

CIC Supplement – Chapter 10

Nonjudicial Constitutional Interpretation: The Netherlands

CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1982

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

APPLICATION OF CHARTER

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter [protecting the fundamental freedoms of conscience and religion; expression; assembly, association; and granting legal rights relating to life, liberty and security of the person; search or seizure; detention or imprisonment; arrest or detention; proceedings in criminal and penal matters; treatment or punishment; self-incrimination; and interpretation].

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

NEW ZEALAND BILL OF RIGHTS ACT 1990

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) in the case of a Government Bill, on the introduction of that Bill; or
- (b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

UK HUMAN RIGHTS ACT 1998

3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(...)

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made

10 Power to take remedial action.

(1) This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(...)

19 Statements of compatibility.

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Council of State Act, arts. 16a-27

CHAPTER II. THE ADVISORY DIVISION

PART 1: COMPOSITION AND TASKS

Section 16a

1. The Council has an Advisory Division.
2. The Advisory Division consists of:
 - a. the Vice-President, and
 - b. the members, State Councillors and Extraordinary Councillors who have been appointed to the Advisory Division.
3. The members of the Royal House referred to in section 1, subsections 2 and 3 sit in the Advisory Division. Section 1, subsection 4 applies mutatis mutandis.
4. The Vice-President chairs the Advisory Division. Section 7 applies mutatis mutandis.

Section 17

1. We will hear the Advisory Division on:
 - a. Bills to be presented by Us to the States General;
 - b. Drafts of orders in council;
 - c. Bills to approve a treaty or to approve the intention to denounce a treaty.
2. We will also hear the Advisory Division in the cases prescribed by statute and on all matters on which We consider this necessary.
3. We will submit to the Advisory Division for consideration the drafts of any Royal Decrees annulling decisions of lower government authorities to be introduced pursuant to any statute.
4. The Bills, drafts and decrees must state that the Advisory Division of the Council of State has been heard.

Section 18

1. Before considering any Bills introduced by one or more of its members the House of Representatives of the States General will hear the Advisory Division about them.
2. Where the House of Representatives of the States General deems this necessary, it will also hear the Advisory Division on the Bills referred to in subsection 1 after they have been considered.
3. We will not hear the Advisory Division on Bills introduced to the House of Representatives of the States General by one or more members before they have been passed by the States General.
4. Subsections 1, 2 and 3 apply mutatis mutandis to the two Houses of the States General meeting in joint session.

Section 19

The Advisory Division need not be heard on:

- a. Bills to change the central government budget;
- b. Bills to approve a treaty or the intention to denounce a treaty, if the treaty or intention has previously been presented to the States General for tacit approval.

Section 20

1. The Advisory Division will draw up the draft of a Royal Decree as referred to in article 136 of the Constitution.
2. Within six months after the draft has been drawn up, Our Minister whom it may concern may submit a reasoned request to the Advisory Division for consideration of the draft. If the Royal Decree differs from the draft or subsequent draft, it will be published in the Bulletin of Acts and Decrees together with the draft referred to in subsection 1 or any subsequent draft. If a request as referred to in the first sentence has not been made within six months, the Royal Decree will read the same as the draft.

Section 21

The Advisory Division will also advise Us if it deems this necessary.

Section 21a

1. The Advisory Division will, on request, provide Our Ministers or either House of the States General with information about matters of legislation and public administration.

2. If information is supplied to either House of the States General, the House concerned will arrange for publication as referred to in section 26, subsection 1 (c).Section 22

In the cases referred to in section 17, the matter will be submitted for consideration either by Us, on the proposal of Our Minister whom it may concern, or by Our Minister pursuant to royal authorisation.

Section 23

1. Our Ministers will give the Advisory Division the information it requires in order to carry out its duties.

2. The gathering of information by the Advisory Division from persons other than Our Minister whom it may concern must be arranged through his intermediary.

3. The Vice-President may summon persons to give information and advice to the Advisory Division.

Section 24

The Advisory Division will consult with Our Minister whom it may concern if the Advisory Division or the Minister so requires.

Section 25

The Advisory Division will be informed of Royal Decrees on matters on which it has been heard.

Section 26

1. Our Minister whom it may directly concern will arrange for the publication of:

a. advisory opinions of the Advisory Division requested by Us;

b. advisory opinions as referred to in section 21;

c. information in matters of legislation and public administration as referred to in section 21a.

2. Publication of the advisory opinions referred to in subsection 1 (a) will take place together with the publication of the text presented to the Advisory Division, in so far as changes have been made to it after the opinion is requested, and with publication of the subsequent report to Us.

As regards:

a. advisory opinions on Bills presented by Us, this will take place simultaneously with the presentation thereof to the House of Representatives of the States General;

b. advisory opinions on Bills presented by the States General to Us, this will take place simultaneously with the promulgation of the Act;

c. advisory opinions on treaties with other powers and international organisations which are to be submitted to the States General for tacit approval, this will take place simultaneously with the presentation thereof to the States General;

d. advisory opinions on orders in council and other Royal Decrees, this will take place simultaneously with their promulgation.

3. Publication of advisory opinions as referred to in section 1 (a) which cannot be provided for as referred to in subsection 2 as well as publication of advisory opinions as referred to in subsection 1 (b) and information in matters of legislation and public administration as referred to in subsection 1 (c) will take place no later than 30 days after a decision has been taken on the opinion, the recommendation or other proposal of the Advisory Division or on the information in matters of legislation and public administration of that Division. The subsequent report and, where applicable, the text presented to the Advisory Division as well as the Royal Decree, if publication has not been

arranged elsewhere, will also be published at the same time. Publication will take place in the manner specified in section 9, subsections 1 and 2 of the Government Information (Public Access) Act.

4. No publication will take place in the cases referred to in section 10 of the Government Information (Public Access) Act.

5. Active publication may be dispensed with if an opinion as referred to in subsection 1 (a) is purely approbatory or only contains remarks of an editorial nature.

6. In its advisory opinions as referred to in subsection 1 the Advisory Division will make proposals for the application of the provisions of subsection 4 or 5.

Section 27

1. The House of Representatives of the States General and the two Houses of the States General meeting in joint session will arrange for publication of the advisory opinions of the Advisory Division referred to in section 18, subsections 1 and 2 or subsection 4, and also provide a written response to these opinions.

2. The advisory opinions will be published together with the written response.

3. No publication will take place in the cases referred to in section 10 of the Government Information (Public Access) Act.

4. Active publication may be dispensed with if the opinion is purely approbatory or only contains remarks of an editorial nature.

6. In its advisory opinions the Advisory Division will make proposals concerning the application of the provisions of subsection 3 or 4.

Advisory opinion W04.20.0135/I of June 15, 2020 (“ministerial accountability”)

Following on from a series of events in the past years, and confirmed in numerous publications and background conversations, it appears that there is confusion and disagreement about the functioning of ministerial accountability. This complicates the task of parliamentarians to hold the government to account, burdens the position of ministers and creates pressure for civil servants. Since a good interplay between parliament, cabinet and civil service is a precondition for good policy-making, good legislation and good execution, citizens will eventually also experience disadvantages if this interplay is severely negatively affected.

(....)

Chapter 4. And now onwards!

(...)

There must be more frequent debates about which measures are useful and necessary, their operationalization and, in a later stadium, whether the results generated by the measures taken are sufficient. The following paragraphs provide as concrete as possible an impetus in support thereof.

(...)

4.3. Re-evaluation of the role of independent authorities

(....)

- There must be a more precise definition of the situations in which the need for independent judgement in relation to the execution of governmental tasks requires the allocation of competences to statutorily enshrined independent authorities. There is a need for restraint in this regard because of ministerial accountability.

- The rationales for setting up autonomous administrative bodies as laid down in the Framework Law autonomous administrative bodies must be re-evaluated.
- The situations in which and conditions under which the minister sets up an independent commission to investigate and evaluate the functioning of a part of the civil service under his purview require further reflection. Restraint should be the starting point in this regard.
- Also in the framework of European legislation, the government should, in collaboration with parliament, develop policy to better safeguard the public accountability of independent regulators.

(...)

4.6 Strengthening the relationship between politics and the civil service

(...)

- A code of conduct or protocol should be drawn up, setting out the rules that govern the relationship between civil servants and members of government. The operation of such a code should be part of a periodic debate with parliament. (...)

4.7 Improved balance between lawmaking, policy and execution

(...)

- In the preparation and adoption of coalition agreements and legislation, government and parliament ought to pay more systematic attention to questions of feasibility and enforceability and should be held publicly to account in this regard;
- When it comes to the execution of policies and legislation, parliament should trigger the [principle of] ministerial accountability at an earlier stage and in a more structural manner;
- The manner in which important executive themes and/or services can be effectively organized from the perspective of citizens must be more explicitly taken into account in dividing governmental portfolios within the cabinet

(...)

The underlying questions of culture, norms and behaviour must be answered more broadly than only by the (sitting) cabinet, the (sitting) houses of parliament or civil servants. Employer and employee organizations in the public sectors, the media, civil society, other governmental agencies, academia and citizens should also be invested in the discussion about these themes [i.e. the direction of policy, lawmaking, execution and associated supervision]. There also lies, in particular, an important task for the political parties that will formulate their programmes with a view to the upcoming elections for the Lower House and the ensuing formation of the government. Taken together, there is a joint task for politics, the government and society to safeguard the functioning of ministerial accountability with a view to the future and where necessary, improve this.

Advisory opinion W11.08.0398/IV of October 20, 2008 ("ritual slaughter")

1. Background

Protection of animal welfare has been invoked as a justifications for several Bills in the recent past. [In its advisory opinion concerning one of those Bills], the Council has noted the legal position of animals. They are to be considered legal objects, not legal subjects: according to contemporary doctrine, animals cannot be bearers of rights in the legal sense. The Council added that there may be good reason not to consider animals as ordinary legal objects, akin to others, but as special legal objects, that warrant special care, also on the part of the government. It flows from this approach that in relation to acts involving animals, such as slaughter, the welfare of the animal must be explicitly taken into account. This does not, however, detract from the fact that the interest of animal welfare must be balanced against other interests, and in this regard it is relevant that animals cannot be bearers of rights as such.

2. Freedom of religion

a. The scope of the freedom of religion

The starting point in determining the scope of the freedom of religion is that the state ought in principle to refrain from interfering in religious debates regarding the content and meaning of religious convictions. Insofar as the Explanatory Note posits that the religious character of the objections regarding the un-sedated slaughter of animals can be the subject of debate, it should be noted that the separation of church and state entails that the government must practice restraint and ought not to pass judgement about the theological validity of a certain view. It should be recognised that there are differences of opinion within Judaism and Islam about un-sedated slaughter, but the religiously-inspired view among at least a proportion of believers of these religions that un-sedated slaughter is not allowed must nevertheless be accepted by the state as the starting point.

Given the foregoing, the Council is of the opinion that un-sedated ritual slaughter must be considered as a form of religious practice that comes within the scope of the freedom of religion.

b. Compatibility with article 6, first paragraph of the Constitution

Freedom of religion is inter alia protected under article 6 of the Constitution. Article 6, first paragraph of the Constitution states: "Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law."

The Council is of the view that there are, in addition to the requirement of a statutory legal basis, substantive criteria that must be considered before a restriction of a fundamental right can be deemed justified. In the Council's judgement, the following criteria are of relevance: sufficient specificity, proportionality and (contained therein) respect for the core of a fundamental right. These criteria demand a serious balancing act, in which the interest in protecting the fundamental right must be accorded significant weight.

It is the view of the Council that the proposed prohibition of un-sedated ritual slaughter does not satisfy the aforementioned criteria. The unqualified prohibition of ritual slaughter no longer makes it possible to practice this form of religious observance. The Explanatory Note posits that the harm inflicted on animal welfare before and during un-sedated ritual slaughter offers a sufficiently strong justification to remove the current exemption in the Animal Health and Safety Act and accordingly permits a limitation of the freedom of religion. The Explanatory Note incorrectly evokes the image of animals as bearers of legal rights, with a status comparable to that of human beings. The Council is of the view that this does not evince that the requisite balancing exercise has been undertaken – during which the protection of the fundamental right should be accorded particular weight. While the Council concurs with the author of the Bill as to the importance of safeguarding animal welfare, it is of the view that the justification provided [in the Explanatory Note] is not sufficient. It deems it likely that the measure creates too great a limitation of the freedom of religion, given that the practice of an established religious ritual and the consumption of meat obtained in observance thereof is made impossible.

According to the Council, the Bill accordingly exceeds the limits of Article 6, first paragraph of the Constitution. Its advice is that the Bill be reconsidered.

NIHR Act, art. 5(1)

The Institute renders advice, following a written request thereto by our Minister whom it may directly concern or one of the two Houses of the States General, in relation to laws, bills, orders in council, draft orders in council, ministerial regulations and draft ministerial regulations that directly or indirectly affect the fundamental rights of individuals.

Advisory opinion W04.15.0170/I of July 15, 2015 ("prohibition on face coverings")

The Bill introduces a prohibition on wearing clothing covering the face in public transport and in building and related premises of educational establishments, governmental offices and healthcare institutions. The prohibition will not apply insofar as the clothing is necessary to protect the body, suitable in relation to participation on festive or cultural activities, and for clients, patients or their visitors in the residential parts of healthcare institutions. ... Non-compliance will be punished with a fine of the first category (405 Euro). By introducing the prohibition on clothing covering the face the government seeks to remove impediments for

communication in places where the quality of service provision or safety cannot be sufficiently safeguarded without such a prohibition.

Clothing covering the face *inter alia* encompasses Islamic veils, such as the burqa and niqab (inspired by Islam). The Bill is not limited thereto, but such clothing is the direct cause for its introduction. This evokes questions about its compatibility with the freedom of religion.

(....)

Reasoning set out the Bill

(....)

a. Scope of the problem

The Division [i.e. the Advisory Division of the Council of State] notes that the premise of the Bill, that wearing clothing covering the face constitutes a societal problem, warrants a closer analysis. The Bill appears to be primarily motivated by objections, levelled against the wearing of Islamic clothing covering the face. (...) The Explanatory Note does not contain any concrete data, including quantitative data, regarding the nature and scope of [the first public discussions about the admissibility of facial veils]. (...) According to the judgement of the Division these are clues that the wearing of Islamic clothing covering the face is admittedly from time to time the subject of public and parliamentary debate, but does not concern a widespread social problem. According to an estimation that is not very recent, which has not been verified by research, there are at most 200 to 400 women in the Netherlands who wear such clothing. As such it is unlikely that schools, governmental institutions, transport or healthcare will encounter this phenomenon to a relatively significant degree.

b. Alternatives for governmental regulation

(....) The Division concludes that the mentioned sectors [education, healthcare, governmental institutions] are sufficiently capable of drawing up regulations and (can) make appropriate use of their competences, if they consider such necessary in light of what the specific situation calls for.

c. Importance of uniformity

(....) In any case, the risk of unclarity and legal uncertainty as a result of a possible lack of uniformity [in regulation across sectors] has not been demonstrated over the course of the past 12 years, since the start of the discussion in 2003.

d. Enforcement

(.....)

e. Conclusion

(....) It accordingly seems obvious to leave regulation to the relevant authorities who are better placed than the legislature to effect rules and decision-making duly tailored to the concrete relationships at stake. This is inherent in the issue to an important degree. Living together means encountering differences. Communication is a primary requirement to conquer or accept such differences. Deliberation or bottom-up measures are usually more suitable in this regard than statutory rules. Only if there would exist gaps within the sectors mentioned to put in place the necessary preconditions, centred on communication, by means of measures or rules, could it be considered to address these by means of a statutory arrangement. Such gaps are however not mentioned in the Explanatory Note.

In light thereof, the Division advises to provide a convincing justification as to why the introduction of a statutory sector-specific prohibition is necessary, and if this is not possible, not to proceed with the Bill.

2. Freedom of religion

The Explanatory Note highlights that the prohibition may result in limitations regarding the use of items of clothing the wearing of which may be viewed as a religious obligation by some. In limiting the freedom of religion, the state is in particular required to observe the requirements set out in the second paragraph of Article 9 ECHR. According to this provision, an interference can only be accepted if this is: prescribed by a legal provision that is accessible and foreseeable; serves a legitimate purpose as mentioned in Article 9, paragraph 2 ECHR; and is necessary in a democratic society. As regards the last condition, what matters is that the interference corresponds to a pressing social need and stands in a reasonable relationship to the objective pursued (proportionality test). (....)

As the Division has set out above under 1, it is of the view that it cannot be assumed that a statutory prohibition on wearing clothing covering the face in the mentioned sectors is necessary without further explanation, given that the institutions have their own competences and responsibilities that make possible the adoption of rules tailored to the specific situation with a view to adequately providing services and ensuring safety, and the fact that there are no specific indications that they are falling short or possess insufficient competences to act. The Division also notes that in the context of determining compatibility with Article 9 ECHR, there is a meaningful difference between the situation in which institutions refuse to allow clothing covering the face in order to ensure the quality of their service or enforce internal order following a process of consideration geared thereto, and the situation in which the formal legislature imposes an abstract prohibition.

In view thereof the Division advises to explicate persuasively that there exists an urgent social need to impose a statutory prohibition on wearing clothing covering the face, as proposed, which justifies the interference with Article 9 ECHR and, if such is not possible, to refrain from proceeding with the Bill.