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WITHHOLDING PARTY FUNDING FROM A 'DISCRIMINATING' POLITICAL PARTY

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ABSTRACT

On 7 September 2005 the District Court in The Hague judged that it was unlawful for the Dutch State to continue providing party funding to the 'Staatkundig Gereformeerde Partij'. On the basis of religious considerations, this Calvinist political party excluded women from full membership and denied women the possibility of taking up political and administrative mandates on behalf of the party. This amounted to discrimination of women with regard to their right to political participation, according to the court. Public funding of the SGP was thus contrary to the obligations contained in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

This contribution analyses the court's decision and reasoning to conclude that it is premised on a number of untenable assumptions, regarding the nature and requirements of the principle of nondiscrimination – contained in CEDAW – vis-à-vis other rights and liberties.

INTRODUCTION

Respect for freedom of religion has historically figured amongst the most prominent principles governing Dutch society, and, together with the principle of religious neutrality of State authorities, makes up the fundamental constitutional principle of separation between Church and State.¹ Lately, however, this principle has come under pressure as a consequence of the heightened sensitivity of the subject of religion in society. Numerous instances of conflicts between this principle and other fundamental rights or principles have recently come to the fore in public discourse, as well as in legal literature.²

One case that has received much attention in this regard involves a Calvinist political party, the 'Staatkundig Gereformeerde Partij' (State Reformed Party; hereafter: SGP). Basing itself on a traditional reading of the bible, this party excludes women from full membership and denies them the possibility of taking up political and administrative mandates on behalf of the party.

On 7 September 2005 the District Court in The Hague judged that it was unlawful for the Dutch State to continue providing party funding to the SGP, which was considered to be in violation of its obligation to ensure the right of women to political participation on an equal footing with men. Public funding of the SGP was thus contrary to the obligations contained in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

SGP: THE PARTY AND ITS VISION OF MANKIND AND SOCIETY

The government is – as a servant of God – unconditionally submitted to God's Word and Law, on the basis of which it shall be judged. In the exercise of its office it is to bear the responsibility of a polity of the state in line with the norms as revealed in God's Word, and for the strict observance of said norms.³

The above excerpt is not taken from a historical theological treatise, but from the program of a contemporary political party in The Netherlands: the SGP. The party strives for a society and state founded on 'God's divine order as it was revealed in the Bible'. Founded in 1918, the SGP is the oldest political party in The Netherlands still in existence.⁴ It has a small yet stable following: in parliament the party has consistently disposed of two to three seats, out of a total of 150.⁵

The party's standpoint on women has given rise to much discussion and controversy, both in The Netherlands and abroad. On the basis of an orthodox reading of the bible, the SGP maintains the point of view that women and men are attributed distinct tasks and responsibilities. According to the party, God's word teaches that 'men and women, by virtue of the natural order of the Creation have received their own specific, distinguishable calling and place. In this order the man is the head of the woman. Measures and policies aimed at recognizing the equivalence of men and women are evaluated positively. Every pursuit of emancipation that repudiates the God given calling and place of men and women is revolutionary, however, and must be forcefully resisted'.⁶

In practice the party takes this to mean that administrative and governing functions are reserved for men and that women have no place in politics. Women cannot be delegated to municipal councils or to parliament. Nor are women allowed to apply for internal administrative functions; they do not even dispose of the right to vote within the party.⁷

GOD'S LAW TESTED AGAINST DUTCH AND INTERNATIONAL LAW

An alliance of women's rights organisations considered the policy of the SGP unacceptable and brought the case before a court. Two claims were made: one against the party itself and a second against the Dutch State. Before going into the substance of these cases, we will first sketch out their historical and legal context by discussing three prior procedures that the SGP has faced due to its standpoint on women.

The Equal Treatment Commission and the Criminal Court

The Equal Treatment Commission is a semi-judicial institution charged with the enforcement of Dutch discrimination law. One of its main tasks is to render so-called 'opinions', in response to a request by a plaintiff, about specific situations concerning unequal treatment or discrimination. Any person in The Netherlands can ask the Commission for such an opinion or advice, free of charge. The opinions of the Commission have no binding force, however.

Since its foundation in 1994, the Commission has twice been asked to pronounce on the lawfulness of the SGP's stance on women's place in politics.⁸ In 1994, an individual woman asked for an opinion, claiming that the impossibility of being able to stand for Parliament on behalf of the SGP constituted discrimination in her regard.⁹ She submitted that this amounted to sex discrimination in employment. The Commission however concluded that the profession of parliamentary representative did not fall within the material scope of Dutch discrimination law at the time. Therefore, the claim was dismissed.

In the course of 1994 new discrimination legislation – the Equal Treatment Act¹⁰ – was enacted, which was wider in its scope and covered more grounds of discrimination. Still, a 2001 opinion demonstrates that this development did not extend the Commission's authority to cover the SGP issue.¹¹ Again, the plaintiff was an individual woman, Mrs. Grabijn-Van Putten, a member of the SGP who had been trying for years to change the SGP's viewpoint on women. The Commission stated that – even with the new legislation in place – Dutch discrimination law 'does not allow for passing judgment on matters of internal associational law.' Moreover, the *travaux préparatoires* of Dutch discrimination law were said by the Commission to clearly indicate that 'the legislator (...) expressly intended for actions of associations to fall outside of the ambit

of these laws'. Only associations with an open and businesslike character came within the scope of these laws, according to the Commission. Finally, the Commission reiterated that the profession of parliamentary representative – to the extent that the plaintiff aspired to this position – did not fall under the reach of Dutch discrimination law: not prior to 1994 *nor* since the enactment of the new, general Act at that time.¹²

The matter has also been brought before the Dutch court, by the same woman who had called upon the ETC in 1994. She was supported by the 'Testcase Fund' of one of the main women's rights organizations of The Netherlands at the time; the Clara Wichmann Institute. This Fund is an initiative of the Institute and it supports for 'public interest litigation' that can improve the position of women.¹³ By mutual agreement the Fund and the individual plaintiff opted for a criminal case: in 1995 they came forth and accused the SGP of 'criminal sex discrimination'.¹⁴

The Public Prosecutor, however, decided not to prosecute. The plaintiff responded by lodging a complaint against this decision at the Court of Appeals in The Hague.¹⁵ In its ruling, the Court sided with the Public Prosecutor, drawing the conclusion that it is not a criminal offence for a political party to opt exclusively for males for political functions and to recruit specifically with that aim.¹⁶ The provisions in the Dutch Criminal Code did not oppose this course of action, which again could be traced back to a deliberate choice by the legislator: according to the Court, membership of associations such as the SGP has consciously been excluded from the scope of said provisions.

The Civil Court

After having failed on this previous occasion, the Clara Wichmann Institute decided to bring a civil action against the SGP by means of the Testcase Fund. This led to a genuine quest for a woman from within SGP circles willing to support this action. The search did not yield any result, despite vigorous efforts – e.g. the placement of 'wanted' ads in newspapers and magazines that are frequently read by the target group.¹⁷ Since Dutch procedural law does not require the existence of an identifiable victim for a class action in the general interest to be brought before the court,¹⁸ the Fund finally decided to proceed without an actual victim and subpoenaed the SGP in November 2003 in a class action along with nine other human rights and women's organizations.¹⁹

As mentioned, in fact two separate claims were filed, against the SGP and against the Dutch State respectively. In the first case, the

central question was whether the political party was itself violating non-discrimination rights and political participation rights as guaranteed by national and international law. The case against the Dutch State involved the alleged violation of (international) obligations, constituted by the failure to take (sufficient) action against the SGP and the continued funding of the party.

The District Court declared the suit against the party itself inadmissible.²⁰ The interest in having the SGP accord women full membership, on an equal footing with men, could not be regarded as a legitimate legal interest for the complainants, who were not women who aspired to SGP membership: 'the (single) fact that an act conflicts with the aims of an interest group, does not lead to the conclusion that thereby the act can be considered unlawful vis-à-vis the interest group'.

Although the interest of the complainants was thus apparently too general to be invoked against a private entity, the court decided that it was perfectly legitimate as a basis for a claim against the state. The suit against the Dutch State did therefore not founder at the admissibility stage.²¹ The court accepted that the women's organizations defended 'the interest of all (...) in maintaining the prohibition of discrimination on the basis of sex'.²² The court added that this interest acquired 'more weight' in light of the fact that 'it is not imaginary that the (near) future would witness the rise of other parties that – on the basis of religious motifs – would reserve different political and/or societal roles for men and women, thereby again creating the risk of discrimination'.²³

In substance, the plaintiffs demanded the declaration that the State was acting contrary to one or more of the following provisions: article 7 CEDAW, article 25 and 26 ICCPR, article 3 First Protocol ECHR *in conjunction* with article 14 ECHR, article 1 Twelfth Protocol ECHR, Article 1 and 4 of the Dutch Constitution or 'another rule of written and/or unwritten law'.²⁴

The court considered the relevant provisions of CEDAW as providing sufficient ground for ruling in favor of the plaintiffs,²⁵ and decided that the Dutch State was acting unlawfully on the basis of article 7a and 7c by subsidizing and funding the SGP as long as this party did not allow women as full members.

A closer look at Article 7 CEDAW reveals that these paragraphs require that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

The Court's conclusion that the Dutch State was not fulfilling the obligations flowing from these provisions relied heavily on the interpretation by the Committee on the Elimination of Discrimination against Women (hereafter: The Committee)²⁶ of these articles.²⁷

The weight given to the Committee's interpretation of article 7 effectively determined the outcome of the case, as the Committee had already made clear on more than one occasion that it regarded the SGP-situation as constituting a violation of the Convention and that the actions undertaken by the Dutch State in this regard were insufficient. In 2001 for instance, it had explicitly stated: 'The Committee notes with concern that in the Netherlands there is a political party represented in the Parliament which excludes women from membership which is a violation of article 7c of the Convention'.²⁸ In its judgment, the Court seems to have uncritically followed this interpretation of the Convention.

The State objected that the measures it had taken to counter sex discrimination in political life were sufficient, since the rights and freedoms of others also had to be taken into account. It specifically referred to the rights of SGP members to freedom of association and freedom of religion. The Court was not convinced and submitted that 'at the drafting of the Convention the relevant interests have already been weighed against one another, which has resulted in the prohibition of discrimination to prevail, to the extent that political parties are concerned'.

The Court in fact pointed to a specific debate that was recorded in the *travaux préparatoires* of CEDAW. During the drafting of the Convention, Canada and the United Kingdom had asserted that article 7 could affect the freedom of association in too far-reaching a manner. It was therefore decided that the provision should apply only to associations 'concerned with the public and political life of the country' (cf. *infra*). The court took this to mean that 'the States Parties did not wish for the prohibition of discrimination in article 7 CEDAW to prevail at all times (...), however – in view of the specific restriction to associations on the political and public level – this does hold for political parties'. Since the Netherlands had ratified the Convention without any reservation, the Court regarded the State as being obliged to take action. 'No other basic right or freedom compels a more restrictive attitude', according to the judge.

Hence, the Court awarded the claim that the State had breached its obligations under CEDAW and thereby had acted unlawfully vis-à-vis Clara Wichmann and the other organizations in the alliance.

The State was instructed to remedy this situation. The appropriate means to do this would be retracting party funding for the SGP,²⁹ at least as long as women cannot become members on an equal footing with men.

A SOLOMON VERDICT?

In several commentaries the judgment of the district court has been hailed as a ‘Solomon verdict’: the SGP was not itself disbanded or forbidden, but merely incurred a financial disadvantage for its choice not to discontinue its discriminatory policy. The decision appeared to be utterly reasonable: if we have to tolerate certain forms of ‘discrimination’, we at least do not have to subsidize them, do we?

Without sympathizing with the SGP standpoints and policies on women, we submit that the case is slightly more complicated than it might seem at first glance. Since we lack the space for a full analysis of the verdict, we shall limit ourselves to the aspect that we consider to be most problematic: the fact that the court in fact introduces a hierarchy of rights; and that it does so on rather questionable grounds.

The tension between the principle of nondiscrimination and other fundamental rights and freedoms is a classic one. Due to its nature, the right to nondiscrimination tends regularly to conflict with scope of other rights, such as the freedoms of religion and expression.³⁰ These conflicts and tensions have been significantly magnified with the introduction of positive obligations for States to protect their citizens against discrimination by non-state actors, such as political parties.³¹ Still, the verdict of the District Court barely acknowledges them. No effort is made to assess or balance any conflicting rights or liberties against the principle of nondiscrimination that the plaintiffs invoke. This seems curious, as there is virtual consensus in the continental legal tradition, both in literature as in practice, on the fact that there is no absolute hierarchy of human rights, without any regard for contextual factors.³² Conflicts of rights cannot be settled definitively at the abstract level, by simply giving more weight to one right or liberty, but can only be solved by way of assessments *in concreto* that fully take account of the complexities of the concrete and particular circumstances of the case. Liberties – such as the freedom of speech, religion and association – never have *a priori* precedence over the principle of nondiscrimination. The reverse, however, also holds true: liberties do not always have to yield to nondiscrimination. If this *were* the case, critics of anti-discrimination legislation would be correct in stating

that the application of the prohibition of discrimination against other actors than the State results in 'dissolving society and limiting in an unbearable manner the basic rights of the individual'.³³

In this case the Court does seem to introduce an abstract hierarchy of rights, in which the prohibition of discrimination is considered to take precedence over any other fundamental right implicated in the case. The verdict manages to avoid any real assessment of other rights or liberties that the State has to take into account. This is striking, since the guarantees and safeguards of the freedom of association, religion and assembly do seem to hold at least a *prima facie* relevance in this case. The Court steers clear of these complexities though, and does so by means of its thesis that the relevant balancing act has already taken place at the time of the drafting of the Convention. It bases this claim on the following excerpt of the *Travaux Préparatoires* of the Convention, in which Canada and the United Kingdom reject the proposed inclusion of an element (d) in article 7:

Concerning subparagraph (d). Canada and the United Kingdom share the view that its provision may apply to private social clubs which are organized on a single sex basis though it is doubtful if the existence of such bodies constitutes discrimination against women. Furthermore, such a provision could be interpreted as an interference with the principles of freedom of association. In the light of the foregoing, the United Kingdom proposes to delete subparagraph (d). Canada believes that it should be attended to include the indication that it concerns non-governmental organizations and associations concerned with public and political life. (...)

As a result of this intervention, element (d) was stricken and element (c) was curtailed in scope to 'non-governmental organizations and associations concerned with the public and political life of the country'. The Court takes this explicit in- and exclusion to mean that the principle of nondiscrimination in the latter context(s) should be applied as strictly and severely as possible and cannot be overruled by the principles of freedom of religion and freedom of assembly. Any exceptions – e.g. on the basis of other rights and liberties – would be unthinkable. In other words: in the field of political participation and membership of political parties, any distinction on the basis of sex immediately constitutes an unlawful discrimination that States Parties are obliged to terminate. A clear and unencumbered 'closed system', without bars.

This line of reasoning has a somewhat artificial feel to it. The only thing that can logically be inferred from the quoted excerpt, is that the drafting parties were of the opinion that the obligations for states to take 'appropriate measures' to ensure the participation in public life of women on equal terms with men were to extend solely

to 'non-governmental organizations and associations concerned with the public and political life of the country'.³⁴ The goal was simply to prevent the provision to be applicable to organizations and associations operating more in the private sphere. Similar delineations of the material scope of discrimination legislation are rather common. It is generally accepted that the extent to which private (legal) persons can be subjected to the prohibition of discrimination in private domains is limited.³⁵ It is therefore not all that surprising that member states restricted the scope of article 7 to merely apply to associations with a certain public or political character.

It can in no way be inferred, however, that the chosen drafting was aimed at determining once and for all that distinctions on the basis of sex made by organizations and associations taking part in public and political life would *never* be justifiable under any circumstance. The court in fact 'inverts' the reasoning: instead of the intended 'negative' perspective (i.e. exclusion of certain domains from the material scope of the Convention), it posits a 'positive' perspective which it moreover renders absolute (i.e. an absolute and strict prohibition of any distinctions that do fall within the scope of the convention).³⁶

The specific choice of words of the definitive article may illustrate the point: States Parties are required to take 'appropriate measures' to eliminate discrimination, and to 'ensure' the right to participate equally to certain organizations and associations. These terms and phrases imply that article 7 entails a positive obligation for states to eliminate discrimination in horizontal relations, a prime feature of which is exactly the room for discretion it leaves to states. It does not entail a negative-like obligation on states to refrain from discrimination themselves and to guarantee in an absolute way the absence of any discrimination in the mentioned spheres of public life. Clearly, the obligation is not such that it would disallow any assessment of conflicting rights and freedoms. If the drafting states *had* indeed aimed at restricting any room to maneuver in this sense, it seems highly likely that they would have chosen a different drafting for article 7, from which this would clearly and incontestably follow.³⁷

This vision finds support in the relevant literature: it is generally assumed that article 7 indeed allows for, or even requires consideration of other interests and rights.³⁸ It is also in line with higher jurisprudence within the Netherlands itself. The Supreme Court, for instance, has on occasion stated with regard to article 10 of the Convention – which is drafted slightly differently, but also utilizes the terms 'appropriate measures' and 'ensure' – that this article does (and must) leave room for an assessment of other fundamental rights.³⁹

Finally, mention can be made of the fact that the Convention on the Elimination of All Forms of Discrimination Against Women is itself widely regarded as a more detailed elaboration of article 26 of the ICCPR (prohibition of discrimination) only, and as such not of the Convention as a whole.⁴⁰ If the latter were the case, this could indeed imply that articles 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (right of peaceful assembly) and 22 (freedom of association) ICCPR had already fully been taken into account at the time of the drafting of the Convention. *Quod non*.⁴¹

All in all it can be said that the central point of the cited *travaux préparatoires* was a mere delineation of the material scope of the concerned provision: nothing less, but certainly nothing more either. This is confirmed by the larger legal context. There is no question of any ‘henceforth pre-determined order’ between the right of women not to be discriminated against with regard to their participation in public and political associations and other basic rights and freedoms. The far-reaching interpretation of the *travaux préparatoires* made by the District Court is neither the most obvious nor the most defensible.

Especially in view of the broader context of the renewed attention within Dutch public discourse for the role of religion in society, it is deplorable that the Court has avoided speaking out on the contentious question which lay at the heart of this case: how to solve a conflict between the fundamental rights of freedom of association and religion on the one hand, and the right not to be discriminated against on the other. No doubt, another possibility to set clear rules in this regard will present itself in the near future.⁴²

NOTES

1 Van Bijsterveld (2006), 248.

2 Jonkers (2006), 473.

3 *Program van Beginselen [Program of Principles]*, article 3.

4 All parties that were founded prior to the SGP – such as the ‘Anti-Revolutionaire Partij’ (Anti-Revolutionary Party; 1879), the ‘Liberale Unie’ (Liberal Union; 1885) and the ‘Sociaal-Democratische Arbeiderspartij’ (Social-Democratic Labor Party; 1894) – have either merged, split up or disbanded.

5 Politics in The Netherlands take place within the framework of a parliamentary representative democracy with a multiparty system.

6 *Program van Beginselen [Program of Principles]*, article 7. See extensively on the attitude of the SGP vis-à-vis policies and legislation aimed to obtaining equality and nondiscrimination their own note on this issue: Mulder (1992).

- 7 From 1997 until 2006 this was literally inscribed in the statutes of the party. These stated that only men could be (regular) members; article 4 of the statutes used to read: 'Members of the party are men who subscribe to the aims of the party (...)'. Women – on the other hand – could at most be 'extraordinary members'. Article 5 used to state that 'extraordinary members of the party (...) are men and women who subscribe to the foundations and aims of the party (...)'. These specifications were only explicitly introduced in 1997 since prior to this time it was generally considered 'obvious' that female party members were not eligible for representative and administrative functions. In 2006, only months after the rulings of The Hague court, the party changed its statutes once more. Article 4 now no longer refers to 'men' but to 'persons' in general, while the 'extraordinary membership' has ceased to exist. This is widely regarded as an effort to regain state funding. However, since the party's principles and policies on the gender issue have not changed, this *pro forma* change has not – as yet – proven successful. The responsible Minister – being the Minister of internal affairs – has indicated that the funding will remain discontinued as long as the District Court's decision is not overturned.
- 8 See extensively on the Commission: Van Vleuten and Willems (1999).
- 9 CGB, 30 December 1994, nr. 1994/16 & 1994/17.
- 10 See on the (civil) Equal Treatment Act or 'Algemene Wet Gelijke Behandeling': Heringa (1994); Asscher-Vonk and Groenendijk, eds. (1999); Gerards and Heringa (2003); Holtmaat, ed. (2004).
- 11 CGB, 21 December 2001, nr. 2001/150.
- 12 The Commission did get into the question of whether the actions of the SGP are reconcilable with international law. The Commission stated that states are under the obligation to offer effective legal protection, but that this does not imply that the Commission can provide for it, since the legislator has not authorized it to do so.
- 13 The Testcase Fund ('Proefprocessenfonds') was closely allied to the (former) Clara Wichmann Institute, until the latter was forced to close down in the course of 2004 due to lack of funds (large scale government cutbacks lead to suspension of state funding). Several activities of the Institute were continued however, amongst which the Testcase Fund. The Fund has been in existence since 1983, and has always been financially independent of the subsidized Institute. It derives its means completely from donations by private citizens.
- 14 The relevant articles are 90*quater*, 137d, 137f and 429*quater* of the Dutch Criminal Code (other criminal provisions regarding discrimination do not include the ground 'sex'). This concerns a number of articles that are roughly based on the UN-Conventions on racial and sex discrimination and that have been extended in Dutch law to include the criteria 'religion and conviction' and 'hetero- or homosexual orientation'. More specifically, the articles entail a definition of (criminal) discrimination (article 90*quater*), a prohibition of incitement to discrimination and hatred (article 137d), a prohibition of collaboration with or support to

discriminating activities (art. 137f) and a prohibition of discrimination in employment (art. 429^{quater}).

- 15 On the basis of article 12 Code of Criminal Procedure. Simply put, this article implies that any citizen can lodge a complaint against the decision to forbear prosecution by the public prosecutor. If the Court considers the complaint sustained the Public Prosecutor has to bring the case before the criminal judge after all. See extensively: Van Gend and Visser (2004).
- 16 Criminal Court The Hague (chamber of council), 30 November 1995, *NJ* 1996, 324.
- 17 The aforementioned Mrs. Grabijn-Van Putten did not wish to take part in the procedure, amongst other things due to her (old) age. Moreover she had resigned her membership, which effectively diminished her (legal) interest. The Testcase Fund also spent several months conferring with a young woman with a SGP-background. After consultation with the SGP board this woman decided not to take part either.
- 18 Stolker (2005).
- 19 The nine other organizations were: the 'Nederlands Juristen Comité voor de Mensenrechten' (Netherlands Committee of Jurists for Human Rights); the 'Nederlandse Vrouwen Raad' (Netherlands Women Council); 'De Bundeling' (the Unison); the 'Vrouwen Alliantie' (Women Alliance); 'Tiye International'; the 'Nederlandse Vereniging voor Vrouwenbelangen, Vrouwenarbeid en Gelijk Staatsburgerschap' (Dutch Association for Women's Interests, Women Labor and Equal Citizenship); the 'Humanistisch Overleg Mensenrechten' (Humanist Committee on Human Rights); 'E-Quality'; the 'FNV Vrouwenbond' (FNV Women Union); and the 'Vrouwen Netwerk Nederland' (Netherlands Women Network).
- 20 District Court The Hague, 7 September 2005.
- 21 District Court The Hague, 7 September 2005.
- 22 Not all plaintiffs that were a part of the collective action were declared admissible however. The court considered inadmissible on the one hand the 'Vrouwen Alliantie' (due to it having been disbanded without a legal successor) and on the other hand 'Tiye International', 'De Bundeling', 'FNV Vrouwenbond' and the 'Nederlandse Vrouwen Raad' (in light of the fact that their statutes failed to demonstrate that they had the common interest at issue as a goal).
- 23 It is clear that the Court is referring to the potential rise of (orthodox) Islamic political parties.
- 24 In the Dutch legal system, provisions of international law that are sufficiently precise and therefore capable of imposing binding obligations can be directly invoked before the national courts by individuals, on the basis of articles 93 and 94 of the Constitution.
- 25 The court did not bother to examine the case in the light of the other provisions that were invoked by the plaintiffs. It merely stated that 'the assumption [appears to be] justified that other dispositions invoked by Clara Wichmann *et al.* are violated as well. Further elaboration of this

is not opportune however, since the mere breach of article 7 CEDAW in itself justifies the conclusion that the State is acting unlawfully vis-à-vis Clara Wichmann *et al.*'. This bold choice for considering only the relevant provisions of CEDAW is interesting, since it has often been questioned in literature whether they are capable of imposing binding obligations in terms of articles 93 and 94 of the Constitution, and can therefore be invoked by individuals. The court does afford some attention to this issue in its judgment, in paragraphs 3.14–3.17, stating simply that they create clear obligations for the state and that the implementation period for fulfilling these obligations expired at the moment of the Parliamentary approval of membership of the Netherlands to CEDAW. This point of view is disputable, but for reasons of space limits, we will not go into this issue.

- 26 The composition of the Committee is arranged in article 17 CEDAW. It concerns 23 'experts of high moral standing and competence in the field covered by the Convention'. These experts are elected by States Parties from among their nationals and serve in their personal capacity. The Committee is authorized to make 'suggestions' and 'general recommendations' based on the examination of reports and information received from the States Parties (article 21 CEDAW).
- 27 See for the general interpretation of and recommendations regarding article 7 of the Convention by the Committee: Committee on the Elimination of discrimination against Women (1997) *General Recommendation No. 23*, points 1–34 and 41–48.
- 28 Committee on the Elimination of discrimination against Women (2001) *Consideration of reports of States parties: The Netherlands*, point 34. The Committee insisted that the Dutch State take urgent measures in order to tackle this situation, amongst other things by means of the introduction of new legislation (*Ibid.*, point 35). Compare – more recently: Committee on the Elimination of discrimination against Women (2007) *Concluding comments of the Committee on the Elimination of Discrimination against Women: Netherlands*, points 25–26.
- 29 More technically the court ordered the State not to apply article 2 of the Subsidizing Act for Political Parties, the relevant part of which is the following: '1. Our Minister provides subsidy to a political party that took part in the last held elections for Chamber and Senate (...) and that has been attributed one or more seats; 2. the subsidy is granted per calendar year'.
- 30 See for example Colliver, Boyle and D'Souza eds. (1992); Gross and Kinder (1998); Howland (1999). See also the 2006 Report of the UN Special Rapporteur on freedom of religion or belief, Asma Jahangir, E/CN.4/2006/5, who specifically affords attention to the potential conflict of freedom of religion with other rights.
- 31 For as long as the principle of discrimination and other basic rights were only applied against the State, they mainly entailed that States refrain from infractions. As a consequence, conflicts between rights were relatively rare. This has changed with the introduction of

- prohibitions of discrimination vis-à-vis non-state parties however. See extensively: Brems (2005).
- 32 See e.g.: Velaers (2004), 330–331; Van der Hoeven (1983); De Lange (1994); Van Baarda (1992), 129.
- 33 Doebling (1970), 305–312.
- 34 At least as far as element (c) is concerned.
- 35 The question as to which activities of private actors should be covered by the prohibition of non-discrimination has played at all levels of non-discrimination law. On the debate in the framework of CERD, see Lerner (1980), 38 and 47–53; Lerner (2003), 53 and Van Dooren (1997), 16. Within the scope of the Council of Europe, the issue has come up at the occasion of the adoption of the twelfth Protocol to the European Convention of Human Rights on the right not to be discriminated against. According to the Explanatory Memorandum to this Protocol, ETS No. 177, paragraph 28, the prohibition of discrimination should only be applied vis-à-vis private individuals insofar as they act in the public sphere normally regulated by law. In the European Union, the question has come to the fore with the expansion of EC equality law. Recent EC equality directives, Directive 2000/43/EC on discrimination based on racial or ethnic origin and Directive 2004/113/EC on sex discrimination in the access to and supply of goods and services, have resolved the issue by covering only those goods and services which ‘available to the public’, a qualification which has been inserted out of concern for respecting the boundaries of the private sphere of individuals. More generally on this issue, see Gardner (1992), and Sommeregger (2005).
- 36 Not only is this interpretation logically problematic; one would also expect – if the presupposition of the court were indeed correct – a more extensive and intensive discussion to have taken place on this issue during the drafting process, in which not only the freedom of association would have had a place, but also the freedoms of religion, assembly and expression. Such a discussion is however tellingly lacking in the *Travaux Préparatoires* of the Convention.
- 37 One could think of the following type of phrasing: ‘state parties shall prohibit and eradicate discrimination of women by non-governmental organizations and associations concerned with the public and political life of the country’. See also Burrows who points out that comparable provisions in the International Convention on the Elimination of all forms of Racial Discrimination utilize much more stringent and unequivocal terms, and oblige States Parties to ‘eradicate’, ‘declare illegal’ and ‘prohibit’ organizations (and also organized and all other propaganda activities) which promote and incite racial discrimination, as well as render ‘participation in such organizations and activities as an offence punishable by law’ (Burrows (1985)).
- 38 See generally: Meron (1986); Verhey (1994). Specifically regarding the SGP issue, see: Kanne (2004); Flinterman (2002), 342–346; De Blois (2002), 178–179. This is also the viewpoint of the Netherlands government, which has repeatedly indicated that the convention leaves room for an assessment of the right not to be discriminated against on the

one hand, and the guarantees of other basic rights and freedoms on the other. See e.g.: Dutch Government (2005), 45–46.

- 39 Supreme Court 20 Oktober 1995, *NJ* 1996/330. The case had been brought before the Court by a woman who had not been admitted to the deacon training school of a Catholic institution, which – according to the plaintiff – constituted a violation of article 10 CEDAW. This article reads as follows: ‘States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training (...)’. The Court of Appeals in Den Bosch had judged that this provision was not the only relevant rule applicable in this case and stated: ‘Besides the articles and international provisions invoked by [the plaintiff] there is a number of provisions concerning the freedom of religion, amongst which the freedom of churches to organize themselves in the manner they see fit, and to which the Bishop has appealed.’ The Court of Appeals subsequently came to the conclusion that there was no unlawful discrimination involved. The Supreme Court confirmed this verdict: ‘The Court [of Appeals] has reasonably declined to attribute the far-reaching meaning and implications to the articles and international provisions invoked by [the plaintiff] and has judged that the freedom of religion (...) includes the right to make distinctions between men and women when it concerns religious functions and the training for these; this is not opposed to any written or unwritten rule or principle’.
- 40 Loenen (1994), 10; De Blois (2002), 178; Joseph, Schultz and Castan (2004).
- 41 One could argue that the necessarily ‘partial’ nature of the Convention is also reinforced by its essentially asymmetrical character. As opposed to the ICCPR and ICESCR – where reference is made to discrimination on the basis of sex – CEDAW distinguishes itself by focusing solely on discrimination against *women*.
- 42 The authors wish to thank Monika Ambrus and the journal’s referees for helpful comments.

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