Seminar on The Role of the Supreme Courts in Providing Effective Legal Protection, hosted by the Supreme Court of the Czech Republic
Brno, 15 September 2023

Legal protection, judgment and reasoning – keynote speech

Dineke de Groot, President of the Supreme Court of the Netherlands, Endowed professor Vrije Universiteit Amsterdam

1. Introduction

Mr President, I congratulate you, your court and the people of the Czech Republic with the 30th anniversary of the existence of the Supreme Court of the independent Czech Republic. Again, you and your team organised an excellent international conference. Thank you very much for bringing us together about a key element of our judicial work, the role of the Supreme Courts in Providing Effective Legal Protection. I appreciate the invitation to speak here today.

Excellencies, ladies and gentlemen,

The 2023 Rule of Law Report of the European Commission is positive regarding the level of perceived judicial independence in the Czech Republic. It says this level is high among both the general public and companies.[1] I would like to congratulate the Czech judiciary for the confidence the Czech courts apparently inspire in the public. The judicial independence of courts is an important aspect of the perceived overall fairness of judicial procedures and of the legitimacy of court judgments in the eyes of the parties and society.

In general, three factors may be seen as essential for the democratic legitimacy – the legitimacy with effect on the level of the legal community as a whole[2] – of judicial decisions. A first factor encompasses the procedural safeguards for the independence of the judiciary. The judiciary performs its function in the state and in society within the framework of a court and a court organisation. Generally, courts are entrusted with dispute resolution and the enforcement of the law. They share together with other branches of state power the responsibility for the upholding of the law within the rule of law-based democracy and for the effective protection of fundamental rights. The democratic legitimacy of the function of the judiciary within the state and the society needs independent and impartial judges.

---

[1] European Commission (SWD(2023) 803 final), 2023 Rule of Law Report, Country chapter on the rule of law situation in Czechia**:** "The level of perceived judicial independence in Czechia is now high among both the general public and companies. Overall, 65% of the general population and 60% of companies perceive the level of independence of courts and judges to be 'fairly or very good' in 20231. According to data in the 2023 EU Justice Scoreboard, the perceived judicial independence among both the general public and companies has consistently increased in the last years. Both figures have increased in comparison with 2022 (57% for the general public and 55% for companies), as well as showing a substantial positive evolution in comparison with 2016 (47% for the general public and 37% for companies)."

[2] A.F.M. Brenninkmeijer, De plaats van de rechter in onze constitutionele rechtsorde, in: De rechter als dictator? Dynamiek in de trias. Verschuivingen in de verhouding regelgeving, bestuur en rechtspraak, RAIO-congresbundel 18 & 19 March 1987, Lochem: J.B. van den Brink & Co., p. 60.

Therefore, procedures for the appointment of judges, the allocation of cases, the removal of judges, the establishment of court budgets, etcetera, must safeguard judicial independence.
A second factor is publicity and transparency regarding court judgments, oral hearings, the functioning of the judiciary, etcetera.
The topic of this panel and therefore my speech is connected mainly to a third factor which is essential for the democratic legitimacy of the functioning of the judiciary: the reasoning of court judgments.

2.1 The topic of this panel: a starting point

This panel reflects on the role of supreme courts in providing effective legal protection while complying with the requirements for the reasoning of judicial decisions in cases where there is no substantial review.
Reflecting on this topic, I would like to use the following as a starting point. Generally, supreme courts have certain core functions and tasks within a rule of law based-democracy and society. For reasons that may vary from country to country, supreme courts may face dilemmas that affect their ability to continue to perform these functions and duties. One way to deal with such dilemmas could be the option of not conducting a substantial review in every case, if the applicable law so permits. When taking this path, the question may arise whether supreme courts still provide effective legal protection in cases without or with less substantial review. To explore this question and try to find an answer, one could address the core functions and tasks of supreme courts and the reasons why supreme courts face dilemmas that affect their ability to continue to perform these functions and duties; one could try to identify the measures that already have been taken to deal with this dilemma; one could try to assess whether effective judicial protection is still provided, even in cases without or with less substantive review.
While addressing the core functions and tasks of supreme courts we may perceive that supreme courts should not only comply with the requirements for the reasoning of judgments in their own judgments. They must also provide guidance in the interpretation and application of the law. Their higher purpose is to provide legal unity, legal certainty, and effective legal protection to the people and to organisations. Their contribution takes place on the national level and on the level of our multi-layered legal order within the European Union, the European Convention on Human Rights and other international treaties.
These perceptions indicate that a supreme court should not provide court judgments on a case-to-case basis only. While dealing with cases, a supreme court should also pay sufficient attention to aspects like the clarity of its judgments, the consistency and foreseeability of its case-law, and the applicability and understanding of its judgments in legal practice.
When this is not done sufficiently, we may see a second problem emerging, apart from legal unity and legal certainty falling short. A party will have good reasons to expect a chance of 50% to win or to lose a case brought before the supreme court when diverse supreme court judgments exist on the same legal question. How and why should a reasonable adviser restrain a party from filing an application to the supreme court in such cases?
Should such a constantly expanding workload give reason to extend the size of a supreme court by appointing more judges, without taking other measures to strengthen legal unity and legal certainty, the opportunities for the people to get effective legal protection from courts might even become more arbitrary.

Therefore, the topic of our panel includes reflections on the mandate of supreme courts to fulfil their functions and tasks while respecting the effectiveness and efficiency of the judicial function within the rule of law-based democracy and society. It is common knowledge that courts usually have a serious workload. Supreme courts are not exempted from this. They must find a balance between the fulfilment of their tasks, the need to provide justice in individual cases and the need to handle their workload within a fair and reasonable budget provided by the state. This is a dynamic process, in which judicial experience, wisdom and sensitivity for what is occurring in society and in other branches of state power will be helpful, as well as the ability to assess whether adaptations in legal provisions and/or supreme court practice are desirable and lawful.

2.2. The starting point in relation to our supreme courts

The Supreme Court of the Netherlands has itself gone through developments in which this kind of thing came up. Awareness of typical aspects of a well-functioning supreme court practice cannot be missed within the longstanding Dutch tradition of a delicately balanced interplay between the three branches of state power, to let the Supreme Court fulfil its constitutional and social tasks independently. I would not be surprised if the Czech tradition of the legal system and legal culture demonstrates comparable phenomena.

3. Legal provisions about the reasoning of judgment

In the Netherlands, some of these developments have resulted in two legal provisions which enable the Supreme Court of the Netherlands to dismiss an appeal for cassation without giving case-specific reasons and to use only standard wording according to these provisions in the dismissive decision.
These two provisions diverge from the general obligation to provide reasons in court judgments. This obligation is laid down in the Constitution. Article 121 of the Constitution of the Netherlands stipulates that judgments shall specify the grounds on which they are based. In the Netherlands, the laws on civil, criminal and administrative court procedures enclose comparable provisions. However, article 121 of the Constitution also provides an exception in cases laid down by act of parliament, such as those two legal provisions.
As far as I know, there used to be also Czech regulation which allowed the Czech Supreme Court not to provide reasoning for specific decisions under certain conditions before the relevant provision was annulled by the Czech Constitutional Court for inconsistency with the constitutional order.[3]
The Dutch legal provisions have been challenged in complaints against the Netherlands submitted to the European Court of Human Rights (ECtHR), so far to no avail. I will discuss this in more detail later.
Longer ago, failure to give reasons for court decisions was quite common in Europe, for example on the basis that jurisdiction was exercised on obvious royal authority, or because it was considered desirable to discourage opportunities for the exercise of a judicial remedy.[4] It is not so easy to file a successful appeal without knowledge of the reasons why the case was lost. Nowadays, it isn't a moot point any more that the reasoning of a court judgment is part

[3] Judgment of the Constitutional Court of of the Czech Republic 11 February 2004, No. Pl. ÚS 1/03.
[4] G. de Groot, Motiveren van rechterlijke uitspraken: een evenwichtsoefening, in: G.J.M. Corstens e.a., 175 jaar Hoge Raad der Nederlanden. Bijdragen aan de samenleving, Den Haag; Boom juridische uitgevers 2014, p. 115.

of the fundamental right to a fair trial. However, the case-law of the ECtHR on the right to a fair trial as enshrined in article 6 of the ECHR demonstrates that the extent to which the duty of a court to give reasons for its judgment applies, may vary according to the nature of the decision, and can only be determined in the light of the circumstances of the case.[5]

4.1 The functioning of standardised reasoning facilities

I will now speak about the context in which these two legal provisions in the Netherlands were adopted. I will address their application in national legal practice and some challenges this practice has been confronted with in the multi-layered legal order. This will show that the use of such a standardised reasoning facility does not prevent from providing effective legal protection.

4.2 The Supreme Court of the Netherlands

The Supreme Court of the Netherlands (in Dutch: *Hoge Raad der Nederlanden*) was founded as a court of cassation in 1838, from a need for nationally applicable judgments and to encourage legal unity. It decides on cases which have usually already been handled by two layers of jurisdiction: a first instance court and a court of appeal. As a court of cassation, it does not establish the facts of a case anew, but reviews whether the previous court interpreted the law correctly, followed the right procedure and sufficiently substantiated its judgment. The cassation procedure is almost always completely written. There are no hearings, and pleadings only take place in a few cases. By law, the Supreme Court has three tasks. These are to promote legal unity, to contribute to the development of the law and to safeguard legal protection on both an individual and a general level. The standard case handling procedure is as follows. A written appeal in cassation will come in, in a civil, criminal or tax case. According to the relevant procedural rules, further documents might be exchanged, and an advocate general may write an independent advice to the court on how the case might be decided. Thereafter, the deliberation process is carried out and a panel of three or five judges will decide on a judgment.

4.3 Grounds for cassation

Until 1963, violation of a legal provision in an act of parliament was the essential ground for cassation. In 1963, opportunities for cassation were widened. The violation of a provision of an international treaty applicable and invocable in the Netherlands, government policy rules and laws and regulations of provinces and municipalities also became grounds for cassation. Furthermore, procedural errors, failure to apply adversarial proceedings and lack of proper reasoning were grounds for cassation from 1963.

4.4 Workload

Since then, more and more court cases were brought before the Supreme Court. Cases became more complex, not only because of these added cassation grounds but also due to other developments, for instance the growing significance of fundamental rights, the

[5] European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Par. 7. Reasoning of judicial decisions.

increase of open standards in acts of parliament and the project of European integration resulting in the legal order of the European Union.
In the seventies of the past century, the functioning of the Supreme Court as a court of cassation was well-established and generally accepted. Up to then it had been a rather small court, without much staff and with paperwork-based resources. The comparatively small number of judges had long been considered as a good opportunity for enhancing legal unity. A debate on how to keep the best but lighten the workload of the judges and the advocates general resulted in some organisational measures. For instance, the maximum number of judges, which is foreseen by law, was raised gradually but relatively slightly in the years since, from 23 in 1976, 31 in 1986 up to 38 today.[6] In 1976, a new division was set up within the Supreme Court, which supports the judges and advocates general in their research and writing work and in the maintenance of a documentation system of judgments.[7] Considerations to improve workloads also drew on similar experiences of supreme courts in other countries.[8] In 1986, a possibility to decide a case with a panel of 3 judges in stead of 5 judges was introduced by an act of parliament.[9]

4.5 Introduction of article 81 of the Dutch Judicial Organisation Act

In 1988, article 81 of the Judicial Organisation Act was adopted. Until then, each judgment should include, in accordance with the just mentioned article 121 of the Constitution, a substantive consideration of the proceedings or complaints in cassation and a justification by giving case-specific reasons for the decision. Since the introduction of article 81 of the Judicial Organisation Act in 1988, the Supreme Court may dismiss cassation appeals with a standard reasoning, after full completion of the usual cassation procedure. Article 81 paragraph 1 of the Dutch Judicial Organisation Act says (informal translation):

> 'If the Supreme Court finds that a complaint raised cannot lead to cassation and this complaint does not require answering questions of law in the interests of legal unity or the development of the law, it may limit the reasoning of the decision to this opinion.'

In cases in which article 81 of the Judicial Organisation Act is applied, the panel considers the complaints in cassation substantively, but it does not provide case-specific reasons for the dismissal in its judgment.[10] Article 81 of the Judicial Organisation Act may be applied in a

[6] Article 72 of the Judicial Organisation Act. The Supreme Court may also have deputy members. In 2022, the Supreme Court consisted of 35 judges who dealt with about 4000 cases. The Netherlands has almost 18 million inhabitants.
See for historical data for instance: D. Schaffmeister, De rol van de Hoge Raad en de ontwikkeling van het cassatierecht in strafzaken, in: De Hoge Raad der Nederlanden. De plaats van de Hoge Raad in het huidige staatsbestel, Zwolle: W.E.J. Tjeenk Willink, p. 96.
[7] This division is called *Wetenschappelijk Bureau* (Research Office) and consists nowadays of about 100 lawyers who work about 6 years at the Supreme Court before continuing their career elsewhere, often in a way that contributes to the dissemination of the work of the Supreme Court.
[8] E. Korthals Altes & H.A. Groen, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 7. Cassatie in burgerlijke zaken, Deventer: Wolters Kluwer 2015/ 34.
[9] E. Korthals Altes & H.A. Groen, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 7. Cassatie in burgerlijke zaken, Deventer: Wolters Kluwer 2015/ 271.
[10] Although article 81 paragraph 2 of the Judicial Organisation Act says that this is normally done by a panel of 3 judges, it is common practice for a panel of 5 judges to whom a case is allocated, to apply article 81 itself, without referral to a panel of 3 judges. Otherwise, the aim of the legislator to enhance the efficient administration of justice by the introduction of article 81 would not be actually served.

judgment to all complaints, as well as partially, i.e. to only some complaints while giving case-specific reasons in the judgment for the dismissal or the success of other complaints.

4.6 Introduction of article 80a of the Dutch Judicial Organisation Act

Between 1988 and 2012, much experience has been gained from practising both full case-specific reasoning and the standard reasoning of article 81.
In 2012, the other provision for a standard reasoning was added by an act of parliament. This article 80a of the Judicial Organisation Act says (informal translation):

> '1. The Supreme Court may, after hearing the procurator general, declare the appeal in cassation inadmissible if the complaints raised do not warrant a hearing in cassation, because the party filing the appeal in cassation evidently has an insufficient interest in the appeal in cassation or because the complaints evidently cannot lead to cassation.
> (…)
> 4. If the Supreme Court applies paragraph 1, it may limit itself to this judgment in stating the grounds for its decision.'[11]

Article 80a contains the possibility of declaring a cassation appeal inadmissible without giving case-specific reasons in the judgment. This judgment can be given shortly after the start of a cassation procedure. It covers all the complaints.
In the run-up to this change in the law, it was discussed how to further improve the ability of the Supreme Court then and in the near future to have both cases and time enough for its core tasks to promote legal unity, to contribute to the development of the law and to safeguard legal protection on both an individual and a general level. A report observed that the introduction of a filter mechanism could enable the Supreme Court to deal more appropriately with cases which had evidently no chance for success.[12] Also, there were ideas of strengthening the core tasks of the Supreme Court by the introduction of a possibility for first instance and appeal courts to ask preliminary questions about points of law to the Supreme Court. This could for instance be a way to enhance speedy effective legal protection on a general level. In civil cases, it was proposed to extend the mandatory representation by a lawyer with special qualifications for being a cassation lawyer.
And so it went.
Examples in the case-law of the Supreme Court in which the options enclosed in article 80a are being used, can be found in cases in which there is evidently not sufficient interest in the appeal in cassation, in cases with complaints which address particular (minor) regulations that have not been taken into account in a criminal procedure, but which did not affect the actual decision,[13] and cases with evidently no prospect in cassation, for instance because the complaints neglect standard case law, or provide purely factual complaints.[14] The criminal division of the Supreme Court has provided so-called overview judgments on its 80a-

[11] Paragraph 2 says that the Supreme Court shall not make a decision referred to in paragraph 1 until the Supreme Court has taken note of the written appeal in cassation and the statement of the defense in civil and tax cases respectively the reasoned notice of appeal in criminal cases. Paragraph 3 says that cases in which article 80a is applied, are decided by three members of the Supreme Court.
[12] Versterking van de cassatierechtspraak, Rapport van de Commissie Normstellende rol Hoge Raad, Kamerstukken II 2007/08, 29279, nr. 69.
[13] Judgment of 7 June 2016 of the Supreme Court of the Netherlands, ECLI:NL:HR:2016:1005, paragraph 2.4.1 and paragraph 2.4.3.
[14] Judgment of 7 June 2016 of the Supreme Court of the Netherlands, ECLI:NL:HR:2016:1005, paragraph 2.3.1.

practice, in which it summarised some aspects of its application of article 80a of the Judicial Organisation Act in its case-law.[15] An advocate general at the tax division of the Supreme Court suggested to add standard considerations in judgments in tax cases in which article 80a of the Judicial Organisation Act is applied.[16] In these standard considerations, the Supreme Court should indicate the grounds for rejecting complaints without specifically addressing them. The Supreme Court rejected this proposal by referring to reasons article 80a was introduced for, such as acceleration of proceedings, workload reduction and attention for the Supreme Courts core tasks.[17] In civil cases article 80a of the Judicial Organisation Act is hardly applied, which cannot be considered separately from the introduction of the mentioned specialised cassation lawyers. Article 80a of the Judicial Organisation Act was evaluated in 2021, within the regular framework of review of legislation.[18]

5. Publicity and transparency regarding the application of articles 81 and 80a

Almost all provided judgments of the Supreme Court of the Netherlands are published the same day on the website of the judiciary.[19] This includes judgments in which article 81 of the Judicial Organisation Act is applied, and judgments of the civil division and the tax division in which article 80a of the Judicial Organisation Act is applied.[20]
The annual reports of the Supreme Court of the Netherlands, published on its website,[21] specify the amount of cases in which the appeal for cassation was granted or rejected, and, if rejected, whether the judgment was case-specified reasoned or standard reasoned by full application of article 81 or 80a. Annual reports do not mention the amount of cases in which some complaints were rejected by applying article 81 and other complaints were granted or rejected by case-specific reasoning.

6. Access to justice

Unlike a leave system, articles 81 and 80a of the Judicial Organisation Act provide access to the Supreme Court for all people and organisations. A case receiving an article 81 judgment, either fully or in part, will still have gone through the regular case handling procedure. Most of these cases will have been discussed in plenary chamber meetings, and generally an

[15] Judgments of 11 September 2012 of the Supreme Court of the Netherlands, ECLI:NL:HR:2012:BX:7004; ECLI:NL:HR:2012:BX0146; ECLI:NL:HR:2012:BX0129; ECLI:NL:HR:2012:BX0132; Judgment of 7 June 2016 of the Supreme Court of the Netherlands, ECLI:NL:HR:2016:1005.
[16] See for a summary of the debate on this proposal: G.H. Kristen e.a., Evaluatie van artikel 80a Wet op de rechterlijke organisatie. Een empirisch-juridisch onderzoek naar de toepassing van artikel 80a Wet RO door de Hoge Raad in de sectoren civiel recht, belastingrecht en strafrecht in de periode 2012-2019. WODC/Universiteit Utrecht 2021 (also published in the parliamentary papers as Kamerstukken II 2021/22, 29279 nr. 703), p. 77.
[17] Judgment of 11 August 2017 of the Supreme Court of the Netherlands, ECLI:NL:HR:2017:1609.
[18] F.G.H. Kristen e.a., Evaluatie van artikel 80a Wet op de rechterlijke organisatie. Een empirisch-juridisch onderzoek naar de toepassing van artikel 80a Wet RO door de Hoge Raad in de sectoren civiel recht, belastingrecht en strafrecht in de periode 2012-2019. WODC/Universiteit Utrecht 2021 (also published in the parliamentary papers as Kamerstukken II 2021/22, 29279 nr. 703).
[19] www.rechtspraak.nl > Uitspraken zoeken.
[20] The amount of judgments of the criminal division in which article 80a of the Judicial Organisation Act is applied, is stated in the annual reports. These judgments are usually not published separately on the website of the judiciary.
[21] www.hogeraad.nl > Over ons > Publicaties > Jaarverslagen.

advocate general will have provided a written advice. Article 81 of the Judicial Organisation Act enables the court to spend less time on decision writing by using a standard formula, but the deliberation process is the same as in regular cases. Article 80a of the Judicial Organisation Act however allows the Supreme Court to declare an appeal inadmissible at the very beginning of the cassation procedure. Article 80a of the Judicial Organisation Act can therefore be seen as a 'selection at the gate' facility and might be regarded as a form of fast-tracked treatment. The article 80a-procedure still differs from a so-called leave to appeal system: litigants will always have the right to take a matter to the Supreme Court. Also, a panel of three judges will still review and decide on these cases. At any stage during the process, judges may decide to put a case on the article 80a-track back into the regular procedure.

7.1 Core tasks of the Supreme Court

Both provisions, article 80a and article 81 of the Judicial Organisation Act, enable the Supreme Court to take all cases into consideration in the exercise of its core tasks, i.e., to promote legal unity, to contribute to the development of the law and to safeguard legal protection on both an individual and a general level. Furthermore, they enable to prioritise in the amount of the attention that must be paid to a case in order to do justice, to deal efficiently with cases that do not require much attention from the perspective of its core tasks, and to find enough time for cases about legal questions of major importance from the same perspective of its core tasks.

7.2 The wording of a standard reasoned judgment

Presumably, in the individual perception of the parties of the overall fairness of their cassation procedure, the application of article 81 or article 80a of the Judicial Organisation Act may not satisfy their need for a case-specific reasoned judgment. While it cannot be expected that the wording of a standard reasoned judgment can satisfy such sentiments, it should still be easily understood by as many people as possible. Special attention has been paid to the wording of judgments in which the standard reasoning of article 81 or article 80a of the Judicial Organisation Act is applied. In 2020, the short standard formulation based on articles 81 and 80a of the Judicial Organisation Act was reformulated and modernised in such a way that litigants should be able to clearly understand the decision. This was done against the background of a Supreme Court project to further the use of clear language in its judgments.[22]

7.3 Some words on the national preliminary ruling procedure

As was indicated in paragraph 4.6, the introduction of article 80a of the Judicial Organisation Act was accompanied by a new facility for first instance and appeal courts to request the Supreme Court of the Netherlands for a preliminary ruling on points of law in a case, with the aim of promoting opportunities for strengthening the normative role of the Supreme

[22] This is explained on this website (in Dutch).

Court in the Netherlands. This preliminary proceeding exists since 1 July 2012 for civil cases, since 1 January 2016 for tax cases and since 1 October 2022 for criminal cases.[23]
In short, a court may make use of the preliminary procedure in a case on mass claims, as well as in cases in which a point of law is discussed with relevance for numerous other disputes arising from similar facts. The procedural rules include rules for participation of parties and third parties. The Supreme Court is not obliged to answer preliminary questions. An answer should be necessary for the requesting court to decide the case. In criminal cases, it is further required that answering a preliminary question is accompanied by a particular weight, having regard to the interest which is involved in the question for other cases.[24]
The preliminary ruling procedure allows a court of first instance or appeal court to obtain an answer to a particular question of law at an early stage of the proceedings. The procedure may function as an instrument to provide legal unity and effective legal protection, and to accelerate their availability in society. In practice, the procedure is for instance used to address points of law which are important for legal unity and legal protection in many cases (for instance in cases about consumer law, insolvency law, guardianship, child maintenance). The procedure is also a way to provide guidance on questions of law which are new and impactful.[25] In the first ten years, about 100 civil cases with preliminary questions were brought before the Supreme Court.[26]

7.4 Legal certainty

Ultimately, providing guiding judgments by means of the preliminary ruling procedure is a way to contribute to legal certainty, in addition to judgments in cases following an ordinary appeal for cassation. Traditionally, the extraordinary remedy of cassation in the interest of the law (in Dutch: *cassatie in het belang der wet*) is another instrument of the Supreme Court to further legal certainty. This instrument is only accessible for the Procurator-General at the Supreme Court, and only in cases in which the judgment of the court in previous instance is final. A judgment of the Supreme Court on a request for cassation in the interest of the law has no legal consequences for the parties to the procedure in the previous instance.

8.1 Effective legal protection

As the preceding has shown, providing effective legal protection in a case is not hampered by the possibility to use fully or partly standard reasoning in a judgment. The Dutch cassation

[23] Article 81a of the Judicial Organisation Act, articles 392-395 Civil Procedure Act, articles 27ga-27ge General Tax Act, articles 553-555 Criminal Procedure Act.
[24] Article 553 paragraph 1 Criminal Procedure Act of the Netherlands.
[25] See for instance Judgment of 13 June 2023 of the Supreme Court of the Netherlands, ECLI:NL:HR:2023:913. In cases before first instance courts, evidence was provided consisting of decrypted crypto communications. This evidence was obtained by use of servers that were located in France. A preliminary question from these courts addressed whether the principle of inter-state trust applied and therefore the decisions of the foreign authorities underlying the investigation conducted abroad have to be respected by a court deciding on a criminal case in the Netherlands.
[26] See (in Dutch) on the preliminary question procedure at the Supreme Court of the Netherlands for instance: I. Giesen and others, De Wet prejudiciële vragen aan de Hoge Raad: een tussentijdse evaluatie in het licht van de mogelijke invoering in het strafrecht, WODC/Utrecht 2016; D.H. Dongelmans and others, Rechtsontwikkeling in rechterlijke dialoog. Tien jaar prejudiciële vragen aan de Hoge Raad in civiele zaken, The Hague: Boom Juridisch 2023.

procedure and practice contain numerous opportunities, safeguards and possibilities to address questions of effective legal protection, whether it be by a party to the proceedings, the advocate general, a member of the Supreme Court or the judgment.
Both the application of article 81 and article 80a of the Judicial Organisation Act have been questioned before the European Court of Human Rights, but without success. Furthermore, an opinion of the UN Human Rights Committee, followed by a judgment of the Dutch Supreme Court, sheds light on ensuring effective legal protection in cases in which standardised reasoning is applied. I will now speak in more detail about these three cases.

8.2 The case of Baydar v. the Netherlands

In the ECtHR case of *Baydar v. the Netherlands*, the complainant had raised in his written reply to the advocate general's advisory opinion a request for a preliminary question to be referred to the Court of Justice of the European Union. The Supreme Court had decided not to do so and justified that decision with the standard wording of article 81 RO. The complainant argued before the ECtHR that thus his right to a fair trial had been infringed.
In its judgment of 24 April 2018[27], the ECtHR considered that article 81 and article 80a of the Dutch Judicial Organisation Act are aimed at keeping the length of proceedings reasonable and allow courts of cassation or similar judicial bodies to concentrate efficiently on their core tasks, such as ensuring the uniform application and correct interpretation of the law. The ECtHR furthermore accepted that the summary reasoning contained in such a judgment implies an acknowledgment that a referral to the Court of Justice of the European Union could not lead to a different outcome in the case and that the Supreme Court is not obliged to refer a question about the interpretation of EU law raised before it if the question is not relevant. The ECtHR therefore considered that, in the context of accelerated procedures within the meaning of article 80a or 81 of the Judicial Organisation Act, no issue of principle arises under Article 6 paragraph 1 ECHR when an appeal in cassation which includes a request for referral is declared inadmissible or dismissed with a summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable.

8.3 The case of *El Khalloufi v. the Netherlands*

In the ECtHR case of *El Khalloufi v. the Netherlands*, the applicant complained about a lack of reasoning of the dismissal of his appeal in cassation because of the application of article 80a of the Judicial Organisation Act. The ECtHR rejected this complaint. It reiterated the following considerations, while providing references to previous judgments. Although Article 6 paragraph 1 ECHR obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. The ECtHR had previously held that it is acceptable under Article 6 paragraph 1 ECHR for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue. It is likewise not contrary to Article 6 paragraph 1 ECHR for those courts to dismiss, based on a specific legal provision, an appeal in cassation as having no prospect of success, without further explanation. In this context,

[27] Judgment of 24 April 2018 of the European Court of Human Rights, *Baydar v. the Netherlands*, application no. 55385/14, paras. 47-50. See also Judgment of 27 August 2013 of the European Court of Human Rights, *Celik v. the Netherlands*, application no. 12810/13.

the Court must also ascertain that the national courts' decisions were not flawed by arbitrariness or otherwise manifestly unreasonable. The Court further referred to its just mentioned opinion in the case of *Baydar v. the Netherlands* that no issue of principle arises under Article 6 paragraph 1 ECHR when an appeal in cassation is declared inadmissible or dismissed with summary reasoning by the Netherlands Supreme Court in the context of accelerated procedures within the meaning of articles 80a or 81 of the Judicial Organisation Act.[28]

8.4 Perspective of Article 6 paragraph 1 ECHR

Thus, the ECtHR sees no issue of principle under Article 6 paragraph 1 ECHR when a supreme court uses standard reasoning in stead of case-specific reasoning in a judgment. This is an indication that the use of standard reasoning by a supreme court does not violate the democratic legitimacy of the functioning of the judiciary. Standard reasoning does not touch the usual need to keep an eye on whether it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable.

8.5 The case of Jaddoe v. the Netherlands

In 2022, the Criminal Division of the Dutch Supreme Court rendered about 3,000 decisions.[29] In 2,099 of those cases, the appeal in cassation was declared inadmissible. The most common grounds for this are that no objections to the contested judgment were raised (1,279) or that the complaints were manifestly incapable of leading to cassation (734). These numbers are in Supreme Court criminal cases quite similar over the years. According to a Dutch Research and Documentation Centre (WODC)) report published In 2022, it appears that the facilities for standardised reasoning enable the Supreme Court to provide legal guidance in cases from the perspective of its core tasks.[30] These may include cases involving major social issues in the context of complex legal issues. The same report further concluded, in its framework of review of legislation, that article 80a had contributed to legal unity and the development of the law, while the provision did not lead to a shortening of legal protection, although bottlenecks in legal protection remained according to consulted criminal defense lawyers.[31]
The UN Human Rights Committee questioned in its view on 26 July 2022 in the case of Jaddoe v. the Netherlands whether the standardised reasoning practice in criminal cases meet the requirements of Article 14, paragraph 5, of the International Covenant on Civil and Political Rights (ICCPR) in the case of a conviction by a court of appeal following an acquittal by a district court.[32] It considered that in such a case, the right to have access to justice in two instances in criminal cases was at stake.
In a judgment following this opinion of the UN Human Rights Committee, the Dutch Supreme Court explained that even in case of application of article 80a or article 81 of the Judicial

[28] Judgment of 19 December 2019 of the European Court of Human Rights, *El Khalloufi v. the Netherlands*, application no. 37164/17, para. 55; this was reiterated in the Judgment of 19 January 2021 of the European Court of Human Rights, *Keskin v. the Netherlands*, application no. 2205/16, paras. 74-76.
[29] In 2022, the Supreme Court has disposed of 4,569 cases, of which 427 were civil cases, 3,007 were criminal cases and 1,135 were tax cases. This can be seen from the Annual Report 2022.
[30] Please refer to the Summary (Samenvatting) of the Report which is mentioned in footnote 18.
[31] Please refer to the Summary (Samenvatting) of the Report which is mentioned in footnote 18.
[32] UN Human Rights Committee, View of 2 September 2022, nr. CCPR/C/135/D/3256/2018.

Organisation Act, the substantive assessment by the Criminal Division of the Supreme Court is identical to the assessment in cases in which the reasoning in the judgment is not standardised but case-specific. Nonetheless, the Supreme Court said it will take the view of the UN Human Rights Committee into account in its future choices between providing standardised reasoning and case-specific reasoning in a judgment in a case. [33]

9. Closure

This panel reflects on the role of supreme courts in providing effective legal protection while complying with the requirements for the reasoning of judicial decisions in cases where there is no substantial review.
For comparative reasons, I have provided some insight into past and current developments in the Netherlands on this topic, and I have discussed some general aspects of the interplay between effective legal protection, judgment and reasoning.
As you will have understood, Dutch law does not prohibit substantial review in any case. Article 81 of the Judicial Organisation Act encompasses full substantial review but enables standard reasoning in stead of case-specific reasoning in a judgment. Article 80a of the Judicial Organisation Act provides for a specific type of cases a possibility to accelerate proceedings, without refraining the Supreme Court from entering into full substantial review.
As the ECtHR indicated in its just mentioned case-law, the appropriate use of such legal provisions is guided by an awareness of keeping the length of proceedings reasonable and allow a supreme court to concentrate efficiently on its core tasks.
Judges who can find a balance between the fulfilment of the general constitutional and social tasks of a supreme court and the need to provide justice in individual cases are indispensable. In the end, the confidence the courts must inspire in the public in a rule of law-based democracy will be of major importance in choices of judges between providing a case-specific reasoned judgment in a case, or a (partly) standard reasoned judgment.
I look forward to listening to the Czech perspective on our topic and to our discussions.
Thank you for your attention.

[33] Judgment of the Dutch Supreme Court, 24 Januari 2023, ECLI:NL:HR:2023:40.