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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Questionnaire for the preparation of the CCJE Opinion No. 20 (2017):

“The role of courts with respect to uniform application of the law”

Answers from the Netherlands

Please in your answers do not send extracts of your legislation but describe the situation in brief and concise manner.

Comments on what is also happening in practice, and not only on point of law, will be much appreciated.

Introduction

The first section deals with the concept of the uniform application of the law in the way, in which it possibly exists, is understood and is operated in different member states of the Council of Europe.

The second section proceeds to discuss the role of the legislative and executive powers in ensuring the uniform application of the law through adoption of consistent legislation and executive acts.

The third section highlights the role of courts in ensuring the uniform application of the law through consistent court case law. **This section, due to the mandate of the CCJE, is the key section of the Opinion.**

The Bureau and the Secretariat of the CCJE would like to strongly thank you for your cooperation and contributions.

1. Concept of the uniform application of the law

- 1.1 Is there in your country a concept of the uniform application of the law? Is it formal, established at the level of the Constitution and/or legislation, or rather informal, discussed and set at various levels and applied in practice through common understanding? Is it a combination of both approaches, to various extents?

From a constitutional point of view, the hierarchy of the laws laid down in the Dutch Constitution – vide answer 2.2 – like in most other Western democracies, presupposes the concept of uniform application of the law. The concept of the uniform application of the law is relevant to all three powers of state: the legislature, the executive and the judiciary. In this respect too, the three powers of state are interconnected and interdependent. The basic and underlying principle is that the rule of law should guarantee legal certainty to citizens. To that end all three state powers have an obligation to foster coherent legal rules and coherent application of these rules.

With regard to the role of the courts, several remarks can be made. In the first place, the systems of appeal and cassation have the function to guarantee the uniform interpretation and application of the law. Although, in the Netherlands, there is no formal binding effect of case law, more in particular of the highest courts, judges tend to follow established case law. In civil cases, judges from first or second instance can ask the Supreme Court for preliminary rulings. The boards of the courts and the Council for the Judiciary also have duties to promote the uniform application of the law; they may not intervene, however, in the judicial assessment of cases. In the second place, there are institutional and informal mechanisms to promote the uniform interpretation and application of the law between the various highest administrative courts. (see under 3.4).

In the third place, judges seek to establish consensus on several points of procedural and material law when practice shows divergent case-law; this results in “guidelines” that generally leave room for individual assessments. This is a delicate issue and a balance is sought between the principles of equality and independence of each individual judge. This is also reflected in the ethical Code of the Dutch Association of Magistrates (2011), par. 2.2:

“(…) The development of law is important and so, by extension, is the uniform application of law: for this reason individual judges may be expected to cooperate in developing substantive collaboration with their peers. There are two aspects to the uniform application of law: on the one hand, it leads to a limitation of the autonomy of the judge while, on the other, it represents an important facet of the quality of the legal system. The judge takes the importance of promoting the uniform application of law into consideration when applying the law and, in principle, is directed by the recommendations which enjoy the support of his fellow judges, such as the maintenance allocation norms and the subdistrict court judge’s formula on dismissals. Any deviation from this kind of recommendation will require the judge to motivate his decision for doing so.”

1.2 What is understood in your country under the concept of the uniform application of the law? Is it understood in the form of:

- consistent legislation to be adopted at legislative level
- uniform practices by the executive institutions and law enforcement bodies;
- uniform case law developed by courts.

Please explain each point and indicate the relative importance of each point.

Vide answer to question 1.1

1.3 What is the rationale of the uniform application of the law in your country and which kind of outcome for the population it is supposed to produce?

See answer to 1.1

2. Role of the legislative and executive powers in ensuring the uniform application of the law

2.1 Are there in your country formal or informal requirements for ensuring the uniformity in the legislative process?

Yes. In the Netherlands, the Council of State is a constitutionally established advisory body to the Dutch Government and houses of parliament. The Council of State must be consulted by the legislature before a draft law is submitted to parliament. In assessing draft laws the Council of State uses a framework made up of three elements: policy analysis, legal issues and technical aspects. Under the scope of the legal assessment the Council of State will test the compatibility of an act with higher law: the Constitution, treaties (such as the human rights conventions) and European Union law. It will also test whether a bill is in accordance with the principles of democracy and the rule of law, with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection and proportionality, and if the act eventually can be easily incorporated into the existing legal system.

2.2 Is there a hierarchy of laws?

Yes, the ranking order is as follows:

- 1. Treaties (with direct force of law)*
- 2. Statute of the Dutch Kingdom*
- 3. Dutch Constitution*
- 4. Acts of Parliament*
- 5. Decrees*
- 6. Ministerial Regulations*
- 7. Provincial Ordinances*
- 8. Municipality Ordinances.*

2.3 How is the conformity of national laws to treaties and other international instruments ensured? How are the latter applied in your country: directly or through national implementing legislation?

Vide answer to question 3.11

2.4 What are the arrangements in cases of contradictions between national laws, or between national law and a treaty?

See under 3.11

2.5 How is usually the law making process carried out in your country? Which of the powers of the state has in practice dominant a role in this process?

The primary law-making body in the Netherlands is formed by the Dutch parliament in cooperation with the government. When operating jointly to create laws they are commonly referred to as the legislature. The power to set regulations can be delegated by the legislature to lower governments or specific organs of the State, but only for a prescribed purpose. A trend in recent years has been for parliament and the government to create "framework laws" and delegate the creation of detailed rules to ministers or lower governments.

2.6 Are acts of the executive power source of law in your country and in that respect are they legally binding for the courts?

Yes. The decrees and ministerial regulations are in principle binding for the courts, subject to assess their conformity with higher law. The government's power to produce secondary legislation is based on primary legislation (Acts of Parliament) which set out broad outlines and principles. By delegating regulatory authority the legislature empowers the executive branch to regulate in detail issues within the scope of the statutory provision.

2.7 In your opinion, are laws too often amended in your country and does it affect the legal certainty in the country?

There is a general concern, shared e.g. by the Council of State, the Council for the Judiciary and the judges, that the frequent, sometimes incoherent and hasty, change of laws does affect the quality of legislation and legal certainty. This is e.g. the case in criminal law, social security law and economic administrative law.

3. Role of courts in ensuring the uniform application of the law

3.1 Has the court case law in your country binding legal effect and is it a source of law? If yes, to what extent? To the same extent as the national legislation?

Although lower courts are not formally bound by judgments of higher courts, they usually will follow their decisions in similar matters. Consequently court rulings, especially of the Dutch Supreme Court and the highest administrative courts, have a wider importance than the specific case in respect of which that ruling was given. It is the task of the highest courts to uphold the uniformity in law. In their cases, therefore, the lower courts will take the decisions of the highest courts into account. Lower courts will usually follow the judgements of higher courts. In this sense court rulings, particularly of the highest courts, can be looked upon as a source of law.

3.2 If the court case law in your country does not have binding legal effect, to which extent it is recognised as important for judges, at formal or informal level?

Vide answer to question 3.1.

- 3.3 In either case, have the courts a role to unify in any way the case law, and if yes, which courts and in which way? Are there special arrangements within each court – or between different courts at horizontal or vertical level within the hierarchy of courts – to ensure uniformity?

See above under 1.3. It is also the task of each court to promote consistency. As observed above, there is a delicate balance between the principles of equality and judicial independence.

- 3.4 Are there specialised courts in your country? Is there a hierarchy of specialised courts if such system exists? Is it possible to challenge final judgments of specialised courts before superior judicial body (Supreme Court or court with a similar role). If yes, please explain in short.

On the first instance level, there are (11) district courts, competent in civil, criminal and administrative cases. In appeal, apart from the (4) ordinary Courts of Appeal, there are three separate jurisdictions in administrative law matters: 1) the Judicial Division of the Council of State in general administrative law matters, 2) The Central Appeals Tribunal in matters of social security and civil servants, and 3) the Administrative High Court for Trade and Industry in economic administrative law matters.

Uniform interpretation of the law between these three administrative high courts is established by the mechanism of referring a case to a grand chamber, in which judges of the other relevant courts participate and by the mechanism of advisory opinions of advocates-general. Also informal consultations between the various jurisdictions take place. There is a growing concern about the lack of transparency of these informal consultations and there are initiatives to provide for a proper legal basis.

- 3.5 Is the unification of case law (mentioned in question 3.3) determined by the Constitution, laws, by-laws or by long lasting practice?

It is primarily a system based on long practice.

- 3.6 Are judgments of such courts (mentioned in the question 3.3) obligatory to follow for:

- judges/panels of that court;
- all judges in the country;
- are there any consequences for judges if they do not follow case law of higher court?

In this respect also, there is no formal binding effect of the case law of the highest, specialised courts, but in practice judges tend to follow these.

- 3.7 If judgments of such courts are not obligatory, what kind of practical effect may they have?

See under 3.6

- 3.8 What are the procedures, if any, applied when there are contradictions or deviations in the case law between different courts or different levels within the same court including superior courts (appealing, rendering legal opinions of court departments, preliminary rulings *in abstracto* etc.)?

Several dimensions can be distinguished. The first is the role of appeal and cassation. The second are formal and informal mechanisms between the highest administrative courts and between these and the supreme court. The third is informal consultation among judges.

- 3.9 Either in the case when the case law has binding legal effect, or in the case when it is not binding but otherwise has some impact, in which, if any, situations would it be regarded as permissible or maybe even necessary to depart from the case law?

If the judge considers that the circumstances of the case require to deviate. In that case, the judge will generally give explicit reasons why this is required.

- 3.10 What is the role of the Supreme Court or any other highest court in your country in establishing uniformity of application of law? Please explain how it is possible to access the Supreme Court and are there any discretionary powers in granting right to hear the case, and what would be the criteria for such possibility (filtering criteria)?

As the highest court in the fields of civil, criminal and tax law in the Netherlands, the Supreme Court is responsible for hearing appeals in cassation. The aim of cassation is to promote legal uniformity and the development of law. Regularly, the Supreme Court gives guidance in the form of so-called "survey-judgments", in which all aspects of a certain issue are summarized. The court examines whether a lower court observed the proper application of the law. At this stage, the facts of the case as established by the lower court are no longer subject to discussion. An Attorney General's office is attached to the Supreme Court. Its members main task is to provide the Supreme Court with independent advice, known as an advisory opinion, on how to rule in a case. Until now, there is no formal filtering system for the Supreme Court. However, the Supreme Court may decide that the request for cassation is denied without giving extensive reasons if the case does not give rise to questions of law important for the unity or development of the law. Likewise, the three other highest administrative courts foster the uniform interpretation and application of the law.

- 3.11 How is the case law of the European Court of Human Rights and other supranational courts or quasi-judicial bodies ensured and applied at national level, and how such case law affects the unification of national case law in your country?

According to Article 94 of the Dutch Constitution, statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons. The provisions of the European Convention are directly applicable – for the purposes set in the Convention – and can be invoked directly before all courts in the Netherlands. The provisions of the EU Charter have direct effect by virtue of the special characteristics of primary EU legislation, and can be invoked directly within the scope of applicable EU secondary legislation.

The case law of the ECHR has a great impact on national level, at the level of legislation and administration, and especially in the courts. Traditionally international case law plays an important role in the Netherlands, because according to the Dutch

Constitution judges are explicitly forbidden to test the constitutionality of Dutch Acts of Parliament. Neither does the Constitution provide for a Constitutional Court. Therefore in human rights issues judges are highly guided by the case law of the ECHR.

- 3.12 In which way the court's case law, including above-mentioned international case law, is assembled, published and made otherwise accessible:

The case law of European courts is directly accessible by the well-known HUDOC and Curia databases.

A substantial part of case law of all the Dutch courts is published, making use of ECLI classification. In the future, all case law might be published online. Dutch and international case law is also published by commercial editors, often annotated by legal scholars. The Dutch Court of Appeal in Amsterdam, together with the Dutch network of European Court-coordinators provides for monthly overviews of EU and ECHR case-law, which is distributed in all courts in the Netherlands and in the Flemish speaking courts in Belgium, and is online accessible to the public free of charge.

Judges:

Apart from the databases that are publicly accessible, judges have access to all the case law of the courts in the Netherlands, which is electronically archived for internal purposes (not publicly accessible). All commercial editions of annotated case law are accessible online for judges.

Other legal professionals:

Apart from the internal databases of the courts most other legal professionals have access to the same public and commercial sources of law as judges.

General public:

Case law is published and accessible for the public at large on www.rechtspraak.nl.

- 3.13 Is the access to such database free of charge?

Yes, vide answer to question 3.10

- 3.14 Are courts the only source of information or are there are more providers (on a commercial basis or through free access)? If the latter is the case, are such providers independent entities, and are they operating on commercial or not commercial basis?

Vide answer to question 3.10.

- 3.15 What are the challenges for the unification of the case law in your country? Does the quality of national legislation pose a challenge – for example the need in modern society to use relatively broad definitions and legal concepts?

This is a broad issue. As observed above, there is growing concern about the issue of the uniform application of the law and formal and informal mechanisms are put in place to ensure equality. On the other hand, the principle of judicial independence must also be assured.

Further steps will be taken to foster greater uniform interpretation between the highest administrative courts and between these and the supreme court. In general, it is

recognised that broad definitions and “open norms” are often indispensable and do not create, as such, great problems.

Any other point you wish to raise.

Equality, uniform interpretation and application of the law are fundamental values in the rule of law. However, they should not lead to rigidity and to obstacles for the development of law. The ECHR noted: “Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement” (judgment of 20 October 2011, 13279/05, par. 58). Moreover, judging implies the assessment of all the specific circumstances of the case at hand. In this perspective too, there are limits to uniformity.