



**D3.5. Right to housing
National report Netherlands**

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Table of Contents

Acknowledgments	<i>i</i>
Table of Contents	2
List of Abbreviations	3
List of English Translations Used	4
D3.5 The Right to Housing – National Report Netherlands	5
1. National legal framework	5
1.1. Relevant institutional and procedural aspects	5
1.2. Constitutional protection	6
1.3. General national rules	9
1.4. Special rules targeting selected groups	13
1.5. Specific rules concerning citizens of former colonies	17
1.6. Constitutional challenges	17
2. Impact of international and European law	17
2.1. Challenges to national rules based on international instruments	17
2.2. Challenges to national rules based on European (Council of Europe) instruments	19
2.3. Challenges to national rules based on EU law	21
3. Right to housing, justice as redistribution and vulnerability	22
Bibliography	25

List of Abbreviations

CESCR - Committee on Economic, Social and Cultural Rights

CJEU - Court of Justice of the European Union

CRPD - Convention on the Rights of Persons with Disabilities

ECHR - European Convention on Human Rights

ECSR - European Committee of Social Rights

ECtHR - European Court of Human Rights

ESC - European Social Charter (revised)

EU - European Union

UN - United Nations

List of English Translations Used

Act on Extraordinary Measures for Urban Problems - *Wet bijzondere maatregelen grootstedelijke problematiek*

Association of Institutional Investors in Real Estate - *Vereniging van Institutionele Beleggers in Vastgoed*
Bed, bath, bread - *bed, bad, brood*

Central Appeals Tribunal - *Centrale Raad van Beroep*

Central Body for the Reception of Asylum Seekers Act - *Wet Centrale Orgaan opvang asielzoekers*

Charter of the Kingdom of the Netherlands - *Statuut voor het Koninkrijk der Nederlanden*

Code of Civil Procedure - *Wetboek van Burgerlijke Rechtsvordering*

Code of Civil Law - *Burgerlijk Wetboek*

Constitution of the Netherlands - *Grondwet van het Koninkrijk der Nederlanden*

Council of State - *Raad van State*

Equal Treatment of Disabled and Chronically Ill People Act - *Algemene wet gelijke behandeling handicap of chronische ziekte*

Extraordinary municipalities - *bijzondere gemeenten*

Freedom-limited location - *vrijheidsbeperkende locatie*

General Act on Entry into Dwellings - *Algemene wet op het binnentreden*

Housing Act - *Huisvestingswet*

Housing Supplement Act - *Wet op de huurtoeslag*

Linking Act - *Koppelingswet*

Netherlands Institute for Human Rights - *College voor de Rechten van de Mens*

Social Support Act - *Wet maatschappelijke ondersteuning*

Supreme Court - *Hoge Raad*

Trade and Industry Appeals Tribunal - *College van Beroep voor het bedrijfsleven*

Zones of potential - *kansenzones*

D3.5 The Right to Housing – National Report Netherlands

1. National legal framework

1.1. Relevant institutional and procedural aspects

The Kingdom of the Netherlands is a constitutional monarchy, comprised of four separate countries: the Netherlands, Aruba, Curaçao and Sint Maarten. Within the country of the Netherlands, there are three extraordinary municipalities (*bijzondere gemeenten*), which are the three overseas territories of Bonaire, Sint Eustatius and Saba. These overseas territories do not form part of any province of the Netherlands and are not part of Schengen. Dutch nationality is granted to those living in the Netherlands, Aruba, Curaçao and Sint Maarten according to the same rules. The relationship between the different countries in the Kingdom are regulated in the Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*) This report will focus mainly on the European territory of the country of the Netherlands.

The country of the Netherlands' Constitution stipulates that provisions of treaties by international institutions which may be binding on all persons become part of the law of the Netherlands after ratification by Parliament and upon publication.¹ Further transposing of the laws into legislation is not necessary. The Constitution holds that statutory law that conflicts with provisions of treaties by international institutions that are binding on all persons shall not be applicable.² In practice, this means that the judiciary may invalidate statutory law if this law is found incompatible with a provision of international law which may be binding on all persons. Interestingly, the judiciary of the Netherlands is *not* competent to review the conformity of Acts of Parliament with the Constitution of the Netherlands, nor is the judiciary competent to review the conformity of international treaties with the Constitution of the Netherlands.³ Thus, while the judge may use international law to invalidate Acts of Parliament, the judge may not engage in constitutional review of such Acts of Parliament. Nor may the judge engage of

¹ The Constitution of the Netherlands, Article 93.

² The Constitution of the Netherlands, Article 94.

³ The Constitution of the Netherlands, Article 120.

constitutional review of international treaties. Article 91(3) of the Constitution of the Netherlands grants Parliament the power to ratify treaties that conflict with the Constitution, provided at least two-thirds of the votes cast in Parliament are in favor.

The judiciary of the country of the Netherlands is comprised of four highest courts: the Supreme Court (*Hoge Raad*), the Council of State (*Raad van State*), the Central Appeals Tribunal (*Centrale Raad van Beroep*) and the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*). The Supreme Court deals with all matters related to civil, criminal and tax law. The other three courts deal with administrative law issues. All four courts issue binding decisions.

1.2. Constitutional protection

The Constitution of the Netherlands deals with housing in paragraph 2 of Article 22.⁴ Paragraph 2 reads as follows:

Article 22

2. It shall be the concern of the authorities to promote sufficient living accommodation.⁵

⁴ Paragraph 1 of Article 22 concerns the government's duty to promote the health of the population. Paragraph 3 of Article 22 tasks the government with promoting social and cultural development and leisure activities. Since these parts of Article 22 of the Constitution of the Netherlands are not relevant to the right to housing, this report will focus only on paragraph 2 of Article 22.

⁵ The official translation provided by the Government of the Netherlands translates this provision in a way that is not quite accurate in my perception. The official translation reads: 'It shall be the concern of the authorities to *provide* sufficient living accommodation' (emphasis added), see The Constitution of the Kingdom of the Netherlands, published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs <<https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>> accessed on 28 November 2018.

This article was added to the Constitution of the Netherlands by constitutional amendment in 1983. It is commonly accepted that the phrasing of this Constitutional provision indicates a duty of care for the government and a large amount of discretion in how to affect this duty, via long term policy making and while taking into account political considerations. What exactly this duty entails was clarified by the government in the explanatory memorandum submitted to parliament in 1979, in which the government specified that ‘sufficient living accommodation not only refers to a sufficient number of houses but also to the volume, quality, safety, health, etc. of the houses.’⁶ There is thus ‘both a qualitative and quantitative obligation.’⁷ The government clarified further: ‘The promotion of sufficient living accommodation means, in our opinion, that as a matter of policy it is only in emergencies that a situation of insufficient number of housing units may exist.’⁸ According to F.M.C. Vlemminx, the government’s explanation supports a reading of this constitutional provision also entailing some sort of obligation to ensure, in addition to the less specific obligation to promote.⁹ According to Van der Pot, the constitutional right also entails a right to sufficient affordable housing.¹⁰

Upon adoption of the constitutional amendment, the government explicitly defended its choice for a rather open and general description of the social rights in the Constitution, compared to the more specific descriptions provided by the European Social Charter and the International Covenant on Economic, Social and Cultural Rights. The government stated that whereas for the international provisions the point of departure was to describe the member states’ obligations as precisely as possible, the national

⁶ Kamerstukken II, 1975/1976, 13 873, number 3, p. 14.

⁷ Kamerstukken II, 1976/1977, 13 873, number 7, p. 24.

⁸ Kamerstukken II, 1976/1977, 13 873, number 7, p. 24.

⁹ F.M.C. Vlemminx, ‘Commentaar op artikel 22 van de Grondwet,’ in E.M.H. Hirsch Ballin and G. Leenknecht (eds), *Artikelgewijs commentaar op de Grondwet* (Web-edition 2018)

<<https://www.nederlandrechtsstaat.nl/module/nlrs/script/viewer.asp?soort=commentaar&artikel=22#>>
accessed on 28 November 2018.

¹⁰ Van der Pot, *Handboek van het Nederlandse staatsrecht* (Deventer, Kluwer 2006) p. 461.

government can entrust the further elaboration of social rights to the legislative and executive authorities.¹¹

In 2018, the Netherlands Institute for Human Rights saw Article 22 of the Constitution of the Netherlands (together with international law norms) leading to a duty for the government to ensure sufficient, affordable, qualitatively good and appropriate housing. This duty includes a special duty for attention to specific vulnerable groups. It is unclear, however, to what extent the Netherlands Institute for Human Rights sees these duties as following from the constitutional provision on housing versus international law norms.¹²

In addition to the specific provision on housing in Article 22 of the Constitution of the Netherlands, Article 12 of the Constitution of the Netherlands provides for security of the home:

Article 12

1. Entry into a home against the will of the occupant shall be permitted only in the cases laid down by or pursuant to Act of Parliament, by those designated for the purpose by or pursuant to Act of Parliament.
2. Prior identification and notice of purpose shall be required in order to enter a home under the preceding paragraph, subject to the exceptions prescribed by Act of Parliament.
3. A written report of the entry shall be issued to the occupant as soon as possible. If the entry was made in the interests of state security or criminal proceedings, the issue of the report may be postponed under rules to be laid down by Act of Parliament. A report need not be issued in cases, to be determined by Act of Parliament, where such issue would never be in the interests of state security.¹³

¹¹ Kamerstukken II, 1975/1976, 13 873, number 3, p. 2.

¹² Letter from the Netherlands Institute for Human Rights to the Second Chamber, 31 May 2018, number 2018/0089/AvD/LvdH/LR, p. 2 <<https://publicaties.mensenrechten.nl/file/5f9d9363-087f-499d-b629-0ea766f012e3.pdf>> accessed 29 November 2018.

¹³ The Constitution of the Kingdom of the Netherlands, published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the

Article 12 of the Constitution of the Netherlands thus protects individuals against interference by the government in the private sphere of their home. The government may only enter an individual's house without the individual's permission if this is authorized by law. A 'house' is considered to be a space that is equipped as and intended to be the exclusive residence for one person or for a limited number of persons living in a joint household.¹⁴ The lawfulness of the residence is irrelevant for the application of this constitutional right.¹⁵ Article 12 of the Constitution of the Netherlands further provides a number of formal requirements that must be followed upon entry of a house without the inhabitant's permission, such as prior notice and the issuing of a report after the entry. These requirements may be derogated from in the instances permitted by law.

Concretely, Article 12 means that eviction of a person from their residence may only take place based on the criteria set out by law. In the next section (section 1.3), I will set out the laws that regulate eviction.

1.3. General national rules

There are a number of general national laws that regulate the distribution of housing in the Netherlands. The reader will note that, in the description of these laws that follows, the municipality and province play important roles in the distribution of available housing and the making of spatial planning policy.¹⁶ Part A of this section will shortly describe the three most important laws in the area of housing distribution: The Housing Act (*Huisvestingswet*), the Act on Extraordinary Measures for Urban Problems (*Wet bijzondere*

Ministry of Foreign Affairs

<<https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>> accessed on 28 November 2018.

¹⁴ Kamerstukken II, 1984/85, 19 073, number 3, p. 20.

¹⁵ S.S. Buisman & S.B.G. Kierkels, 'Commentaar op artikel 12 van de Grondwet' in E.M.H. Hirsch Ballin en G. Leenknecht (eds), *Artikelsgewijs commentaar op de Grondwet* (webeditie 2018) <<https://www.nederlandrechtsstaat.nl/module/nlrs/script/viewer.asp?soort=commentaar&artikel=12#>> accessed on 1 December 2018.

¹⁶ [No author], 'Opkomen voor woonbelangen: Voor mensen met een beperking, chronische ziekte en psychische aandoening,' *Ieder(in)*, MIND Landelijk Platform Psychische Gezondheid and the Patiëntenfederatie Nederland (2016, reprinted in 2017) p. 11 <

https://iederin.nl/downloads/dl.php?l=1275_Handreiking_Wonen_herdruk_2017.pdf> accessed on 28 November 2018.

maatregelen grootstedelijke problematiek), and the Housing Supplement Act (*Wet op de huurtoeslag*). Part B will focus on the legal rules regarding eviction.

A. *Distribution of Housing*

The Housing Act regulates the distribution of housing by giving municipalities the possibility to issue a housing regulation, in which rules are set out for how social housing is distributed to those searching for housing within the municipality. People who are searching for social housing in that municipality are only eligible for that housing if they request and are granted a housing permit from the municipality. The eligibility for a housing permit is usually based on whether someone has social or economic ties to the municipality. Municipalities may only issue such a regulation if affordable housing is scarce. There is one exception to this general rule: even when affordable housing is not scarce, municipalities may set out rules for the distribution of social housing to those in urgent need of housing. The municipality may decide who can qualify as in urgent need, but shall in any case include those who reside in temporary shelters for those who left their homes due to intimate relationship problems or because of violence and those who receive or give informal care from/to family members, friends or neighbours.¹⁷ If the municipality decides to make rules for the provision of housing for those in urgent need, the municipality must also stipulate how it provides housing for refugees.¹⁸

The Act on Extraordinary Measures for Urban Problems authorizes municipalities with serious urban problems to take extra measures to distribute housing in a way that addresses these problems. The municipality may decide to designate certain areas of the city as 'zones of potential' (*kansenzones*)

¹⁷ See [No author], 'Opkomen voor woonbelangen: Voor mensen met een beperking, chronische ziekte en psychische aandoening,' Ieder(in), MIND Landelijk Platform Psychische Gezondheid and the Patientenfederatie Nederland (2016, reprinted in 2017) p. 10 <https://iederin.nl/downloads/dl.php?l=1275_Handreiking_Wonen_herdruk_2017.pdf> accessed on 28 November 2018 and the Housing Act (*Huisvestingswet*), Articles 2(2), 12 and 13.

¹⁸ Housing Act (*Huisvestingswet*), Article 12(4).

based on the poor socio-economic quality of the area.¹⁹ In these areas, the municipality may then decide to only issue a housing permit to individuals with employment (or another type of steady income), or without a criminal record.²⁰ Together, the Act on Extraordinary Measures for Urban Problems and the Housing Act exhaustively regulate the distribution of housing by the municipality.

The Housing Supplement Act regulates the financial support that the government provides to renters whose income is below a certain level and whose rent is below a limit set out by law. This law includes special provisions for people with a disability. For these people, the rent limit is higher.²¹ Moreover, if a person with a disability lives in a house that has had special accommodations made for his/her disability, the government can decide to provide more financial support than would be allowed otherwise.²²

B. Rules on Eviction

The General Act on Entry into Dwellings (*Algemene wet op het binnentreden*) sets out the criteria under which a public official may enter a residence without the inhabitant's permission. This Act sets out the general rule that entry into a residence without the inhabitant's permission is only allowed if the public official who enters the residence has a written authorization issued by the public prosecutor or (unless the law determines otherwise) the mayor of the municipality in which the residence is located.²³ Additionally, the law sets out a number of public officials whom the law can determine are exempted

¹⁹ The Act on Extraordinary Measures for Urban Problems (*Wet bijzondere maatregelen grootstedelijke problematiek*), Article 3.

²⁰ The Act on Extraordinary Measures for Urban Problems (*Wet bijzondere maatregelen grootstedelijke problematiek*), Articles 5, 8 and 9.

²¹ Housing Supplement Act (*Wet op de huurtoeslag*), Articles 13(1)(a)(2) and 13(2)(a).

²² Housing Supplement Act (*Wet op de huurtoeslag*), Article 21(1)(c)(3).

²³ General Act on Entry into Dwellings (*Algemene wet op het binnentreden*), Article 2(1) and Article 3.

from the requirement of a written authorization: judges, judicial bodies, members of the public prosecutor's office, mayors, court bailiffs and tax bailiffs.²⁴

Court bailiffs are tasked with eviction and the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) determines when court bailiffs may enter a residence without the inhabitant's permission to evict the resident. A court bailiff may only do so after a judicial decision to evict has been issued and after the resident has been informed of this decision by the bailiff. The resident then has three days to voluntarily comply with the decision.²⁵ If the resident does not voluntarily comply, the bailiff may enter the house to evict the resident.²⁶ The law does not permit the owner of a building to evict the resident, even if the resident is unlawfully resident. The owner must first receive a judicial decision to evict and is subsequently obliged to effectuate the eviction via the bailiff.²⁷

A judicial order to evict a resident shall only be granted if the judge finds on the of the grounds set out in the Code of Civil Law applicable. One such ground is that the renter did not act as a good renter should (for example by not paying rent or by causing nuisance).²⁸ According to *Stichting Eropaf!*, a Dutch foundation that strives for innovation in social work, 80% of the evictions in the Netherlands are issued on grounds that the renter had not met their obligations to pay rent.²⁹

²⁴ General Act on Entry into Dwellings (*Algemene wet op het binnentreden*), Article 2(1).

²⁵ Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), Article 2:555.

²⁶ Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), Article 2:556 and Article 2:557 (in combination with Article 2:444).

²⁷ Code of Civil Law (*Burgerlijk Wetboek*), Article 7:272(2); see also District Court of Maastricht (*Rechtbank Maastricht*), 6 October 2009, number ECLI:NL:RBMAA:2009:BJ9693.

²⁸ Code of Civil Law (*Burgerlijk Wetboek*), Article 7:274(a).

²⁹ Stichting Eropaf!, 'Handreiking: Voorkomen huisuitzettingen 2018', p. 8 < https://eropaf.nl/wp-content/uploads/2018/07/Eropaf-Handreiking-2018_online.pdf> accessed on 1 December 2018.

1.4. Special rules targeting selected groups

This section addresses four laws that specifically affect refugees (including undocumented persons) and persons with a disability: the Social Support Act (*Wet maatschappelijke ondersteuning*), The Central Body for the Reception of Asylum Seekers Act (*Wet Centrale Orgaan opvang asielzoekers*), the Equal Treatment of Disabled and Chronically Ill People Act (*Algemene wet gelijke behandeling handicap of chronische ziekte*), and the Linking Act (*Koppelingswet*).

A. Social Support Act

While the Social Support Act does not deal with housing in general, it does set out some rules that pertain to certain vulnerable groups. This law regulates the provision of care by the municipality to those individuals who need it, with the aim of allowing these people to live at home as long as possible. The preamble to the Act states, among others, that ‘the support of the self-sufficiency and the participation of persons with a disability, chronic psychological or psycho-social problems must be aimed at allowing individuals to stay in their own living environment as long as possible.’³⁰ The preamble also calls attention to the ‘desirability of care being taken to ensure the accessibility of facilities, services and spaces for people with a disability.’³¹

Article 1.2.2 of the Social Support Act holds that only those foreigners who have a legal right of residence in the Netherlands may be eligible for support under this act. This is a result of the so-called Linking Act that excluded all non-lawfully resident foreigners from access to social support of any kind (see part 1.4.D for more on the Linking Act). Paragraph 3 of Article 1.2.2 of the Social Support Act gives the national government the possibility to deviate from this general rule. As far as I can see, the government has not made use of this possibility with regard to access to shelter.

³⁰ Social Support Act (*Wet maatschappelijke ondersteuning*), Preamble.

³¹ Social Support Act (*Wet maatschappelijke ondersteuning*), Preamble.

Specific to the right to housing, the Social Support Act determines that everyone (lawfully) resident in the Netherlands has the right to protected living and temporary shelter, under the conditions set out by this law.³² Protected living is meant for individuals with psychological or psychosocial problems that prevent them from being able to live independently (even with assistance from others). Temporary shelter is available for individuals who have left their homes and who are not able to independently (even with assistance from others) maintain themselves. Moreover, this Act sets out the rules for when a municipality must facilitate adjustments to the house of a person with a disability.³³

Article 2.1.2 of the Social Support Act mandates the municipality periodically establish a plan for the policy with regard to social support. The plan must detail policy proposals that work toward a number of different social aims, including the implementation of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD or Disabilities Convention).³⁴

B. The Central Body for the Reception of Asylum Seekers Act

The Central Body for the Reception of Asylum Seekers Act called into being the Central Body, a governmental body that was tasked with the reception of asylum seekers and the provision of material and immaterial care for these people.³⁵ The Act explicitly tasks the Central Body with the provision of shelter for asylum seekers.³⁶ While an individual is in the process of seeking asylum, s/he will thus receive shelter from the Central Body. Once an individual's asylum claim has been denied, and after s/he has exhausted legal remedies to appeal this decision, the individual is given a term within which s/he must

³² Social Support Act (*Wet maatschappelijke ondersteuning*), Article 1.2.1(b) and (c).

³³ Social Support Act (*Wet maatschappelijke ondersteuning*), Articles 2.3.6 and 2.3.7.

³⁴ Social Support Act (*Wet maatschappelijke ondersteuning*), Article 2.1.2(2)(h).

³⁵ See preamble to The Central Body for the Reception of Asylum Seekers Act (*Wet Centrale Orgaan opvang asielzoekers*).

³⁶ The Central Body for the Reception of Asylum Seekers Act (*Wet Centrale Orgaan opvang asielzoekers*), Article 3(1).

leave the country. During this time, the individual may still receive shelter from the Central Body.³⁷ What happens after this time has passed, depends on a number of different factors. If the individual is willing to assist the authorities to facilitate her/his deportation to her/his country of origin, the individual will be taken to a shelter that is under the control of the Minister of Security and Justice. This shelter places limits upon the individual's freedom of movement and is called a 'freedom-limited location' (*vrijheidsbeperkende locatie*). However, if this individual who is willing to assist the authorities facilitate her/his deportation has minor children, the individual together with her/his partner and children are allowed to stay in a 'family location', where the family may remain housed together.³⁸ This family location is under the authority of the Central Body for the Reception of Asylum Seekers, although it is a different type of location than that which is used for asylum seekers. The families resident in the family location have fewer rights and privileges than asylum seekers. Finally, if the individual refuses to assist the authorities in facilitating her/his deportation, there is no other right of shelter or housing provided by Dutch national law.

C. Equal Treatment of Disabled and Chronically Ill People Act

The Equal Treatment of Disabled and Chronically Ill People Act was passed in 2003 as the Dutch implementation of the European Union (EU) Directive on Equal Treatment in Employment and Occupation.³⁹ Whereas the Act initially only prohibited discrimination based on disability or chronic illness in situations related to labour and vocational training, it has been since extended to also apply to housing, education and public transport. Since the Dutch ratification of the UN Disabilities Treaty, the Equal

³⁷ See 'Terugkeerbeleid,' at Rijksoverheid website <<https://www.rijksoverheid.nl/onderwerpen/terugkeer-vreemdelingen/terugkeerbeleid>> accessed on 28 November 2018.

³⁸ Foreigners Act (*Vreemdelingenwet 2000*), Article 56.

³⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Treatment of Disabled and Chronically Ill People Act has been amended to apply to all situations where goods and services are offered.

Paragraph 6a of this law prohibits discrimination based on chronic illness or handicap with regard to housing. Discrimination is prohibited specifically with regard to the offering of housing, the making of a rental contract or contract of sale for a residence, offering services with regard to the negotiation of a rental contract or contract of sale for a residence, the bylaws for the residents of a housing unit, and the registration of oneself as a house seeker.⁴⁰

The Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) is tasked with the responsibility of deciding on cases brought by individuals who believe their rights under the Equal Treatment of Disabled and Chronically Ill People Act have been violated.

D. The Linking Act

In 1998, the Dutch government adopted the so-called Linking Act, which amended a number of laws so as to make access to social services conditional upon the possession of a legal residence status. By linking residency status to access to social services, the Linking Act aimed to discourage undocumented persons from remaining in the Netherlands, by making it impossible for them to gain access to social services such as permits, non-urgently necessary medical care and welfare. Specific to the issue of housing, the Linking Act prohibited municipalities that use a system of housing permits to distribute scarce housing from issuing such a housing permit to undocumented persons. Undocumented persons are also excluded from eligibility for housing subsidies.

⁴⁰ Equal Treatment of Disabled and Chronically Ill People Act (*Algemene wet gelijke behandeling handicap of chronische ziekte*), Article 6b.

1.5. Specific rules concerning citizens of former colonies

This study has not found any specific rules concerning citizens of former colonies in regard to the right to housing.

1.6. Constitutional challenges

As mentioned above (under 1. National Framework), the Dutch judiciary is not competent to review Acts of Parliament against the Constitution. A survey of the two cases in which Article 22(2) of the Constitution of the Netherlands was used to challenge administrative decisions or executive actions showed that there were no significant cases relevant to the vulnerable groups studied here.⁴¹ There is a complex history of cases dealing with the eviction of squatters in the Netherlands.⁴² However, since this case law is not particular to the vulnerable groups dealt with in this report, it will not be detailed here.

2. Impact of international and European law

2.1. Challenges to national rules based on international instruments

The national law and policy of excluding undocumented persons from access to basic social needs (including emergency shelter) has been challenged on various occasions based on international and European instruments.⁴³ This issue is referred to in Dutch discussions as ‘bed, bath, bread’ (*bed, bad, brood*), in reference to the minimum needs the undocumented persons are claiming a right to. In this

⁴¹ This search was conducted at <uitspraken.rechtspraak.nl> on 29 November 2018 with the search term ‘artikel 22 Grondwet’ (‘Article 22 Constitution’). This search yielded four cases. Only two of these four dealt with Article 22(2).

⁴² See for example Supreme Court (*Hoge Raad*), 9 October 2009, number ECLI:NL:HR:2009:BJ1254 and Kamerstukken II 2008/09, 31 560, number 11.

⁴³ For a thorough overview of the case law on this issue, both at an international and national level, see Anna Stupers, Anna Tsheichvili & Bas Wallage, ‘Bed, bad en brood: Rijk en gemeente op weg naar een sluitend opvangbeleid’ [2017] *NTM/NJCM-Bull.* 504.

section, I will give a brief overview of the developments on this issue in relation to international law. In section 2.2 I will focus on the developments in relation to the legal instruments of the Council of Europe. In 2010 and 2017 the Committee on Economic, Social and Cultural Rights (CESCR) criticized the Netherlands' policy of not (or only conditionally) providing shelter to irregular migrants.⁴⁴ In 2017 the Committee expressed its concern

'that restrictive provisions in, inter alia, the [Linking Act], which links access to housing, education and welfare benefits to a legal residency status, have contributed to a precarious situation for undocumented migrants and rejected asylum-seekers in the State party. The Committee is further concerned that access to food, water and housing are not guaranteed under this Act. The Committee further notes with concern that the Government has made access to housing for undocumented migrants conditional upon a "demonstrated willingness to return to the country of origin" and that it has threatened to sanction municipalities that continue to provide shelter to undocumented migrants [...].'⁴⁵

The Committee continued by reminding the Netherlands

'of its obligation to ensure that all persons in its jurisdiction enjoy the minimum essential levels of each of the rights in the Covenant, including the rights to food, housing, health, water and sanitation. The Committee urges the State party to [...] refrain from making access to food, water and to housing conditional on an individual's willingness to return to his or her country of origin [...].'⁴⁶

In 2016 the UN Special Rapporteurs on extreme poverty and human rights, adequate housing, and the human rights of migrants addressed a highly-detailed 18 page letter to the State of the Netherlands regarding the State's failure to provide emergency assistance (including shelter) to undocumented homeless persons. The UN Special Rapporteurs had already written a similar letter in 2015 and in their

⁴⁴ CESCR, *Concluding Observations*, E/C.12/NLD/CO/4-5, 19 November 2010, §25 and CESCR, *Concluding Observations*, E/C.12/NLD/CO/6, 23 June 2017, §38-39.

⁴⁵ CESCR, *Concluding Observations*, E/C.12/NLD/CO/6, 23 June 2017, §38.

⁴⁶ CESCR, *Concluding Observations*, E/C.12/NLD/CO/6, 23 June 2017, §39.

2016 letter they ‘strongly urge[d]’ the Netherlands ‘to provide emergency assistance to homeless migrants in an irregular situation.’⁴⁷ The measures taken since the 2015 letter do not, in the Special Rapporteurs’ analysis ‘change the fact that the Netherlands is confronted with thousands of adult irregular migrants in need of housing who are not eligible for such housing based on current government policies.’⁴⁸

2.2. Challenges to national rules based on European (Council of Europe) instruments

On 10 November 2014, the European Committee for Social Rights (ECSR) published its ruling on a complaint brought by the Conference of European Churches regarding the Dutch policy of excluding undocumented persons from unconditional access to, among others, emergency shelter.⁴⁹ In its ruling, the ECSR held that even though Article 31(2) of the European Social Charter (revised) (ESC) (the right to housing) in principle only applies to those individuals lawfully resident in the territory, there is nevertheless a minimum of basic needs that the State has an obligation to provide to every human being, regardless of status.⁵⁰ The ECSR thus found a violation of Article 31(2) ESC, stating:

‘In light of the Committee’s established case-law, shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-

⁴⁷ Letter from the UN Special Rapporteurs on extreme poverty and human rights, adequate housing, and the human rights of migrants, reference OL NLD 1/2016, 25 February 2016, p. 18.

⁴⁸ Letter from the UN Special Rapporteurs on extreme poverty and human rights, adequate housing, and the human rights of migrants, reference OL NLD 1/2016, 25 February 2016, p. 17.

⁴⁹ ECSR, *Conference of European Churches v the Netherlands*, 1 July 2014 (adopted), 10 November 2014 (published), number 90/2013. On the same day, the ECSR published its decision in a similar case which also found a violation of Article 31(2) ESC due to lack of provision of unconditional emergency shelter to irregular migrants, see ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v The Netherlands*, 2 July 2014 (adopted), 10 November 2014 (published), number 86/2012, §105-129.

⁵⁰ ECSR, *Conference of European Churches v the Netherlands*, 1 July 2014 (adopted), 10 November 2014 (published), number 90/2013, § 122 and 141-145.

term accommodation in a more permanent housing be offered to them. The Committee [...] reiterates that the right to shelter is closely connected to the human dignity of every person regardless of their residence status.⁵¹

Previous to this seminal case, the ECSR had ruled on one other cases regarding the Dutch policy of denying shelter to undocumented persons. In 2009 the ECSR ruled on a case regarding the right of undocumented children to temporary shelter under Article 31(2) ESC and found the government of the Netherlands in violation of this Article because of its refusal to provide such shelter.⁵²

In 2016 the European Court of Human Rights (ECtHR) also ruled on a case that dealt with access to emergency shelter for irregular migrants. In this case, *Hunde v. the Netherlands*, the question at issue was whether the Netherlands' refusal to provide unconditional emergency shelter to this group of individuals violated Article 3 of the European Convention on Human Rights (ECHR). The ECtHR ruled that in principle the Dutch government's policy of only providing shelter to undocumented persons if they agree to assist in their deportation does not violate Article 3 ECHR. Interestingly, the Court did seem to give significant weight to the presence of other available procedures and facilities that prevent a situation of inhumane treatment:

'[...] to the extent that Article 3 requires States to take action in situations of the most extreme poverty – also when it concerns irregular migrants – the Court notes that the Netherlands authorities have already addressed this in practical terms. In the first place, the applicant had the possibility of applying for a 'no-fault residence permit' and/or to seek admission to a centre where his liberty would be restricted. It is furthermore possible for irregular migrants to seek a deferral of removal for medical reasons and to receive free medical treatment in case of emergency [...]. In addition, the Netherlands have most recently set up a

⁵¹ ECSR, *Conference of European Churches v the Netherlands*, 1 July 2014 (adopted), 10 November 2014 (published), number 90/2013, § 144.

⁵² ECSR, *Defence for Children International v The Netherlands*, 20 October 2009 (adopted), 28 February 2010 (published), number 47/2008.

special scheme providing basic needs for irregular migrants living in their territory in an irregular manner [...] In these circumstances it cannot be said that the Netherlands authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent.⁵³

The Court's explicit reference to the 'special scheme' of *bed, bad brood* (also referred to in para. 5 of the ruling) shows the importance of measures being present to alleviate the most extreme poverty.

After these decisions from the ECSR and the ECtHR, the Dutch courts issued a number of rulings regarding the implications of these decisions for governmental policy. Initially, district courts and the Central Appeals Tribunal held that the ruling by the ECSR meant that municipalities were obliged to offer shelter under the Social Support Act.⁵⁴ However, in 2015, the highest administrative courts adjusted their approach. The Council of State and the Central Appeals Tribunal issued three coordinated decisions on the matter in which they held the national arrangement to be sufficient under Articles 3 and 8 of the ECHR.⁵⁵ According to the Council of State, the fact that the accessibility of shelter in a freedom-limited location is conditional upon willingness to assist in one's deportation, does not mean that there is no sufficient shelter available.⁵⁶

2.3. Challenges to national rules based on EU law

Over the past decade-and-a-half, there has been much discussion (and litigation) about the Dutch system of social housing in relation to EU rules on state aid. In 2005, the EU Commission issued a letter to the Netherlands that set out the conditions under which state aid may be given to housing corporations.

⁵³ *Hunde v the Netherlands* App no 17931/16 (ECtHR, 28 July 2016) §59.

⁵⁴ Central Appeals Tribunal (*Centrale Raad van Beroep*), 17 December 2014, number ECLI:NL:CRVB:2014:4178, and, among others, District Court of Amsterdam (*Rechtbank Amsterdam*), 8 May 2015, number ECLI:NL:RBAMS:2015:2651.

⁵⁵ Council of State (*Raad van State*), 26 November 2015, number ECLI:NL:RVS:2015:3415; Central Appeals Tribunal (*Centrale Raad van Beroep*), 26 November 2015, number ECLI:NL:CRVB:2015:3803 and ECLI:NL:CRVB:2015:3834.

⁵⁶ Council of State (*Raad van State*), 26 November 2015, number ECLI:NL:RVS:2015:3415, §3.5.

Housing corporations are Dutch foundations or associations that build, rent and take care of affordable housing. In the Commission's view, state aid to housing corporations is allowed only if

'the social housing would be provided to a clearly defined target group of disadvantaged citizens or socially less advantaged groups. Any commercial activities by the [housing corporations] should be carried out on market terms and should not benefit from State aid. Finally, the offer of social housing should be adapted to the demand from disadvantaged citizens or socially less advantaged groups.'⁵⁷

After this 2005 letter from the Commission, the Netherlands entered into negotiations with the Commission on how to comply with these criteria. In 2009, the Commission accepted the proposed revisions to Dutch law and policy made by the Netherlands.⁵⁸ The Commission's 2009 decision led to much subsequent litigation before the Court of Justice of the European Union (CJEU) from Dutch housing corporations against the Commission (with interventions in support of the Commission from the Association of Institutional Investors in Real Estate, *Vereniging van Institutionele Beleggers in Vastgoed*).⁵⁹

3. Right to housing, justice as redistribution and vulnerability

A discourse connecting housing rights to (re)distribution is explicitly present in many of the sources studied for this report. Below I will set out a number of instances where this connection has been made.

The preamble to the Housing Act states that 'it is desirable to set new rules with regard to the distribution of housing and the composition of the supply of housing.' The preamble to the Housing Supplement Act

⁵⁷ See European Commission, 'State aid No. E 2/2005 and N 642/2009 – The Netherlands: Existing and special project aid to housing corporations,' 15 December 2009, C (2009) 0065, p. 8-9, referencing the Commission's Article 17 letter of 14 July 2005.

⁵⁸ European Commission, 'State aid No. E 2/2005 and N 642/2009 – The Netherlands: Existing and special project aid to housing corporations,' 15 December 2009, C (2009) 0065.

⁵⁹ CJEU, Case T-202/10 *Stichting Woonlinie and Others v Commission* [2011] not published, EU:T:2011:765. For the most recent judgment, see CJEU, Case T-202/10 RENV II and T-203/10 RENV II *Stichting Woonlinie and Others v Commission* [2018] ECLI:EU:T:2018:795.

lists as an aim of the Act ‘the reduction of the rental costs of households with lower incomes.’ Moreover, in the preparatory documents to the Linking Act, the government explicitly stated that the Housing Act aims at ‘promoting a fair and just division of scarce living space.’⁶⁰ The subsequent justification given for excluding undocumented persons from access to housing permits is because that undocumented individual’s ‘interest in having the possibility to move to a house for which a permit is needed does not outweigh the interest of an effective allocation of such scarce (affordable) houses for distribution.’⁶¹ The government further stated that ‘the first principle is that scarcity of appropriate housing [...] is the only justification for a limitation upon the right of free establishment by way of government involvement in distribution of housing.’⁶² Interestingly, this notion of justice is not noted in the judicial decisions from Dutch courts discussed above.

With respect to people with disabilities as a vulnerable group, a different discourse can be identified. Here, the measures taken to increase their access to housing (and other services) are framed in terms of facilitating personal responsibility, self-reliance and participation. For example, the preamble to the Social Support Act reads

‘Considering that citizens have a personal responsibility for the way in which they live their lives and participate in social life, ... that citizens who themselves or together with those in their community are insufficiently self-sufficient or are insufficiently able to participate must be able to appeal to government-organized support; the support provided to promote self-sufficiency and participation of people with a handicap, chronic psychological or psychosocial problems must be aimed at allowing citizens to remain in their own living environment as long as possible.’⁶³

⁶⁰ Kamerstukken II, 1994/1995, 24 233, number 3, p. 38.

⁶¹ Kamerstukken II, 1994/1995, 24 233, number 6, p. 66.

⁶² Kamerstukken II, 1994/1995, 24 233, number 6, p. 67.

⁶³ Social Support Act (*Wet maatschappelijke ondersteuning*), Preamble.

Vulnerability and the need for government to provide specific support to vulnerable individuals in the area of housing is recognized by the provision of the Housing Act which allows municipalities to provide special treatment to specific groups of vulnerable persons. This special treatment entails treating their housing needs with more urgency than other groups.⁶⁴ The importance of social housing focusing on 'socially less advantaged groups' (which one could assume are vulnerable) was also emphasized by the EU Commission (see section 2.3 above).⁶⁵

⁶⁴ See description of the Housing Act above in part 1.3.A.

⁶⁵ See European Commission, 'State aid No. E 2/2005 and N 642/2009 – The Netherlands: Existing and special project aid to housing corporations,' 15 December 2009, C (2009) 0065, p. 8-9, referencing the Commission's Article 17 letter of 14 July 2005.

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