Development of the Law by the Supreme Courts - Leiden 11 November 2016

1. Law-making in general

I would like to share some thoughts with you about the development of the law by supreme courts. A phenomenon which is also, more ambitiously, described as law-making. I recently had a conference on this subject with my colleagues in the Network of the Presidents of the Supreme Judicial Courts of the European Union. Therefore, I can also inform you about experiences in the other member-states of the European Union.

Law-making happens when courts interpret legislation or rules in treaties, when they apply legal rules by analogy, and if they accept unwritten rules without statutory base. Today, it is generally recognised in many countries, in any case in all EU member states, that law-making is not exclusively a task for the legislator, but also for the courts. In the Hutchinson-case, the ECHR recalled that in the Convention States, the progressive development of the law through judicial interpretation is a well-entrenched and even necessary part of legal tradition.[1] Legislation is not always complete and not always clear, and can by definition never give a detailed answer in all possible situations, including unexpected future developments. If a dispute about such a case is brought before him, the judge has no choice but to elaborate an answer. In that sense, development of the law can be regarded as unavoidable, given the very nature of the work of the judge. This applies all the more in countries with a 'common law' system, where the importance of legislation for law-making is more restricted, so that judge-made law plays a (more) leading role.

In some countries, the law-making power of the judiciary is recognised in legislation. This may be done indirectly. In several countries in which there is a filtering system for cases before the supreme court, a criterion for filtering is whether a decision in the case would contribute to the development of the law. In the Netherlands, we do not have a filtering system in the strict sense of the word. But our Supreme Court can be selective in its working methods. Which is necessary, as we have to deal with some 6.000 cases a year, with 33 judges. Since 1988, it can reject an appeal which has no prospect of success without giving any substantive statement of reasons, if the decision in question is not relevant for legal unity or for the development of the law. In the Explanatory Memorandum to the act which introduced this possibility, the minister explicitly accepted that one of the tasks of the Supreme Court is to 'take the lead in the development of the law'. [2]
Legislation may also be more explicit about the law-making power of the court. In Estonia, the Code of Criminal Procedure (par. 2, section 4) states that decisions of the Supreme Court are sources of criminal procedure in the issues which are not regulated by other sources of criminal procedural law. In Hungary, there is legislation about uniformity decisions of the Supreme Court which are adopted in a special procedure with the aim of formulating general principles as to the interpretation of the law. These decisions are binding for all courts, and are published in the Official Gazette.

[1] ECtHR 3 February 2015, Hutchinson vs. United Kingdom, 57592/08, par. 24.
[2] Parliamentary Papers II, 1986/87, 19 953, no. 3, page 1.

2. Increasing importance of law-making by the Supreme Court

Since the 19th century, there have been several developments which have led to an increase in the law-developing activities of the courts. In any case, this development can be clearly observed in the Netherlands. The increasing role of the judge in law-making has a number of causes. Just like many other countries within the EU, the Netherlands has developed into a social welfare state under the rule of law, in which the government wishes to regulate more than in the past. This growth of legislation also increasingly requires interpretation by the courts. This is partly due to the fact that society has become more complex, and the expanding legislation more complicated. As a result, in a growing number of cases, it is unclear how the law should be interpreted and applied. Furthermore, it frequently occurs that statutory rules are deliberately formulated in broad terms with a view to offering the courts freedom of interpretation. Because legislation has increasingly been used to regulate society, it has also become more commonplace, when interpreting an older statute, to take account of current social conditions. 'Dynamic' interpretation of the law along these lines results in more active law-making activities by the courts, more active than would be the case with a more 'static' interpretation. In general, judges have gradually become freer in respect of the wording of the statutes. In sum, it is my impression that in all the member states of the European Union, today it is broadly accepted that the legislator is not capable of forming the law all on his own, and that alongside and in addition to the legislator, a substantial contribution from the courts has become essential, albeit within certain boundaries.

In our country, in the past decade there has been a clear development in our Supreme Court to focus its attention especially on the unity of law and the development of law. This happens by adjudicating individual cases. Dealing with all these individual cases is still important for us, but is no longer regarded in itself as the most important task of the Supreme Court. We try to spend the majority of our time on decisions which are important from a legal point of view. The necessary time for this focus can be found thanks to an act which allows us to deal with unfounded appeals without giving substantive grounds. A possibility I already mentioned. And since 2012 we can also decide cases without giving grounds after a simplified procedure. It only takes a few months to decide a case in this manner. On the basis of this new legislation the Supreme Court can decide to declare an appeal in cassation inadmissible at the start of proceedings, if it is evident that the appeal has no chance of success or if it is evident that the submitting party has insufficient interest in the appeal in cassation. Our court applies this special procedure in many cases. In 2015, the Criminal Chamber disposed of 57 % of the cases by applying this simplified procedure. All cases are screened soon after they have been submitted, to determine whether or not they are eligible for this (abbreviated) form of disposal. This process also influences our mindset: the first thing we have to do when a case comes in, is to consider its chance of success with the perspective of its importance for the development of the law.

In many other (European) countries, a comparable tendency seems to be emerging. A tendency according to which the Supreme Court, when it comes to setting priorities, above all focuses on legal decisions which are complex or have a large effect on other cases.

3. Ways in which highest national courts can contribute to the development of the law

There are several methods, techniques, by which a Supreme Court can contribute to the development of the law. I will briefly mention some of these methods.

The Supreme Court can *provide a more detailed explanation of its legal reasoning.* Not only mention the final legal conclusion ('that is how it is') but also explain the arguments that reveal how the court arrived at that conclusion. In this way, it will be more predictable how the court will decide in other comparable cases. There is a growing tendency within the Dutch Supreme Court during the past decades to follow this approach.

It is also possible that in a judgement of the Supreme Court, a legal rule is formulated which is more broadly applicable than strictly necessary for deciding the case in question. A *broader-than-necessary formulation* is often valuable for legal practice. It makes clear how decisions should be taken in a whole range of other – future – cases and therefore it has a clear law-making effect. From the information form my colleagues abroad, I get the impression that several Supreme Courts in the EU are rather reluctant to go further than answering the question which the parties ask them to decide on. However, some Supreme Courts are more inclined to formulate broad rules. In Estonia, for instance, decisions with a broad legal formulation are quite common and are regarded as good practice. Similar decisions can be found in the Netherlands.

Some Supreme Courts from time to time add *superfluous considerations* to their rulings, obiter dicta. These are considerations that bear no direct relation to the decision in the case at hand. With this technique, the court is as it were calling for additional broadcasting time. It can be used when they know or foresee from their contacts with society and legal practice, that the issue is leading or will lead to controversy. If this technique is used, it is limited to questions which to some extent are related to the subject of the case in which the judgement is made. Otherwise it would become regulation with no link at all to adjudication. The Supreme Court of Latvia frequently uses obiter dicta. And our Supreme Court does this from time to time.

A Supreme Court can also, in one or more *preceding paragraphs,* start to formulate in general terms the legal framework which it adopts when judging cases of this kind. This technique is regularly found in decisions of the European Court of Human Rights. The scope of such preceding considerations can vary. They can even expand to *panoramic rulings* in which an entire legal problem is mapped out. A Supreme Court may for example opt to render such a ruling if it is clear that the lower courts are confronted with a whole range of aspects within a broad problem area. The Supreme Court of Estonia gave a decision in 2015 in which it devoted a whole chapter to describe the legal situation, although that was not of primary importance for the case at hand. It happens in Poland, when formulating preliminary rulings in criminal cases, in Austria in exceptional cases, also in the Czech Republic, even quite often, and in Norway and Sweden. We do it from time to time in the Netherlands. An example of such a summary ruling can be found in a decision of by the Criminal Chamber of our Supreme Court in July 2014, concerning the hearing of witnesses[3], and in a panoramic ruling recently rendered on self-defence and the excessive use of self-defence.[4] Another good example of a panoramic ruling is a decision from early this year, rendered by the Tax Chamber of our Supreme Court concerning the reasonable period of adjudication in administrative law. In that ruling, a variety of questions in this field were answered, also questions that had not previously been submitted to the Supreme Court, and which were also not at stake in the case under judgement.[5]

Another technique would be that the Supreme Court gives guidance when answering the request of a lower court for a *preliminary ruling or advice*. There should be a basis in legislation for

[3] Supreme Court 1 July 2014, ECLI:NL:HR:2014:1496.
[4] Supreme Court 22 March 2016, ECLI:NL:HR:2016:456
[5] Supreme Court 19 February 2016, ECLI:NL:HR:2016:252, heading 3.

answering such request. Since 1 July 2012, such a basis exists in the Netherlands in civil cases. A lower judge can submit a question of law to the Supreme Court, in cases in which there are large numbers of disputes about the same question of law. The experiences with this procedure are so positive that since the beginning of this year, the procedure is also applicable in fiscal cases, and the government has the intention to introduce a similar procedure in criminal cases. As a consequence, our Supreme Court will become increasingly involved in the development of the law. A similar possibility exists in Poland. The same goes for Montenegro, where the Supreme Court can adopt legal positions of principle on the request of any court.

In some countries the Procurator General or a similar authority can ask the Supreme Court to *quash the decision of a lower court in the interest of the law.* The rights and obligations of the parties in the case are not influenced by such a decision, which thus only serves the interest of the law: its clarity, uniformity and development. The method can be used when there is serious uncertainty about a legal problem which rises frequently, if it is not to be expected that the Supreme Court will be called to decide on this question in normal proceedings within the near future. This technique exists for centuries in France, and has also been adopted in the Netherlands, Spain and Italy. In the Netherlands, it is used several times a year, for instance when new legislation raises technical questions on which a quick answer is desirable. The need for this special remedy has decreased since the possibility of preliminary rulings has been introduced in our country. In Bulgaria there is an even broader possibility to ask for an interpretative judgment of the Supreme Court. Such a judgment can be asked by various authorities, amongst others the Minister of Justice, the Ombudsman and the Chairperson of the Supreme Bar Council. Similarly, various authorities in Poland can ask the Supreme Court for a resolution to solve doubt in the interpretation of the law.

4. Influence of international (treaty) law

It is my belief that international law affects the highest national courts in Europe in such a way that these courts will increasingly be involved in the development of the law. This applies all the more in countries with a monist system, a system in which judges are not permitted to apply national legal provisions if these violate an international treaty. In such a system, it is not the legislator but the judge –by interpretation of the treaty – who ultimately determines the legal consequences of that treaty.
For questions of interpretation of a treaty, the views of the courts of the other contracting party or parties can be inspiring. This exchange of information does take place in practice. With a number of courts participating in the EU-network, the Netherlands has reached agreement on direct cooperation between the legal staff of the highest courts. If in the preparation of a case they are in need of information about foreign law, including the interpretation of a treaty by foreign courts, they can easily obtain that information almost without obstacle, by simply sending an e-mail to a colleague abroad. These possibilities are regularly used, to the satisfaction of all. A usable answer is generally available within a few weeks

5. Limitations to the law-making task of the (highest) court judge

Although the highest national courts have gradually become more involved in the development of the law, it is realistic to observe that their possibilities for law-making are not unlimited.
Unrestricted law-making by the courts would not be compatible with the separation and distribution of powers in a state governed by the rule of law. When it comes to questions of social and economic structure, the decision should be taken in a democratic manner via the

political decision making processes. In my view, it is not up to judges to make decisive choices in such political or policy-related controversies. We must therefore work to ensure that the courts in this connection do not get in the way of the legislator. We must prevent legislator and judiciary becoming involved in some sort of arms race, in terms of law-making. Instead, it is desirable that they cooperate successfully in that connection. Mutual communication in any form, based on mutual understanding and respect for one another's position, can make a valuable contribution.

It is not always easy to determine where the limitations on the law-forming task of the judge precisely lie, and whether an issue can be earmarked as (too) political or policy-related. In this area there is a clear field of tension between the judge and the legislator. Judges, in particular the highest national judges must be fully aware of this tension, when becoming involved in the development of the law.

Judges are also bound by the limitations imposed by the existing judicial system. The limits depend on the subject matter, it is for instance generally accepted that an act may not be punishable or taxable without a sufficient and predictable ground in legislation. The limitations also depend on the perspective of the judge when interpreting legislation. A judge who tries to stay as close as possible to the text of the statute, is less inclined to develop the law than a judge who gives equal or even more weight to other factors of interpretation. But if the text and the legal history of a statute clearly lead to a certain interpretation, the room for a different interpretation is obviously small. On the other hand, even in a textualist approach, there will be more room for development of the law by the courts if the text of the statute is unclear or ambiguous, if it uses broad and general terms, if the statute gives no solution and so there is a legislative vacuum, or if various statutes contradict each other. And some judges feel freer in the interpretation if the statute in question becomes older. Dutch courts use all kinds of arguments when interpreting legislation, amongst other the practical effects of the interpretation and also prevailing views in society.

The limits of judicial power may also be reached if national legislation violates international law, for instance EU-law or the ECHR. Nevertheless, the state, including the court, is obliged to comply with international law. There is a dilemma, how can and will a court go in complying with international law, when there are various ways to remedy a violation of a treaty or a rule of EU-law.

In a judgement in a tax case in 1999, our Supreme Court formulated a general framework for the assessment of this problem.[6] Our Supreme Court sketched out the dilemma facing the judge. In favour of intervention by the judge is the fact that by intervening, he can offer immediate effective protection to the interested party. On the other hand, in the given constitutional situation, in the opinion of our Supreme Court, the courts should follow a reticent approach when intervening in statutory legislation. According to this judgement rendered in 1999, generally speaking, balancing these considerations will imply that the judge himself will immediately remedy the shortcoming in legislation, if on the basis of the system of the legislation, the cases regulated by statute, and the underlying principles or the history of the statute, it is possible to determine with sufficient clarity which solution should be provided. However, if there are different conceivable solutions, and the choice between those possible solutions depends in part on general considerations of government policy, or if important choices of a constitutional nature have to be taken, then the judge should leave the choice to the legislator for the time being. The proviso for the time being has been included because there is a possibility that the outcome will be different if the courts have established that a particular

[6] Supreme Court 12 May 1999, Decisions in Tax Cases (BNB) 1999/271.

statutory rule leads to unjustified unequal treatment, and the legislator still fails to change that statute in a way that eliminates the resultant discrimination. Here, too, there is evidence of some sort of dialogue: on occasion, the judge will hesitate in favour of the legislator, but maintains a finger on the pulse, and may return to the issue at a later stage. In this way, neither automatically has the final say; a situation which brings about a balance of power.

6. Future prospects

In drawing this speech report to a close, I would like to take a cautious look at the future. Although nothing is so difficult to predict as the future. Nevertheless, if I consider the already mentioned causes for the (highest) courts becoming more and more involved in the development of the law over the past few decades, in the foreseeable future, I do not expect any of those causes to disappear. It is therefore my expectation that the highest national courts will continue over the coming years to undertake at least as much law-forming work as has been the case to date. As concerns the situation in the Netherlands, I would even dare to suggest that with recent changes of legislation, the legislator has underwritten the importance of the law-forming task of the Supreme Court, and offered this court additional instruments for focusing even further on that task. That fact alone justifies the expectation that our Supreme Court will indeed focus more on that task.

When courts assume a further reaching task in making law, they may from time to time need information, for instance expert advice or information about the practical consequences of various solutions between which they have to choose. In certain countries, judges are able to obtain this type of information, to a certain extent, by calling in an 'amicus curiae', an expert "friend of the court". A phenomenon well known in the United States and also with the ECtHR. In some countries the procurator general can fulfil this function. The amicus curiae also exists in France, and I mention especially Ireland.
In the Netherlands, in the ruling on a request for a preliminary ruling, a possibility has been established whereby our Supreme Court can obtain information from third parties with a view to arriving at a more well-founded response to the legal questions posed. Before giving a preliminary ruling about attachment law, the Supreme Court received a contribution from the professional organisation of bailiffs.[7] The legislation introduced in 2012 even offers the possibility of issuing a public appeal for contributions by our Supreme Court. We have developed a web application for such consultations. I expect that input from third parties will occur more frequently in future, just as the legislator in our country also makes use of internet consultations.

With this look into the future, I come to end of this speech, in which I described the development towards more law-making activities of the courts, in which I mentioned various instruments and techniques that courts can use to develop the law. I also observed the influence of international law on this role of the judiciary. And I addressed the limits to the power of the courts to develop new rules. A power which I consider as one of the most essential, difficult and also fascinating aspects of the work of a supreme court judge.

[7] Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ9958.