Celebrating 50 years of Indonesia - Netherlands legal cooperation

Towards consistency of case law and legal certainty

The perspective of the Supreme Court
17 October 2019

1. Introduction

Legal certainty is the central theme today. For arguments sake, let us imagine a society in which there is no legal certainty at all. A society in which decisions of government officials and judicial decisions are essentially unpredictable, are often contradictory to each other and also arbitrary. In such a situation, it is unclear which rules will actually be applied and enforced. Most probably, this is not the kind of society you would prefer to live in. Perhaps it is attractive for a few people who are in power, the decision makers who can decide according to their own will and mood. It is certainly not a society that is very attractive for investors. It is no coincidence that the higher a country scores on the World Rule of Law Index, the greater economic prosperity in that country is. Investors will be more willing to invest in a project if it is clear which rules will be applied and enforced, and if they can be confident that this will take place in a fair and predictable manner. Certainty is also important for the well-being of people. They can get sleepless nights from uncertainty about their position, also about their legal position. They can feel threatened and humiliated if decisions about important things in their life are made arbitrarily. It is safe to say that legal certainty is very important for the welfare and well-being of a democratic society under the rule of law.

Legal certainty requires legal unity. In fact, it is quite simple: without legal unity it is hard to think of legal certainty at all. If different courts or even different panels in the same court come to different solutions for the same sort of judicial problem, that inevitably leads to unpredictability, to uncertainty. It is therefore not very surprising that promoting legal unity is one of the main tasks of the highest court in a country, the supreme court. In this speech I will elaborate on that task and show you the importance in this respect of consistent decisions of the highest court, decisions which by their consistency may form case-law, also called jurisprudence. I will also speak about one of the other main tasks of a supreme court: the contribution to the development of the law. This related task also contributes to legal certainty. When a supreme court fulfils these two tasks, its decisions are not only important for the parties directly involved in the case at hand, but they will also be relevant for other persons and organizations, probably for a very large number of other persons and organisations. By promoting legal unity and by contributing to the development of the law through its jurisprudence, a supreme court has a direct and important influence on the welfare of a society.

In this speech I will also discuss the influence of legal science on the decisions of courts. In that context, I will regularly refer to the influence of legal science on the case-law of the Dutch Supreme Court and vice versa. That is not in the first place because I am personally attached to legal science – I am still a law professor at a university – , but essentially because I find it important to highlight that both the supreme court and legal science benefit enormously from this mutual influence.

I will close my speech with some remarks on the special and valuable cooperation between the Mahkamah Agung and the Dutch Supreme Court, a cooperation in which consistency of judicial decisions and legal certainty are the most important focal points.

2. Legal unity

As I said, promoting legal unity is, or in any case should be one of the important tasks of a supreme court. Legal unity is a necessary condition for legal certainty. But legal unity has more benefits than its contribution to legal certainty. I will mention a few of them:

- legal unity contributes to equality and diminishes the risk of discrimination;
- legal unity also diminishes the risk of arbitrariness;
- legal unity reduces the risk of corruption: when the highest court has set a fixed line on a particular issue and it is therefore predictable that a different decision by a lower judge will be annulled, there is no point in paying that judge a bribe in order to deviate from that fixed line;
- legal unity is necessary for the development of the law, a phenomenon which I will address later in more detail. If every subsequent decision of the courts on an identical or comparable case can go in all directions, there can be no question of development and influence on practice, on society.
- and last but not least another important benefit of legal unity is worth mentioning, especially in the light of the panel discussion we will have later on this afternoon: the object of study for legal science becomes much clearer if there is one clear line in the interpretation of the law by the courts regarding a particular issue. In such a situation, it is useful and rewarding for scientists to study, describe and comment on the interpretation chosen by the courts. In case of too much diversity of the judicial decisions, it is not even possible to make them object of science at all and to analyse and systematize them. That is not just a pity for the scientists. It is also a loss for the judges. After all, they can benefit if legal scientists have already been able to provide an overview and analysis and have commented on the interpretation of the law by the courts. This can inspire the judges when making new decisions about comparable issues and increase the quality and consistency of those decisions.

I want to add that these arguments do not necessarily imply that the rules should at all cost be identical in all parts of a country. There are many countries in which local governments can make their own rules to a certain extent, I mention the United States of America, and also the Netherlands where cities and provinces can make legislation on certain subjects. But these are differences provided for by law, and legislation at the national level decides to what extent local authorities are allowed to make their own rules. This is how it should be in a democracy under the rule of law. And that is quite something different compared with the diversity which will arise if the same legal rules are interpreted and applied in a different way by various authorities and courts in the country. That would be an undesirable form of inconsistency. Also undesirable at a local level. Local rules too should be interpreted and applied consistently in the region for which they were established.

How can a supreme court promote legal unity? The answer sounds quite simple: by providing consistent case-law, that is an interpretation of the law by the supreme court which will be followed in future cases. In this way a supreme court can set clear and consistent standards for the lower courts and more general for legal practice. It can become a beacon for all those who want to navigate on the sea of legal questions. As I said, this sounds simple but once you realise that even in a small country as the Netherlands there is a caseload at the supreme court of thousands of cases per year, it will immediately become clear that it is not that easy for such a court to be and remain consistent. This is the more so if different panels of judges decide similar types of cases, as is usually the case with supreme courts. A patchwork of mutually contradictory decisions can easily arise in such a situation. But such a patchwork of decisions cannot guide the lower courts, nor can it form the basis for a scientific legal textbook in which the system of the law is described, analysed and debated. So, in order to promote legal unity it is essential for a supreme court to be consistent itself. There are several ways for a supreme court to guard this internal consistency, I do not pretend that there is only one perfect method to reach consistency. But because of the time I will only highlight the practical method which we use in my supreme court.

This method consists of an intensive process, which is possible because we are a relatively small supreme court. The court consists of approximately ten judges per chamber. All members of such a chamber come together every week for a full day to decide cases in chamber that are ready for discussion at that moment. The decision is made by a panel which consists of three or five judges, depending on the legal complexity of the case. But the members of the chamber who are not part of this panel can also intervene in the discussion, and they do so on a regular basis. They have received and read the documents in those cases, including the draft for the judgment and explanatory notes and written comments from the members of the panel. The result is a lively substantive discussion at a high level in which everyone listens well to each other, and is open to adjust his or her initial opinion on the basis of the arguments expressed by the colleagues in the chamber. An attempt is made to come to a decision on which everyone, or at least a large majority of the members of the chamber, can agree, or at least against which the members of the chamber have no serious objections. The judges in the chamber try to reach common ground because they know that the chamber must be consistent, and therefore all colleagues feel bound in future by what is decided today. In this way the Dutch Supreme Court succeeds to be quite consistent in its case law. It very seldom changes its course, lower courts are aware of that and therefore loyally follow the case-law of our court.

3. The development of the law by supreme courts

By consistent case-law, supreme courts can also contribute to the development of the law. That is also a very important task which supreme courts may, and in my view should fulfil. Development of the law by the courts is desirable, and in fact even necessary every time a problem arises that the legislator did not or could not think of when making statutes. As soon as drones started to fly, the courts were confronted with cases concerning drones, although legislation in many countries did not yet take account of the existence of these flying objects. The court cannot refuse to answer those questions if a dispute is submitted to it. Development of the law by the judge is therefore inevitable. Another example concerns a case that my Court had to decide upon not so long ago. In that case the question arose whether the removal of a virtual amulet in an online computer game could be regarded as removing a “good”, so that this action could be classified as theft. Obviously, no one had ever heard or thought of internet at all, when the article about theft was included in the Criminal Code. Which was in 1886... . The Dutch Supreme Court decided that a virtual amulet could be classified as a good, and upheld the conviction for theft by the court of appeal.

Given the fact that society nowadays changes quickly and technological developments succeed each other at a rapid pace, it is not surprising that the importance of this task is internationally increasing. From a survey which I made amongst the supreme courts of the European Union, it appears that in many European countries, a tendency is emerging towards a greater focus on the law-making task of the supreme courts. A tendency which may be stimulated by the fact that experienced legislators are aware that they cannot predict all future developments and possibilities, and therefore often formulate statutory rules in a more abstract, general way which gives the courts room for interpretation.

In judgments containing such interpretative decisions, a supreme court develops the law. By stating and clarifying its interpretation, the court not only decides for the parties in that specific case, but also, and perhaps especially, for all other people and organizations who have to deal with a similar problem and want legal clarity and legal certainty. That is why supreme courts in such judgements often formulate their legal views in more general terms, and not only focus on their application in this specific case. This makes such court decisions easier to follow in other cases, and lower judges will be more inclined to follow those – visible – lines of the highest court. Legal certainty and clarity are served by this.

Not only the lower courts but legal practice in general profit from such decisions of the highest court. Legal advisers can more easily predict the outcome of a possible trial and advice their clients more properly. That can prevent new and unnecessary trials.

Legal science is also stimulated by decisions in which legal rules are interpreted in a general sense. Legal scholars in the Netherlands are particularly interested in the Supreme Court's case law, especially in the decisions of which the grounds are not case-specific. Handbooks on any field of law in our country focus on judgments of the Supreme Court, alongside the legislation concerned. Equally, handbooks about the European Convention of Human Rights are for a large part dedicated to case-law of the European Court of Human Rights, and decisions of the Supreme Court of the United States are very important in literature about many fields of law in that country.
It can also work the other way around: legal sciences may very well stimulate the development of the law. That is why the opinions of the Advocates-General of our supreme courts, which form an independent expert advice to our court, give us an oversight and analysis of all the relevant legal literature on the legal question we have to decide. Our links with legal science are close: several members of our court and many Advocates-General have been professors of law, and some of us even combine a professorship with their function at the Supreme Court. When it comes to development of the law, the importance of legal scholarship cannot be underestimated. This is all the more true because the development of law by the supreme court is not merely a question of legal technique. In reaching law-making decisions, their consequences and desirability may be an important contributing factor. For that reason, courts in some countries, for example in the United States and France, have the opportunity of calling in an “amicus curiae” (a friend of the court) to provide them with the necessary information. The advocates-general at some supreme courts, like the Dutch Supreme Court, fulfil a somewhat comparable role. In the absence of, but also in addition to this possibility, legal science can play an important role in providing the courts with such information. By analysing and criticising legislation and case-law, and by proposing new ways for the supreme court to proceed, legal scholars can provide important arguments for a supreme court to develop the law in a certain direction.

4. Publication of the case law

This role of legal science in analysing an criticising supreme courts judgements, brings me to another subject that I want to address very briefly before I will make some closing remarks on the relationship between the Mahkamah Agung and the Dutch Supreme Court. The subject I want to discuss now is the publication of supreme court decisions. It is obvious that both for promoting of legal unity and for the development of the law, it is necessary to publish those decisions that can be regarded as case-law as soon as possible, preferably on the same day on which the judgement was delivered. Further, these judgments have to be easily accessible, understandable and user friendly. Otherwise, there will be only a limited influence of these judgments on legal practise and legal science. Especially in case of large amounts of judgments, the proverbial haystack, it can be very helpful to publish a brief summary together with the judgement itself. This summary may hold some keywords indicating the relevant legal issue and the most relevant statutory articles as well as an indication of the legal importance of the judgement. It is very important to have a good public database of supreme court decisions. After all, a supreme court communicates through its decisions, and if the way these decisions are communicated is insufficient, the message will get lost.

5. Relationship with the Mahkamah Agung

Before I come to the end of my speech, I would like to make some remarks on a special relationship, the valuable cooperation between the supreme court of Indonesia, the Mahkamah Agung, and the Dutch Supreme Court. The cooperation started around 2008 under chief justice Tumpa and my predecessor Corstens. Chief justice Hatta Ali and I have intensified the relationship, with the valuable support of two NGO's, CILC in the Netherlands and Leip in Indonesia. One of the main objectives of this cooperation is to strengthen the rule of law in Indonesia, in particular by creating more legal unity and legal certainty. These are key objectives in the reform program of the Mahkamah Agung. Even if you only consider the size of the Indonesian population and judiciary, it becomes clear that it is not easy to achieve these goals, and that it takes huge efforts. Nevertheless, the last years the Mahkamah Agung has made important and big steps in its reform program. This deserves great respect. As the president of the Dutch Supreme Court, I am very happy and proud that we have been able to contribute to this process by suggesting possible solutions. For instance by explaining how our systems works and what solutions we have found for similar problems. For example the question to cope with the influx of cases in order to create more time for the proper fulfilment of our core tasks. And also how we do our best to keep our decisions consistent. And how make our decisions and knowledge known to the public. Next year the Mahkamah Agung will have a new chief justice and there will also be a new president of the Dutch Supreme Court. I sincerely hope they will extend the fruitful cooperation and that the results achieved will be preserved and extended.