament by establishing a separate standing committee for this role. It seems that the Dutch parliament like many other European parliaments, exercises parliamentary scrutiny separately for each committee responsible for one or more ministries as well as special ad-hoc committees for parliamentary inquiries. While this model ensures that MPs can follow their separate political fields closely, there is a risk that the overall scrutiny of the government may be lost in the sectorization of the scrutiny function. Moreover, there may also be a risk that MPs in the committee work devote less attention to scrutiny than to legislation, budget, and other political issues before the committee. Interlocutors mentioned that in practice, MPs receive little support from their committees in exercising the scrutiny function. This suggests that the committees should be strengthened in terms of staff and resources for MPs and/or by organisation of the committee work.

2. Ombudsman

67. The Ombudsman institution is an important institution designed to assist Parliament in scrutinizing the government and uncovering illegalities, abuse, and violations of the principle of good administration in the administrative system. The Ombudsman issued a special report to Parliament on the Childcare Allowance Case in 2017. However, this report did not appear to prompt rapid action, neither by Parliament nor by the Government. The Ombudsman institution is an indispensable tool for Parliament in its scrutiny function, but since the Ombudsman institution has no powers to enforce its findings, change requires political will. In this respect, emphasis should be placed on the last sentence in paragraph 20 of the Venice Principles for the Ombudsman institution:

> *"20. The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the*

[37] In the French Parliament, the Rules of Procedure of both chambers enable all political groups, even small ones, to require the establishment of commissions for information or scrutiny; Article 44 of the German Basic Law allows 1/4 of the members of the Bundestag to establish a committee of inquiry. Article 115 of the Finnish Constitution allows 10 MPs to instigate an inquiry on constitutional responsibility for a government minister. Article 27 of the Rules of Procedure for the Norwegian parliament allows 1/3 of the members of committees to call hearings and to decide who is to be invited. This decision may be appealed to the presidency of the parliament by another 1/3 of the committee. In that case, the presidency (appointed on proportional representation) will decide. For the standing committee on constitutional affairs and scrutiny, the right for 1/3 of the members to call hearings is unconditional. A minority of 1/3 of this committee can also make open a case and make inquiries with the aim to assess the constitutional responsibility of government ministers.

[38] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 89.

Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities."[39]

3. Access to information

68. Access to information is a prerequisite for Parliament's scrutiny of the government. In accordance with European parliamentary tradition, Article 68 of the Dutch Constitution provides MPs from both houses of Parliament with the right to receive orally or in writing *"any information"* requested by one or more of its members. The government has a corresponding obligation to provide the requested information as long as providing *"such information does not conflict with the interests of the state".* In the Netherlands, ministers and state secretaries have three weeks to respond to questions, or if more time is justified, six weeks.[40]

69. However, according to the parliamentary report, Parliament was *"misinformed on several occasions and faced refusals by the cabinet to provide information – for example, with a view to protecting personal opinions".*[41] Moreover, interlocutors pointed to a culture in the government of not leaving a paper trail for government decisions and thus render parliamentary scrutiny difficult. The findings of the 2020 PIC Report of lack of compliance with constitutional duties raise concerns and should be taken seriously. The Commission was told that Article 68 of the Constitution is not enforceable in court.

70. Maintaining the rule of law is not only about institutions and formal legal safeguards, but also about maintaining an enabling environment for the rule of law through the political culture.[42] This means a political culture with a high degree of awareness of the rule of law consequences of political decisions and exercising self-restraint when politically desired measures are contrary to the rule of law. Access to information is vital for parliamentary control of the government. In principle, no official document should be denied to Parliament. If the information is sensitive, Parliament has rules on secrecy and confidentiality in both committee meetings and in the plenary.[43] If the information contains confidential elements, such parts can be blacked out before the documents are made available to parliament. For parliamentary scrutiny to be effective, it is essential that it is the scrutinising body, and not the body subject to scrutiny, who decides what information is necessary for scrutiny purposes. Withholding information from Parliament on the grounds that it reflects ministers' or civil servants' personal opinions is a flawed argument, since the motives for policies and actions or inactions can be important considerations for accountability.

71. Loyal and constructive cooperation among State bodies is a fundamental and overarching principle for a constitutional democracy.[44] In a previous opinion, the Venice Commission has defined the principle of loyal and constructive cooperation as a duty *"even if an institution is in a situation of power, when it is able to influence other state institutions, […] to do so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority."*[45]

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[39] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution («The Venice Principles»), para. 20.
[40] Article 12.2 of the Rules of Procedure for the House of Representatives.
[41] Parliamentary document 35 510, no. 3, Childcare Allowance Parliamentary Inquiry, p. 20.
[42] CDL-AD(2016)007, Rule of Law Checklist, I.A para. 42.
[43] See Articles 143-147 of the Rules of Procedure for the House of Representatives.
[44] Venice Commission, CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: A checklist, paras. 20-29.
[45] Venice Commission, CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government

72. The principle of loyal and constructive cooperation is particularly important in a parliamentary system where enforcement is contingent on majority decisions in Parliament. If the constitutional rights of MPs are not respected by the government based on their normative force alone, mechanisms to make them practical and effective should be considered.

73. Indeed, the right to government information for Members of Parliament can be considered a fundamental democratic right according to the modern parliamentarian tradition[46] and is recognised as such in various Council of Europe documents.[47] In PACE Resolution 1601 (2008), Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, the right to information is recognised as an essential element of parliament's scrutiny function vis-à-vis the government and the latter's accountability. As with any parliamentary rights, the right to information should be practical and effective.[48]

74. According to the 2020 PIC Report as well as interlocutors, a significant problem in relation to parliament's access to information the Childcare Allowance Case has been the Government's practice of withholding from Parliament information on internal consultations between ministries or between civil servants and ministers on the grounds that it reflects civil servants' personal opinions. Such a restrictive interpretation of Article 68 appears to depart from the long-held interpretation in parliamentary practice and constitutional doctrine.[49] In the view of the Venice Commission, it is also significant that the right to information for MPs is a constitutional right flowing from Article 68. It is therefore not evident that limitations to the right to government information in the Public Access to Government Information Act apply equally to MPs as to the general public.

75. Parliament should receive correct, adequate, and timely information and this right should be practical and effective. Enforcement of constitutional rights can take many forms and can be exercised by general and specialised courts, parliamentary institutions, and special independent bodies. It is up to the Dutch authorities to decide which measures to take based on the Dutch political and legal context. The government's formal duty of providing correct and not misleading information can be strengthened by extending it to any communication with Parliament even when not specifically requested,[50] and by introducing a requirement of providing requested information without any delay.[51]

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emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 87.

[46] See Hironori Yamamoto, Tools for parliamentary oversight: A comparative study of 88 national parliaments, Inter-Parliamentary Union 2007, p. 55. Of the 88 national parliaments included in the study, 80 allowed individual MPs to submit a written request for information to the government, and 58 parliaments also set deadlines for the replies, varying from 3 days in Ireland to 60 days in Australia, see pp. 57-58.

[47] Venice Commission, CDL-AD(2010)025, Report on the role of the opposition in a democratic parliament, para. 55 and 118; CDL-AD(2019)015, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: A checklist, paras. 40 and 124. See also Commonwealth Parliamentary Association, Recommended Benchmarks for Democratic Legislatures, 2018, benchmark 7.1.2: *"The Legislature shall have mechanisms to obtain information from the Executive branch sufficient to exercise its oversight function in a meaningful and timely manner. There shall be clear and effective procedures requiring the Executive to provide timely responses to oral and written questions and Parliamentary Committee reports and recommendations."*

[48] Compare e.g. the reasoning in ECtHR, *Karácsony and Others v. Hungary* [G.C.], no. 42461/13 and 44357/13.

[49] See Paul Bovend'Eert, Henk Kummeling, Solke Munneke and Wim Voermans, Factsheet Reikwijdte van Artikel 68 Grondwet, prepared for the House of Representatives, 20 January 2020, available at https://www.tweedekamer.nl/kamerstukken/detail?id=2020Z00722&did=2020D01523.

[50] Compare Article 82 of the Norwegian Constitution.

[51] Compare Article 47 of the Finnish Constitution.

76. Measures can also be taken on the government side, for example by regulations and guidelines to ensure that decisions and policies are reasoned and transparent vis-à-vis Parliament. The Venice Commission learned from the Dutch authorities that such measures are being considered:

- Each department is required to implement an action plan on archives.
- For every document submitted to Parliament, the government will publish all the underlying documents that ministers and state secretaries use for decisions.
- Personal opinions will no longer be considered internal documents, save for the cases where there is an interest of the state, typically related to defence and negotiations.
- A list of documents will be published on the day the cabinet meets, as well as the relevant advice from the Council of State.
- The government has started a dialogue with Parliament on the working relations between the powers of state.

77. These initiatives are welcome and if implemented they would increase the transparency of the government and correspondingly allow for more effective parliamentary scrutiny. However, these initiatives on the government side can only be effective under real world conditions if MPs are put in a legal, political, and practical position to scrutinise the government.

D. Impact studies

78. An important aspect of preparing draft legislation is the assessment of the possible impact of the legislation.[52] . It seems that such studies are being undertaken in the Netherlands and various institutions, including the Advisory Division of the Council of State are being consulted before legislation is adopted. In addition, it may be necessary to make reviews of adopted legislation already after a shorter time of application of the law in order to detect possible problems - at least in those cases like the present one when suspicion of hardship exists from the outset or when the advice of the State Advocate (or of the Advisory Division of the Council of State is not followed).

79. Formal provisions in a law for review after a set period would be of benefit when novel legislation is planned. The officials dealing with the policy are thus kept alert to look for problems which might inform the expected review.
80. In this respect it is also useful to recall the Recommendation Rec(2004)5 of the Committee of Ministers of the Council of Europe on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Right and Appendix to Recommendation.[53] Such verification might have revealed problems in the legislation in the Childcare Allowance Case.

V. The administrative level

81. On the administrative level, there appear to be several issues, some of which are being addressed through on-going initiatives within the ministries.

A. Rigorous interpretation of legal provisions

[52] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.5.v.; ECtHR Hatton v. the United Kingdom, 36022/97, 8 July 2003, § 128: *"A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake."* See also Evans v. the United Kingdom, 6339/05, 10 April 2007, § 64. About the absence of real parliamentary debate since the adoption of a statute, which took place in 1870, see Hirst (No. 2) v. the United Kingdom, 74025/01, 6 October 2005, § 79.
[53] https://search.coe.int/cm/Pages/result_details.aspx?Reference=Rec(2004)5.

82. Even though the text of Article 26 AWIR does refer to a full payment of the amount to be recovered, the rigorous interpretation of Article 26 AWIR excluding any recourse to balancing and proportionality was not imperative and another interpretation could have been adopted by the administration, as finally confirmed by the Administrative Jurisdiction Division of the Council of State in October 2019.

83. Already in 2009, the Tax and Customs Administration asked the State Advocate for advice regarding the interpretation of the law in the situation where illegal and fraudulent arrangements of the childminder centres existed. The State Advocate's advice included the following: *"[t]hat the childcare allowance for parents who had not paid a personal contribution be set at a lower level, to be followed by an individual assessment in each case*"; "*that the reasoning of the Tax and Customs Administration/Benefits, by which childcare allowance was provisionally set at zero, was arguable, but that parents should be given the opportunity to demonstrate that they were facing costs for childcare. In the view of the State Advocate, this would involve a specific assessment that would take all the facts and circumstances into account. To the extent that a personal contribution had been paid following an initial cut in childcare allowance, the State Advocate believed that entitlement to childcare allowance did exist*." [54]

84. However, the Tax and Customs Administration did not follow the advice of the State Advocate but developed a strict interpretation of the law, under which a failure to pay, either wholly or partly, one's personal contribution led to demands for repayment of childcare allowance in its entirety.

85. The Venice Commission is of the view that from the outset the executive power should take into account possible effects and hardships when it applies new legal provisions, taking into account possible scenarios. This should be reviewed when information on the application of the law - see above, impact assessments - shows that the chosen application leads to difficulties. Such a review should be triggered notably by information from the judiciary, be is through a high number of cases, or reports from the judiciary (see the section below on strengthening the information flow from the judiciary to the other branches of government). Input from the Ombudsman is essential in this respect as often it will be the Ombudsman who may be the first to notice systemic problems in the application of legislation.[55]

B. Information flow between civil service and government ministers

86. The information flow between administrative bodies and government ministries and between government ministries themselves seems to have been wanting in several ways. This is a recurrent issue in the 2020 PIC Report. Government ministers appears to have been unaware of the scale of the problems, concerning notably the "all or nothing approach'"

87. It would seem that the Ministers and Secretaries of State did not always receive relevant information in time and sometimes they did not understand the subtle signals and information as presented by the administration. At least in the beginning, the administration seems to have presented the situation to the ministerial level in a more positive light than was the actually the case. If the accountable ministers are kept in the dark, it is likely that this will negatively affect Parliament's scrutiny of the government and its access to information.

C. Information flow within administrative entities

88. Another issue is the information flow within administrative entities. It appears that case managers in the field warned of the effects of the Tax and Customs Administrations policies, but these warnings did not reach or were ignored by the higher management. In this respect, the

[54] Parliamentary document II 2020/21, 31 066, no. 753, referred to in the 2020 PIC Report, p. 36.
[55] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), para. 17.

Dutch authorities informed the rapporteurs that inspectorates are established in some ministries and are being set up in others. The rapporteurs were also informed of initiatives to change the culture within the public administration so that internal criticism could be better received and considered.

89. These are very welcome initiatives, and the Venice Commission encourages the establishment of early warning systems within all administrative bodies as well as measures to allow information flow between administrative bodies. Considering that the interpretation of the law by the Tax and Customs Administration could be questioned, such early warning systems should also allow for internal review of the legality of policies.

D. Complaint procedures

90. A fourth issue relates to the internal complaints system in the Tax and Customs Administration. It took very long to have complaints decided and it appears that citizens found the complaints procedure challenging.

91. An administrative appeal (objection) procedure exists, and litigation is possible. However, the family benefits system is aimed at a very large number of families who are if not precarious, at least economically and culturally distant from administrative rules and procedures. Even though a sophisticated system would exist in the Tax and Customs Administration to deal with requests for information or complaints, it is apparently totally centralized, and it does not appear that social security bodies or local communities are places reception or assistance to these families in the event of difficulties.

92. In systems of mass administration involving private persons with limited access to legal aid, complaints procedures should be made simple and informal. The administrative bodies should be required to inform individual on how to complain under a duty of neutrality. Laws and guidelines may establish simple procedures to enable people to go to the courts themselves.

E. Data protection / discrimination through Artificial Intelligence

93. An important aspect of the Childcare Allowance Case was the way in which possible fraud was identified. The ICT system introduced at the Tax and Customs Administration in 2011 made it possible to carry out checks on a greater scale. The applications that were considered suspect were selected by the ICT system on the basis of a risk-classification model. That risk-classification model is a self-learning model that "learns" from examples of correct and incorrect applications. It seems that the process involved the use of a high number of indicators, which included citizenship.

94. In 2020, the Dutch Data Protection Agency presented a report that the risk-classification model entailed improper and discriminatory processes, given that the nationality of applicants was used as a criterion for the selection of persons to be investigated, without any further indication that they had committed fraud. The Data Protection Commissioner pointed out that Artificial Intelligence was used to make this selection. The use of this criterion was a violation of the applicable legislation, including the EU General Data Protection Regulation (GDPR).[56]

94a. Article 1 of Protocol No. 12 of the ECHR contains a general prohibition of discrimination in the “enjoyment of any right set forth by law” or by “a public authority”. Unlike article 14 ECHR,

[56] Belastingdienst/Toeslagen, De verwerking van de nationaliteit van aanvragers van kinderopvangtoeslag (Tax authorities / Allowances: The processing of the nationality of applicants of childcare allowance), Onderzoeksrapport z2018-22445, available athttps://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/onderzoek_belastingdienst_kinderopvangtoeslag.pdf (the Venice Commission had access to an unofficial translation).

this is a “free-standing right” not to be discriminated against.[57] The prohibition of discrimination also includes the exercise of discretionary power and indirect discrimination without discriminatory intent.[58] The protocol is ratified and in force for the Netherlands.

95. As concerns EU Law, Article 22 of the GDPR on the conditions for the use of algorithms for making decisions with legal effects is relevant in this case. As a main rule, a (natural or legal) person has the right not to be the subject of a decision based exclusively on automated processing significantly affecting him or her. However, there are three exceptions. Two of them are based on the explicit consent of the person or on the conclusion of a contract that requires the use of an algorithm. The third exception corresponds to cases where applicable EU or that of the Member State authorizes the exclusive use of an algorithm to base the decision in question. In such a case, appropriate measures must be provided for in order to safeguard the rights and freedoms and the legitimate interests of the person affected concerned. Furthermore, no decision adopted with the exclusive use of an algorithm may be based on “sensitive” personal data (data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as genetic, biometric, health data or data relating to life or sexual orientation of somebody).

96. In the Netherlands, the use of nationality as possible criteria for identifying fraud would seem to fall under these prohibitions. Discriminatory practices were systematised through algorithms.

97. In the future, more sophisticated artificial intelligence algorithms are likely to be used and it will be much harder to identify which criteria were used by these algorithms due to the very nature of learning of modern AI systems. Detecting bias in such system can be next to impossible as self-learning AI systems are fed with large amounts of training data. This data comes from the real world; it aggregates individual decisions made by humans. However, in part these past decisions made by humans may have already been made on a discriminatory basis. On the other hand, such bias could normally not be discovered without such aggregation. Therefore, AI also presents an occasion to review past practices, and this should be used to identify bias in administration.

98. Bias and discrimination in AI originate from training data, which could be indicative of real past discrimination. This discrimination can be perpetuated in the AI system. When bias is detected, the system should be re-trained. As a prudent measure, the Commission suggests that when AI systems are introduced, the anonymised training data is preserved to be able to detect such bias at a later stage. Possibly fully anonymised training data could even be made public to enable research for bias in that data.

99. As this sector develops fast and new AI techniques replace older ones in rapid succession, the Data Protection Commissioner and other relevant bodies should follow these developments closely and their views should be taken into account in the design of future AI systems.

VI. The judicial level

A. Role of the judiciary under the rule of law

100. The judiciary is essential to control the work of Parliament and the executive power. While the judiciary and in particular the Council of State’s Administrative Jurisdiction Division have been criticised in the Dutch debate for its inactions, any measures taken in respect of the judiciary

[57] See ECtHR, Sejdic and Finci v. Bosnia and Herzegovina [GC], 2009, case nos. 27996/06 and 34836/06, 2 December 2009, § 53.

[58] European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights and on, Article 1 of Protocol No. 12 to the Convention, para 31; Biao v. Denmark [GC], 2016, § 103; D.H. and Others v. the Czech Republic [GC], 2007, § 184.

should strengthen its independence and capacity to exercise judicial control of political and administrative decisions. This could include more financial independence of the Judiciary,[59] the budget of which depends on negotiations between the Ministry of Finance and the Ministry for Justice and Security as concerns the ordinary judiciary and the Ministry of Interior and Kingdom Relations as concerns the Council of State.

101. A difficult subject to approach is that of judicial culture and deference. Several interlocutors mentioned that Dutch courts were generally deferential to Parliament.[60] Insofar as deference is detrimental to the courts' review function, this issue can only be addressed through cultural changes within the judiciary itself.

102. Another issue is that there appear to have been shortcomings in the information flow from the district courts to the Administrative Jurisdiction Division of the Council of State. If the latter has indeed been unaware of the scale of the societal problems caused by its case-law, steps should be taken to improve the information flow within the judiciary. If the appeals procedure is insufficient to inform the Administrative Jurisdiction Division on the state of administrative law, a separate and internal forum for information exchange between this body and the district courts could be considered.

B. Proportionality

103. A key problem was that the courts and in the final instance the Council of State's Administrative Jurisdiction Division did not intervene decisively against the Tax and Customs Administrations problematic interpretation of the law.

104. While the wording of Article 26 of the AWIR[61] did require the recovery of the entire amount of the allowance the Council of State followed the Tax and Customs Administrations strict interpretation of this provision approving the rigid "all or nothing approach" and did not interpret in the light of international law. Such an interpretation could have led to an application of the principle of proportionality.

105. As pointed out above, Article 3:4 of the General Administrative Law Act (hereinafter "the AWB")[62] establishes the principle of proportionality in administrative law. However, the AWB is a general law that is applied in proceedings in all administrative matters unless an issue is regulated differently in a special law. Article 3:4 of the AWB reads:

> *"Article 3:4*
> *1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.*
> *2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order."*[63]

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[59] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 55.

[60] See also Wim Voermans, "Conspicuous Absentees in the Dutch Legal Order: Constitutional Review & A Constitutional Court, in *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems,* G. F. Ferrari, ed., Brill Nijhoff: Leiden 2019, pp. 337-347, on pp. 341-342.

[61] Version in force before 1 January 2021: *"If a revision of an allowance or a revision of an advance results in an amount to be recovered or if a settlement of an advance with an allowance leads to this, the person concerned shall owe the entire amount of the recovery."* (Staatsblad van het Koninkrijk der Nederlanden 2005, No. 344 of 05/07/2005, available at https://zoek.officielebekendmakingen.nl/stb-2005-344.html).

[62] General Administrative Law Act / *Wet van 4 juni 1992, houdende algemene regels van bestuursrecht* (*Algemene wet bestuursrecht* – AWB) is available at https://wetten.overheid.nl/BWBR0005537/2021-07-10.

[63] Under Article 1:3 of the AWB, an "order" means a written decision of an administrative authority constituting a public law act. There are two types of orders: administrative decisions and policy rules.

106. Until October 2019, the Administrative Jurisdiction Division of the Council of State held that Article 3:4 could not be applied in cases of the reclaim of childcare allowance, no matter which part or percentage of the total allowance was affected. The Administrative Jurisdiction Division overruled contrary decisions of the lower courts.[64]

107. It is however interesting to note that the Council of State is well used to applying the principle of proportionality in similar cases. This can be discerned from an analysis of the case-law of the European Court of Human Rights (ECtHR). The ECtHR has thus far rendered four decisions concerning the means-tested allowances administered by the Tax and Customs Administration.[65] In those four cases, the ECtHR concluded that the applications were manifestly ill-founded and declared them inadmissible. The issue was whether Article 8 ECHR entitled to the payment of these allowances. In final national instance, the Administrative Jurisdiction Division of the Council of State had found that there was no such right.[66]

108. In these cases, the Administrative Jurisdiction Division of the Council of State heavily relied on the European Convention on Human Rights and the case-law of the ECtHR, especially on the principle of proportionality as well as prohibition of discrimination. In applying the AWIR, the Administrative Jurisdiction Division conducted a proportionality test under Article 8 ECHR, balancing the interests concerned, as well as a "step by step" justification test under Article 14 ECHR taken together with Article 8 ECHR.[67] Therefore, the ECtHR saw no reason to substitute its own assessment for that of the domestic courts.

109. The system of legal monism and the supremacy of the ECHR to domestic law could have facilitated a general application of the balancing principle and that of proportionality. In this light, it could be recalled that the ECtHR has in its case-law determined that

> *"it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with … the principles underlying the Convention (see Larkos v. Cyprus [GC], no. 29515/95, §§ 30-31, ECHR 1999-I)."*[68]

110. However, the case-law of the Administrative Jurisdiction Division of the Council of State between 2012 and 23 October 2019 applied the AWIR in a much more rigorous manner together

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"Administrative decision" means an order which is not of a general nature, including rejection of an application for such an order. "Policy rule" means an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority. Under Article 1:2.1 of the AWB, "interested party" means a person whose interest is directly affected by an order.

[64] Administrative Jurisdiction Division of the Council of State, judgment ECLI:NL:RVS:2019:3535, no. 201900753/1/A2 of 23 October 2019, items 8.1 and 8.9, at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2019:3535 (Last visited on 17 July 2021).

[65] Case of Yeshtla v. The Netherlands (Decision, no. 37115/11, 15/01/2019), A.D. And l.K. v. The netherlands (Decision, nos. 71815/14 and 71827/14, 12/03/2019), Aghmadi and Jaghubi v. The Netherlands (Decision, nos. 70475/14 and 70530/14, 12/03/2019), Heerawi v. The Netherlands (Decision, no. 36558/14, 12/03/2019).

[66] *Cf. Aghmadi and Jaghubi* decision, § 11.

[67] In every decision, the ECtHR cited the ruling ECLI:NL:RVS:2014:3788 of 22 October 2014, where the Administrative Jurisdiction Division of the Council of State initially noted as follows: *"Noting what the [appellant] has submitted, the Administrative Jurisdiction Division has to examine whether the means employed – termination of the allowance previously granted to the [appellant] – stand in reasonable proportion to the legitimate aim described above under 4.3." Cf. Aghmadi and Jaghubi* decision (§ 17), *Yeshtla* decision (§ 24), *A.D. and L.K.* decision (§ 25) and *Heerawi* decision (§ 16).

[68] ECtHR, Pla and Puncernau v. Andorra, judgment, no. 69498/01, 13/07/2004, § 59.

with the Childcare Act. Until 23 October 2019, the Administrative Jurisdiction Division did not apply balancing and proportionality tests in Childcare Allowance Cases.

111. Article 1 Protocol 1 ECHR protects the right of persons to peaceful enjoyment of their possessions. According to the ECtHR case law, the concept of "possessions" can include legitimate expectations. For an expectation to be "legitimate", it must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act bearing on the property interest in question.[69] The ECtHR has held that Article 1 Protocol 1 ECHR extends also to social welfare benefits.[70]

112. Any interference with these property rights requires justification in the general interest.[71] This entails a fair balance test, assessing all the relevant elements against the case-specific background[72], including for example the amount or percentage of the loss suffered, any arbitrariness of a condition,[73] the applicant's good faith,[74] and the impact on the applicant's means of subsistence.[75] In addition, the Court appears to view retrospective effects as a significant factor in this balancing test.[76]

113. The Administrative Jurisdiction Division of the Council of State took the view that Article 1 Protocol 1 ECHR did not apply to conditional payments such as those paid to beneficiaries in the Childcare Allowance Case because the advance payments did not constitute property ("*no fair belief can be derived from an advance payment that an entitlement to that advance payment exists").*[77]

114. This would be because applicants were granted benefits without any verification as to their entitlement. Until such time as their entitlement was verified, applicants could have had no fair belief that they were in fact entitled to the benefit. However, that verification was in many cases only completed a number of years after payment was granted. In the meantime, beneficiaries of the payments needed to rely on the payments to subsist. Beneficiaries received payments which could be revoked in full (years into the future) through little or no fault of their own.

115. On 23 October 2019, the Administrative Jurisdiction Division of the Council of State rendered two judgments on appeal by which it reversed its earlier case-law concerning childcare allowance, ending the "all or nothing" approach.[78] The Administrative Jurisdiction Division noted that *"due to the large number of similar cases that have been submitted to the Division over the years, the seriousness and extent of the financial consequences of the case law as described above have become apparent in several cases. It has not become apparent to the Division during this period that such consequences have diminished in severity or extent. This case is therefore not an isolated one"* (item 8.10 of the judgment).

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[69] ECtHR, Kopecký v. Slovakia[GC], §§ 49-50; Centro Europa 7 S.R.L. and di Stefano v. Italy[GC], § 173; Saghinadze and Others v. Georgia, § 103; Ceni v. Italy, §39; Béláné Nagy v. Hungary[GC], § 75.
[70] ECtHR, Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005.
[71] ECtHR, Kjartan Ásmundsson v. Iceland, §§ 39-40; Rasmussen v. Poland, § 71; Moskal v. Poland, §§51 and 64; Grudić v.Serbia, § 72; Hoogendijk v.the Netherlands(dec.); Valkov and Others v. Bulgaria, §84; Philippou v.Cyprus, § 59.
[72] ECtHR, BélánéNagy v.Hungary[GC], § 117 and Stefanetti and Others v. Italy, § 59.
[73] ECtHR, Klein v. Austria, § 55;
[74] ECtHR, Moskal v. Poland, § 44; Čakarević v.Croatia, §§ 60-65; Casarin v. Italy, § 74.
[75] ECtHR, Šeiko v. Lithuania, §§ 32-35.
[76] ECtHR, Bulgakova v. Russia, § 47.
[77] Administrative Jurisdiction Division of the Council of State, 10 December 2014, ECLI:NL:RVS:2014:4445 and 16 March 2016, ECLI:NL:RVS:2016:691.
[78] A meticulous analysis of these judgments is contained in the 2020 PIC Report – Appendix 2 (see footnote 43), pp. 133-136.

116. The Administrative Jurisdiction Division of the Council of State concluded that, contrary to what it has previously held, when determining the right to advance childcare benefit the Tax and Customs Administration can assess which amount of childcare allowance should be determined if part of the costs have been paid. For that assessment the Tax and Customs Administration should apply under Article 3:4 of the AWB and weigh the interests involved and the adverse consequences of a decision may not be disproportionate to the objectives served by the decision. The provision provides the Tax and Customs Administration with discretionary powers in respect of the determination of the amount to be reclaimed.

117. This change of case-law is to be welcomed. It opened the way for solving difficulties, for financial compensation, and putting an end to injustice as it was identified in the 2020 PIC Report.

118. In this respect, the Venice Commission has consistently cautioned against considering 'the rule of law' as a purely formal concept in the meaning of 'rule by law' and not as a substantive concept,[79] meaning that the law must be accompanied with guarantees against abuse of legal powers.[80] The Venice Commission's Rule of Law Checklist states that an *"exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law".* It seems safe to conclude, which indeed has been done by several Dutch authorities, including the Council of State's Administrative Jurisdiction Division in its two judgments in 2019, that applying the "all or nothing" approach falls under this definition.

119. As for the legal safeguards against arbitrariness and abuse of power, it is first to be noted that the Constitution offers no such guarantee since it is not applicable by the courts (see below).

C. Structure of the administrative judiciary

120. Similar to Belgium and Luxembourg, the system of administrative justice in the Netherlands is inspired from the French system with a Council of State *(Raad van State)* at its top. However, some reforms that were made in France were not followed in the Netherlands, for instance the Raad van State decides in second and final instance, as a full appeal, not in cassation. In the Netherlands, it is therefore the ordinary courts that are in charge of administrative cases in first instance. Full appeals, on the merits, against these decisions go to the Council of State.[81]

121. However, the Council of State has a double nature, it is an advisory body and a judicial body. It is presided by the King or Queen but in practice, the Vice-President heads the institution. The Raad van State is separated in two divisions: the Advisory Division advises Government and Parliament on draft legislation. Another, the Administrative Jurisdiction Division decides in final instance on appeals against administrative decisions of the courts of first instance.

122. While there are two separate divisions, advisory and judicial, some members of the Raad van State can be in both divisions. In the Netherlands, there has been discussion on this double nature of the Raad van State but on the European level, the European Court of Human Rights did not find a violation of the Convention in this system.[82]

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[79] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, I.A para. 15.
[80] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.C Prevention of abuse (misuse) of powers.
[81] However, appeals on a number of administrative matters go in appeal to the Central Appeals Tribunal or the Trade and Industry Appeals Tribunal. These matters include: sickness and maternity benefits, invalidity benefits, old-age benefits, survivor's benefits, death rants, unemployment benefits, family benefits, social assistance, benefits for victims of war, civil servants issues.
[82] European Court of Human Rights, Kleyn and others v. Netherlands [GC] - 39651/98, 39343/98, 46664/99 et al. Arrêt 6.5.2003 [GC].

123. Nonetheless, the Dutch legislator has undertaken steps to better separate the advisory function from the judiciary function. However, the legislator did not go the full way. It reduced the number of members of the Council of State who can sit in both divisions to ten. In practice, only two members of the Raad van State, still have this double function, and the Commission was told that it would be very unlikely that new members would be appointed to both divisions.

124. In the light of a clear separation of powers, the move of separating the two functions within the Raad van State is certainly positive. It is important that the separation of the two functions be visible.[83] The Dutch legislator could consider going a step further and remove the possibility for members to be in both divisions or separate the divisions institutionally.

D. Constitutional review

125. An issue that has been raised by several interlocutors is the absence of constitutional review in the Netherlands. Article 120 of the Dutch Constitution the states that *"[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."* This means that even if a court comes to the conclusion that the law that it has to apply is flagrantly unconstitutional, it still will be obliged to apply that law.[84] This makes the Netherlands the only Council of Europe and Venice Commission Member State that entirely excludes constitutional review.

126. In practice, it is the Advisory Division of the Council of State that provides a priori advice on the constitutionality of bills. This advisory role is indeed very important and should be preserved. However, the Advisory Division of the Council of State will provide its advice on draft legislation at a given moment in time. It will not systematically be asked for advice also on later amendments in Parliament. More importantly, often unconstitutionality is revealed only in the practice of the application of laws.[85] Article 120 of the Constitution obliges the courts to apply a legal provision, even if it is clearly unconstitutional.

127. Nonetheless, the absence of constitutional review in the Netherlands is not a problem in most cases. By virtue of the monist system established by Article 94 of the Constitution,[86] human rights protection is well established in the Netherlands. Dutch Courts will not apply a national legal provision when it contradicts international law, notably the European Convention on Human Rights.

128. However, in the very case of the Childcare Allowance Case, this safeguard of international law did not apply because the Council of State had decided that neither Article 6 ECHR nor Article 1 Protocol 1 ECHR would apply in these cases. The Convention did not serve as a safeguard against the problematic interpretation of the relevant legislation concerning childcare benefits.

129. There are areas where the ECHR and other human rights conventions do not provide remedies, and where there might be a place for constitutional review or other domestic mechanisms to ensure the constitutionality of laws and decisions. The Venice Commission notes that while most of its member states provide some type of access to individual constitutional justice, this is no obligation and there are a great variety of models to ensure the supremacy of

[83] CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 144.
[84] For case-law in the CODICES database, see: NED-2013-2-006, NED-2012-2-007, NED-2007-1-003, NED-2007-1-001, NED-2006-3-001, NED-1998-3-022 (www.CODICES.CoE.int).
[85] Venice Commission, CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, para. 49.
[86] Article 94 of the Constitution - Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

the Constitution both in terms of *ex ante* control at the legislative level and *ex post* control.[87] The Commission would also emphasise that is not clear whether constitutional review would have prevented the Childcare Allowance Case as the efficacity of such review also depends on the types of norms in the Constitution. In light of the experiences with the Childcare Allowance Case, it is for the Dutch authorities to consider whether Article 120 of the Constitution should be amended, or other mechanisms of constitutional review are required. In any case, introducing constitutional review should not be considered as a quick fix, but should be based on a profound analysis of the rights protection in the Dutch legal system and its institutions

E. Dialogue and reporting

130. The Judiciary has a unique insight into the practical working of legislation. The judiciary speaks through its judgements, and it is often academia that aggregates that information, but the judiciary can also participate in discussions and round tables organised by other state powers. The judiciary can thus be a valuable source of information for the legislator, as systemic problems in the interpretation and application of the law will become evident in the courts case-law.

131. The Commission learned that in the Netherlands only some 5 per cent of court judgments are published. In some countries, the task of anonymising judgments takes much time and energy.[88] Using IT tools, it might however be possible to prepare the cases from the outset in a way that they can be published in an anonymous way if the parts enabling an identification of the case are stored separately and are added in the version available to the parties only. Such a technique could enable the publication of a much higher percentage of judgments. This is especially important for enabling access to the reasoning in the judgments of the highest courts.

132. Some interlocutors suggested that the judiciary submits an annual report to the other branches of government on the application of the law and/or regular round table conferences between the judiciary, the legislature, and the executive. These appear to be a very efficient and practical measures, which would be welcome. It would depend on the Dutch traditions, how channels could be established for the judiciary to draw the other branches attention to legislation which is giving rise to systemic problems in practice. Regardless of how such systems are set up, its aim should be to strengthen the information flow between the different branches of government.

VII. Conclusion

133. The Venice Commission has consistently cautioned against considering ‘the rule of law’ as a purely formal concept in the meaning of ‘rule by law’ and not as a substantive concept, meaning that the law must be accompanied with guarantees against abuse of legal powers.

134. In general, the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law. While the shortcomings in individual rights protection uncovered in the Childcare Allowance Case are indeed serious and systemic and involve all branches of

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[87] Venice Commission, CDL-AD(2021)039rev, Study on Individual Access to Constitutional Justice, p. 4; CDL-AD(2016)007, Rule of Law Checklist, paras. 108-113.

[88] On the need for anonymisation of judgments see, for instance: CDL-JU(2011)011, The anonymity requirement in publishing court decisions - Report by Ms Kjersti Buun Nygaard, Deputy Secretary General, Supreme Court of Norway (10th meeting of the joint Council on Constitutional Justice conference on "the anonymity requirement in publishing court decisions"); CDL-JU(2011)012, L'anonymisation des arrêts au tribunal fédéral Suisse - rapport par M. Paul Tschümperlin, Secrétaire Général, Tribunal fédéral de la Suisse (10e réunion du conseil mixte sur la justice constitutionnelle - conférence sur "l'exigence de l'anonymat lors de la publication de décisions juridictionnelles"); CDL-JU(2011)010, The anonymity requirement in publishing court decisions - Report by Ms Krisztina Kovács, Counsellor, Constitutional Court of Hungary (10th meeting of the joint Council on Constitutional Justice conference on "the anonymity requirement in publishing court decisions").

government, it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the Childcare Allowance Case are taken seriously by all branches of government, which is very positive. In the interest of its citizens, the Netherlands appears to be capable and willing to address and redress its mistakes. But in this case, this reaction has taken a much longer time than it should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance. The Venice Commission hopes that this opinion will contribute to the on-going process of reforms. Prevention is always better than cure.

135. The Venice Commission therefore welcomes a number of initiatives that have been taken or that are on-going. Many of these reforms were announced in the letter of 15 January 2021 of the Prime Minister to the President of the House of Representatives and include improving the quality of legislation by better taking into account input from civil society and developing pilot legislation, improving access to information to Parliament and notably by giving up on the practice of considering "personal opinions" as internal documents from information provided to the courts, or improving information flow within and between the ministries.

136. The Speaker of the House of Representatives of the States-General of the Netherlands asked the Venice Commission to give its contribution to a very broad reflection of what needs to be done in the Netherlands. The Venice Commission's proposals are not only based on standards but also on comparative experience and common sense. Several of the proposals made in this opinion could be useful in most other countries too.

137. In view of the complexity of the matter, this process of reforms needs to be undertaken in various sectors, the legislative, the executive and the judicial branches. The Venice Commission makes the following proposals, which are far-reaching and are meant as food for thought in the reflection to be carried out by the Dutch authorities:

A. Legislative power:

- the inclusion of hardship or proportionality clauses should be considered for future legislation where this is appropriate to the specific objectives and design of the policy at issue;
- in appropriate parts, new legislation could include provisions that recall or restate general basic principles of good administration;
- the Rules of Procedure of Parliament could be changed to facilitate scrutiny of the executive, this could be done, for instance, by extending the rights of 30 MPs also to initiate hearings and parliamentary investigations or ensuring that a standing committee has specific responsibility for effective scrutiny of laws and their application for compliance with general principles of good administration and the rule of law;
- the right of Members of Parliament to full information without delay under Article 68 of the Constitution should be made be practical and effective;
- both committees and individual MPs should benefit from sufficient staff and resources that are earmarked for scrutiny of the government and laws;
- as concerns attitudes, while this cannot be imposed through legislation, it should be seen as acceptable and even normal that MPs from government parties also represent Parliament as an institution and that participation in parliamentary scrutiny of the government is not an act of disloyalty.

B. Executive power:

- The information flow within civil service and up to the ministerial level, notably on issues that go against current policy, should be improved;
- for individuals, access to relevant information should be made easier, complaint procedures should be made simple and informal and help should be offered on how to complain under a duty of neutrality;
- the executive should review its Instructions on legislation and amend them as necessary to ensure that its internal assessment of the quality of legislation includes effective monitoring for compliance with basic principles of good administration and the rule of law, such as legal certainty, legitimate expectations, non-discrimination, individual assessment and proportionality;
- the executive should assess and ensure the quality of the law, both when preparing legislation to be submitted to Parliament and when it applies new legal provisions, taking into account possible scenarios and risks; such assessments should be reviewed when appropriate;
- the executive, the Data Protection Commissioner and other relevant bodies should follow the developments in Artificial Intelligence closely and new developments should be taken into account in the design of future AI systems and when existing ones are reviewed;
- sectoral information should be shared widely within the administration to enable relevant input also from other sectors of the administration.

C. Judicial power

- Channels could be established for the judiciary to draw the other branches attention to legislation which is giving rise to systemic problems in practice;
- based on a profound analysis, it could be considered whether Article 120 of the Constitution should be amended, or whether other mechanisms of constitutional review should be introduced.

138. The Venice Commission is confident the on-going reforms and further reforms will lead to an improvement of the situation avoiding a repetition of problems that surfaced in the Childcare Allowance Case. The Commission remains at the disposal of the authorities of the Netherlands for further assistance in this matter.