

## Development of the Law by Supreme Courts in Europe

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### 1. Introduction

This article is dedicated to the development of the law by the courts,<sup>1</sup> and especially by supreme courts<sup>2</sup> in Europe, a phenomenon which is also, more ambitiously, described as law-making.<sup>3</sup> There are many possible definitions for the term ‘law-making’. In brief, the term can be described as ‘the adoption of a legal rule which up to that time was not yet (clearly) recognised as applicable law’. This definition encompasses both the creation of legal rules by the legislator and the adoption of such rules by the courts. Judicial law-making takes place when courts interpret legislation or rules in treaties, when they apply legal rules by analogy, and when they accept unwritten rules without a statutory basis.

I will address various questions regarding law-making by (supreme) courts: To what extent do the courts in fact make and develop law, and is there a statutory basis for this activity (Sections 2 and 3)? Can we observe a tendency towards more law-making by the courts (Section 4)? What instruments and techniques can the courts use for law-making (Section 5)? And what is the influence of international law on this role of the judiciary (Section 6)? Of course there are limits to the power of the courts to develop new rules. What are these limits, how are they established, and what is the relation between court and legislator in this context (Section 7)? And what developments can be expected in the foreseeable future (Section 8)? All (supreme) courts are more or less frequently confronted with these interesting questions, which are therefore well worth discussing.

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1 See on this subject also (with further references): J.L.M. Gribnau, ‘Legitimacy of the Judiciary’, (2002) 6 *Electronic journal of comparative law*, no. 4; G. Hager, *Rechtsmethoden in Europa* (2009); K. Riesenhuber (ed.), *European Legal Methodology* (2017); and D. Whelan, *The Comparative Method and Law Reform* (1988), Chapter VI, <<https://www.ucc.ie/law/irishlaw/dwhelan/c-method-and-l-reform/index.shtml>> (last visited 9 October 2017).

2 A court can be regarded as a supreme court when it has the power to quash judgments of a lower court in at least one category of cases, and when no appeals can be filed against the judgments of this higher court. Following this definition, there may be several supreme courts in one country for various fields of law (civil law, administrative law etc.). Membership of the Network of Presidents, mentioned in the first footnote, is limited to one supreme court for every Member State of the EU, in practice the general supreme court. There is also an Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA-Europe).

3 In this article I will not distinguish between ‘development of the law’ and ‘law-making’. When gradually developing existing law, courts also create new elements and are therefore engaged in law-making.

## 2. Judicial law-making in general: statutory basis

Today, it is generally recognised in many countries that law-making is not exclusively a task for the legislator, but also for the courts.<sup>4</sup> In the *Hutchinson* case, the European Court of Human Rights (ECtHR) recalled that in the Convention States the progressive development of the law through judicial interpretation is a well-entrenched and even a necessary part of legal tradition.<sup>5</sup> Today we have moved far beyond the caricature drawn centuries ago by Montesquieu<sup>6</sup> of the judge as a speaking puppet, an expressionless being who merely repeats the words of the statutes. Although it is questionable whether any judges ever truly matched this image, we cannot escape the truth of the fact that at the start of the 19<sup>th</sup> century judges in many countries did not take a great deal of freedom when interpreting statutory law.<sup>7</sup> Nonetheless, even at that time, there was a clear awareness that the legislator is not able to foresee or regulate everything. In his *Discours préliminaire*, his introduction to the French *Code civil* in 1804, Portalis spoke of ‘mille questions inattendues’, a thousand unexpected questions, which arise as soon as new legislation is introduced.<sup>8</sup> Legislation is not always complete and not always clear, and by definition can never give a detailed answer in all possible situations, including unexpected future developments.<sup>9</sup> If a dispute about such questions is brought before it, the court has no choice but to produce an answer. In that sense, it could be said, development of the law has been traditionally unavoidable given the very nature of the work of the court. The court has to explain what the law is, also if the answer is not clear or legislation on the subject is completely absent.<sup>10</sup> By applying statutory rules to a broad range of day-to-day and more exceptional situations, the courts bring these rules to life. Without case law, the text of a statute would remain sterile.

The answers to a questionnaire which I sent to supreme courts of all the Member States of the European Union<sup>11</sup> show that all the responding courts engage in development of the law to a greater or lesser extent. The answers do not reveal regional or other systematic differences in this respect.

In some European countries the law-making power of the judiciary is recognised in legislation. This may be done indirectly. In several countries with a filtering system for cases before the supreme court, a criterion for filtering is whether a decision in this case would contribute to the development of the law. For instance, in Austria, an appeal to the Supreme Court in civil matters is only admissible when the decision depends on a question of law which is of considerable importance for the uniformity, the stability or the development of the law.<sup>12</sup> In Denmark, leave to appeal to the Supreme Court must be granted by the Appeals Permission Board, and the recurring criterion for this board is the fundamental nature of the case. It follows from parliamentary history that this criterion encompasses cases where there is a need for the Supreme Court to establish, confirm, change or adjust a legal practice.<sup>13</sup> In Estonia, an appeal in cassation in civil cases will be accepted (amongst other things) when adjudication of the appeal has fundamental importance with respect to the further development of the law.<sup>14</sup> In Finland, the primary criterion for granting leave to appeal to the

4 Even in civil-law countries the idea that courts also contribute to the development of the law is not particularly modern. This idea already existed some 100 years ago. See P. Calamandrei, *La cassazione civile part I, Storia e legislazioni* (1920), p. 533, concerning the task of the French *Cour de cassation* in the 19<sup>th</sup> century.

5 ECtHR 3 February 2015, *Hutchinson vs. United Kingdom*, no. 57592/08, para. 24.

6 Montesquieu, *De l'esprit des lois* (1748), Book XI, Chapter 6.

7 However, in common-law countries, the importance of legislation for law-making is more restricted. In the United Kingdom, for instance, judge-made law has already played a very important role for many centuries. See the overview of J.G. Sauveplanne, ‘Codified and Judge Made Law’, in *Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde* (1982), p. 95 et seq., <<http://www.dwc.knaw.nl/DL/publications/PU00009908.pdf>> (last visited 9 October 2017).

8 For an online reproduction of the text by Portalis, visit the following website: <[http://classiques.uqac.ca/collection\\_documents/portalis/discours\\_1er\\_code\\_civil/discours.html](http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours.html)> (last visited 9 October 2017). See also the German *Reichsgericht* 22 May 1922, (1922) *Juristische Wochenschrift*, 910, which rejected ‘the idea that the complete abundance and richness of life is encased in codified legislation. That is impossible. Every day shows us new forms of the law, the creative force of law is endless, and in all such cases the judge should find the law. All legislation (...) is in reality patchwork.’

9 Cf. ECtHR 20 May 1999, *Rekvényi vs. Hungary*, no. 25390/94, para. 34: ‘[M]any laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (...). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (...).’

10 See the German *Reichsgericht* 22 May 1922, (1922) *Juristische Wochenschrift*, 910: ‘when legislation fails, the court replaces the legislator for the individual case’.

11 See note \*, supra.

12 Section 502 of the Austrian Code of Civil Procedure.

13 Answer to my questionnaire from the Danish Supreme Court.

14 Para. 679(3) of the Estonian Code of Civil Court Procedure.

Supreme Court is that a decision of this court is necessary for the application of the law in identical or similar cases.<sup>15</sup> Similarly, in Germany leave to appeal to the Supreme Court in civil cases may be granted (amongst other things) if the development of the law requires a decision by this court.<sup>16</sup> The Swedish Supreme Court may grant leave to appeal, where the primary criterion is whether it is important to establish a judgment that may provide guidance for the lower courts.<sup>17</sup>

In the Netherlands we have no filtering system in the strict sense of the word, but nevertheless our Supreme Court can be selective in its working methods. Since 1988 an appeal which has no prospect of success can be rejected by the Supreme Court without giving any substantive statement of reasons. This is only possible if the decision in question is not relevant for legal unity or for the development of the law.<sup>18</sup> In the Explanatory Memorandum to the Act which introduced this possibility, the government explicitly accepted that one of the tasks of the Supreme Court is to 'take the lead in the development of the law'.<sup>19</sup>

Legislation may also be more explicit about the law-making power of the court. In Spanish legislation, violation of case law is mentioned as a ground for cassation by the Tribunal Supremo.<sup>20</sup> In Estonia, the Code of Criminal Procedure (Paragraph 2, Section 4) states that decisions of the Supreme Court are sources of criminal procedure in 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.

Obviously, the law-making power of the judiciary cannot be unlimited, and must be balanced against other powers in the state. I will elaborate on the limitations of this judicial power in Section 7 below.

### 3. Development towards more active law-making courts

Since the beginning of the 19<sup>th</sup> century, and in particular in the 20<sup>th</sup> and 21<sup>st</sup> centuries, courts in civil-law countries<sup>21</sup> have gradually and increasingly expressly taken up the task of developing the law. The increase in the judiciary's role in law-making has a number of causes.<sup>22</sup> Just like many other countries in 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 it did in the past. The growing body 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 legislation 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 (greater) freedom of interpretation.<sup>23</sup> Because legislation has increasingly been used to regulate society, it may be regarded as natural<sup>24</sup> that when interpreting an older statute courts take account of current social conditions. 'Dynamic' interpretation along these lines results in more active law-making by the courts, more active than would be the case with a more 'static' interpretation. The treaties in which fundamental rights are laid down, in particular the European Convention on Human Rights (hereafter: the European Convention), are also of huge importance. In such treaties, fundamental rights are generally formulated only summarily, allowing considerable freedom for

15 Chapter 30, Section 3 of the Finnish Code of Judicial Procedure.

16 Section 543, Subsection 2 of the German Code of Civil Procedure.

17 Chapter 54 of the Swedish Code of Judicial Procedure.

18 Initially Article 101a and at present Article 81 of the Judiciary Organisation Act. The term 'development of the law' itself appears in the text of this article.

19 *Kamerstukken II* [Parliamentary Papers], 1986/87, 19953, no. 3, p. 1.

20 See Article 88, Section 1, subpart d of the Act of 13 July 1988, no. 29/1998. See about cassation on this ground in civil cases <<http://www.pelayo-abogados.com/pdf/arturo/La-infraccion-de-la-doctrina-jurisprudencial.pdf>> (last visited 9 October 2017).

21 See note 7, *supra* about common-law countries.

22 This section is primarily based on the situation and the developments in the Netherlands. However, I am convinced that much of what I write here also applies to a greater or lesser extent to the majority of other European countries.

23 See A. Wallkamm, 'Generalklauseln – Normen im Spannungsfeld von Flexibilität und Rechtsstaatswidrigkeit. Über das Verhältnis von Recht und Politik', (2008) 39 *Rechtstheorie*, p. 507 et seq.; and K. Willems, 'The Limits of the Law of Obligations', in E. Claes et al. (eds.), *Facing the Limits of the Law* (2009), p. 55 et seq. with further references.

24 However, in the United States for the interpretation of the Constitution various legal experts only want to have regard to the text of this document. See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009), p. 58 et seq.

interpretation. These rights must also be interpreted dynamically.<sup>25</sup> Because such treaties are of a higher order than national legislation, courts are regularly obliged to consider in specific cases whether the national law can be applied. This is at least the case in countries with a monist system, like the Netherlands, where the courts enjoy the constitutional authority to make such an assessment. In any case, courts in all EU Member States have to apply directly applicable rules of EU law, even if their national legislation deviates from these rules. As a consequence, for courts in these countries legislation at a national level has become less sacrosanct.

The growing role of courts in the development of the law applies above all to the supreme courts. After all, the highest courts are in the best position to take the lead in the development of the law.

#### 4. Increasing focus on the law-making task of the supreme courts

In many European countries, a tendency seems to be emerging towards a greater focus on the law-making task of the supreme courts, a tendency in which the supreme court, when it comes to setting priorities, above all focuses on legal decisions which are complex or have a strong effect on other cases. In Finland, in the beginning of the 1980s, a system of leave for appeal was introduced before the Supreme Court. The primary ground to grant leave for appeal is that a decision by the Supreme Court is necessary for the application of the law in identical or similar cases or for the consistency of case law.<sup>26</sup> This legislation changed the position of the Supreme Court considerably: its primary role is now that of creating precedents. A recent example of the aforementioned tendency can be found in Spain. The Act of 21 July 2015, LO7/2015, has led to a radical change of the procedure before the Supreme Court in administrative cases. The purpose of this new legislation is that the Supreme Court as a court of cassation will concentrate on decisions which are relevant in order to establish case law (*interés casacional*).

An interesting overview of the various systems of appeal to the supreme court in EU Member States can be found in a report called 'The Filtering of Appeals to the Supreme Courts', which was presented by the Lithuanian Supreme Court president Rimvydas Norkus in November 2015 at a conference of the Network of the Presidents of the Supreme Judicial Courts of the European Union.<sup>27</sup> There are various ways to create room for the aforementioned focus on law-making decisions but, as follows from this report, in many European countries there is – to some degree – a form of differentiation in the treatment of cases. Several countries use a method to determine the filtering of cases at the supreme court. In various countries where such a method exists, the supreme court is not obliged to deal with cases which do not warrant a decision by the highest court from a legal point of view.<sup>28</sup>

As to the situation in the Netherlands, in Section 2 I mentioned that the contribution to the development of the law has been explicitly recognised in Dutch legislation as one of the tasks of the Supreme Court. Nonetheless, this says nothing about the question of how this task relates to the other tasks of the highest court. The Dutch Supreme Court, as a court of cassation, also has the task of arriving at a decision in individual cases brought before it, and of intervening if the law has not been correctly applied in such cases. The Supreme Court is required to make such decisions even in respect of cases with little relevance for the development of law, for example cases in which a lower court has ignored a rule, the existence and content of which are not disputed. In these cases, the intervention by the Supreme Court is based on the task of that court to offer legal protection in individual cases (individual legal protection).

25 See ECtHR 25 April 1978, *Tyrer vs. United Kingdom*, Series A, no. 26, § 31: the European Convention on Human Rights 'is a living instrument which (...) must be interpreted in the light of present-day conditions'.

26 See note 15, supra. See also Section 2 of this article for comparable examples in other European countries.

27 <[http://www.lat.it/download/1369/introductory%20report%20-%20the%20filtering%20of%20appeals%20to%20supreme%20courts%20\(president%20rimvydas%20norkus\).pdf](http://www.lat.it/download/1369/introductory%20report%20-%20the%20filtering%20of%20appeals%20to%20supreme%20courts%20(president%20rimvydas%20norkus).pdf)> (last visited 13 October 2017). See for comparative law on this subject also J.A. Jolowicz, *On civil procedure* (2000), p. 336 et seq., and the report of a seminar organised in 2010 by the Hague Institute for Innovation of Law, <[http://www.hiil.org/data/sitemanagement/media/Report\\_Hoge\\_Raad\\_Selection\\_of\\_Cases\\_Seminar\\_complete\(2\).pdf](http://www.hiil.org/data/sitemanagement/media/Report_Hoge_Raad_Selection_of_Cases_Seminar_complete(2).pdf)> (last visited 9 October 2017), and more recently 'Le filtrage des recours devant les cours suprêmes, Actes du colloque du Vème Congrès statutaire de l'AHJUCAF', June 2016, <[http://www.ahjucaf.org/IMG/pdf/ahjucaf\\_le\\_filtrage\\_des\\_recours\\_devant\\_les\\_cours\\_supremes.pdf](http://www.ahjucaf.org/IMG/pdf/ahjucaf_le_filtrage_des_recours_devant_les_cours_supremes.pdf)> (last visited 9 October 2017).

28 See Section 2 of this article for examples.

In the last few decades in the Netherlands we have seen a development in our way of thinking about these tasks, and the relationship between them. Until the 21<sup>st</sup> century, the approach of the Supreme Court strongly focused on the adjudication of individual cases. In this period, development of the law was seen as a ‘by-product’ of the administration of justice by this court in individual cases. But times have changed: a clear tendency has emerged in the Supreme Court to focus stronger attention on its task to foster the unity and development of the law.<sup>29</sup> Development of the law has been identified as one of the core tasks of the Supreme Court.<sup>30</sup> The Court tries to spend the majority of its time on decisions which are important from a legal point of view.

The time necessary for this focus can be found – amongst other things – by applying the Act mentioned in Section 2, which allows the Dutch Supreme Court to differentiate in its treatment of cases, by dismissing certain categories of unfounded appeals without providing substantive grounds. In addition, since 2012 the Supreme Court can also decide cases without providing grounds after a simplified procedure. This procedure is described in Article 80a of the Judiciary Organisation Act. It usually takes only 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 the proceedings, if it is evident that the appeal has no chance of success or if it is evident that the party concerned has insufficient interest in its appeal in cassation. The Supreme Court applies this special procedure in many cases, especially in criminal cases. In 2016, the Criminal Chamber of the Supreme Court dealt with more than 60 % of the cases<sup>31</sup> by applying this simplified procedure. A large proportion of these cases were appeals without prospect of success, for example appeals that failed to recognise that the Supreme Court is a cassation court and not a third fact-finding instance. All cases are screened soon after they have been submitted to the Supreme Court, in order to determine whether or not they are eligible for this (abbreviated) form of disposal. The new Article 80a therefore introduced a certain degree of ‘selection at the gate’ at the Supreme Court. This process also influences the mind-set of the judges: the first thing they have to do when a case comes in, is to consider its chance of success bearing in mind its importance for the development of the law.

It is important to emphasise in this connection that the possibilities for the efficient settlement of cases without stating substantive grounds, must *not* be viewed as a means of saving money. The purpose of these possibilities is to enable the Supreme Court, given its limited resources, to shift its focus further onto the unity of law and the development of law. The use of these means will therefore have favourable consequences for these tasks of the Supreme Court. As a result, this court is in a position to focus its attention above all on those themes and problems which occur regularly in practice, and in respect of which there is a need for clear guidelines from the highest court.<sup>32</sup>

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

The highest national courts can develop the law in their judgments in a number of different ways. I wish to mention several instruments which may serve this purpose. In Section 5.1, I will address four techniques which can (also) be used in normal judgments. In Section 5.2, I will mention special types of judgments of a supreme court that have especially been introduced for the development of the law and in which these four techniques can also be used.

29 An important stimulus was the report ‘Versterking van de cassatierechtspraak’ [‘Reinforcing the administration of justice in cassation’] by the Hammerstein Committee published in 2008. See <<http://njb.nl/Uploads/2016/5/rapportversterkingvandecassatierechtspraak.pdf>> (last visited 9 October 2017). The report encouraged the Dutch Supreme Court to focus its attention on ‘cases that matter’.

30 As for example expressed in the annual report of the Dutch Supreme Court 2007-2008, p. 6 et seq.

31 To be exact: more than 60 % of the cases in which grounds for the appeal to the Supreme Court were presented.

32 This was also expressed in the explanatory notes to Article 80a of the Judiciary Organisation Act during the parliamentary discussion of that article. See *Kamerstukken II* [Parliamentary Papers], 2010/11, 32576, no. 3, p. 1.

## 5.1. Four techniques

### 5.1.1. Provide a more detailed explanation of the legal reasoning

A supreme court can develop the law by providing a more detailed explanation of its legal reasoning. By this, I mean that the supreme court in its judgment not only outlines its final legal conclusion ('that is how it is') but also includes the arguments that reveal how it arrived at that conclusion. Such a form of reasoning increases clarity and increases predictability as to how the supreme court will decide in other comparable cases. There is a growing tendency within the Dutch Supreme Court to follow this approach. Various other supreme courts in Europe use this technique as well.<sup>33</sup> In other countries, however, the (supreme) courts give a more succinct statement of their legal reasons.<sup>34</sup> This is also connected with the traditional culture of the wording of judgments in a country, but such a culture can gradually change.<sup>35</sup>

### 5.1.2. A broader-than-necessary formulation

A supreme court may also formulate a legal rule in its judgment which is more extensive and more broadly applicable than strictly necessary to decide the case in question.<sup>36</sup> Such a 'broader-than-necessary formulation' is often valuable for legal practice. It generally has a clear law-making effect, because a broadly formulated rule of this kind clarifies how decisions should be taken in a whole range of other – including future – cases. From the information from my colleagues abroad, it follows 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.<sup>37</sup> However, some supreme courts are more inclined to formulate broad rules. In Estonia, for instance, decisions with a broad legal formulation are quite common in administrative law matters and are regarded as good practice. Similar decisions can be found regularly in the Netherlands.

### 5.1.3. Preceding paragraphs to describe general principles

The formulation of one or more broad legal rules in a judgment (see Section 5.1.2) can be expanded by adding a description of general principles followed by the supreme court when deciding cases in this category.<sup>38</sup> Such a formulation of general principles usually occurs in one or more preceding paragraphs in the judgment, before the court applies these principles to the present case. In such paragraphs, the court describes in general terms the legal framework which it adopts when judging cases of this kind. This technique can be regularly found in judgments of the European Court of Human Rights.

The scope of such preceding paragraphs may vary. There are even 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. In such cases, the supreme court may decide to map out the problem area, and thus clarify the situation and provide a clear oversight. This happens in Poland, when formulating preliminary rulings in criminal cases,<sup>39</sup> in Austria in exceptional cases, also quite often in the Czech Republic, and in Norway and Sweden.<sup>40</sup> The Supreme

33 I especially mention German courts, which frequently use an academic style to explain the legal reasons for their decisions.

34 The courts of cassation in France and Belgium usually give only short reasons for their decision. See for a comparison: Mitchell de S.-O.-L'E. Lasser, *Judicial Deliberations, A Comparative Analysis of Judicial Transparency and Legitimacy* (2009).

35 See the report of a French working group, presided by president Philippe Martin of the *Conseil d'État*, on the wording of decisions of administrative courts: <[http://www.conseil-etat.fr/content/download/1690/5098/version/1/file/rapport\\_redaction\\_decisions\\_juradm\\_2012.pdf](http://www.conseil-etat.fr/content/download/1690/5098/version/1/file/rapport_redaction_decisions_juradm_2012.pdf)> (last visited 9 October 2017). And see for the French Court of Cassation the Report of the Commission for Reflection on the Reform of the Court of Cassation of April 2017, <<https://www.courdecassation.fr/IMG///Rapport%20sur%20la%20r%C3%A9forme%20de%20la%20Cour%20de%20cassation.pdf>> (last visited 9 October 2017), p. 129 et seq.

36 A broad rule can be accompanied by a more detailed explanation of the legal reasoning, as mentioned in Section 5.1.1, but that is not necessarily the case. A broad legal rule can also be stated without or with only limited explanation.

37 The answers to a question in this regard in my questionnaire, mentioned in note \*, supra, show that the supreme courts in Belgium, France, Luxembourg, Romania and Slovakia do not go beyond answering the question which the parties ask them to decide on. In Cyprus, the Supreme Court does not do this either when a constitutional question is concerned. A cautious approach in this respect is reflected in the answers from Germany, Hungary and Malta.

38 Such principles can also be of a more technical nature, and do not necessarily have to be general principles of law, like the principle of equality.

39 See also Section 5.2.1 on preliminary rulings.

40 Information derived from the answers to my questionnaire, mentioned in note \*, supra.

Court of Estonia gave a decision in 2015 in which it devoted a whole chapter describing the legal situation, although that was not of primary importance for the case at hand.<sup>41</sup> The Dutch Supreme Court quite frequently uses preceding paragraphs describing the legal framework on which it will base its decision. The scope of such paragraphs may vary. The Dutch Supreme Court from time to time expands these paragraphs to render a panoramic ruling, usually between 1 and 5 times a year. An example of such a panoramic ruling can be found in a judgment of the Criminal Chamber from July 2014 concerning the hearing of witnesses, and in a panoramic ruling of this Chamber from 2016 on self-defence and the excessive use of self-defence.<sup>42</sup> Another good example of a panoramic ruling is a judgment from early 2016, rendered by the Tax Chamber of the Dutch Supreme Court, concerning the reasonable period of adjudication in administrative law.<sup>43</sup> In that ruling, a variety of questions in this field was answered, including questions that had not been submitted to the Supreme Court previously, and which were not at stake in the case under judgment. Naturally, writing such panoramic rulings is time-consuming. A wide use by the Supreme Court of the possibilities offered by 'selection at the gate'<sup>44</sup> can enable it to focus increasingly on such rulings.

#### 5.1.4. Superfluous statements

Apart from preceding paragraphs with general principles, as mentioned in Section 5.1.3, some supreme courts from time to time add superfluous statements to their rulings. These are statements that do not influence the decision in the case at hand, and which as a consequence need not be included in the judgment. With this technique, the court calls for additional 'broadcasting time', as it were. It can be used when the court knows or foresees from its contact with society and legal practice that the issue is leading or will lead to controversy. If this technique is used, it is limited to matters which to some extent are related to the subject of the case in which the judgment is made. Otherwise it would result in regulation with no genuine link to adjudication.

The Dutch Supreme Court uses superfluous statements from time to time, usually at the end of the judgment. One example is a ground-breaking judgment by the Criminal Chamber. The Supreme Court added a superfluous statement with respect to its (realistic) expectation that on the basis of that judgment many attorneys would wish to request a review of already settled criminal cases.<sup>45</sup> Examples can also be found in decisions of some other supreme courts in Europe.<sup>46</sup> The Supreme Court of Latvia frequently uses superfluous statements and ancillary court decisions.<sup>47</sup>

## 5.2. Special types of judgments

### 5.2.1. Preliminary rulings

A supreme court can give special guidance when answering the request of a lower court for a preliminary ruling or advice. There should be a basis in legislation for responding to such requests.

Since 1 July 2012, such a basis exists in the Netherlands for civil cases. A lower court can submit a question of law to the Dutch Supreme Court in the course of proceedings brought before it.<sup>48</sup> The ruling in which the Supreme Court responds to such a request is intended for cases about issues regarding which large numbers of disputes arise or will arise related to the same question of law, for example claims from a large number of clients of a financial institution, arguing that the institution in question has promoted and

41 Supreme Court of Estonia (Administrative Chamber) 13 May 2015, case no. 3-3-1-8-15.

42 Dutch Supreme Court 1 July 2014, ECLI:NL:HR:2014:1496, *Nederlandse Jurisprudentie* 2014/441 (panoramic ruling on calling and hearing witnesses) and Dutch Supreme Court 22 March 2016, ECLI:NL:HR:2016:456, *Nederlandse Jurisprudentie* 2016/316 (panoramic ruling on self-defence and excessive use of self-defence).

43 Dutch Supreme Court 19 February 2016, ECLI:NL:HR:2016:252, *Beslissingen in Nederlandse Belastingzaken* 2016/140, Heading 3.

44 See Section 4 of this article.

45 Dutch Supreme Court 3 March 2015, ECLI:NL:HR:2015:434, *Nederlandse Jurisprudentie* 2015/256, Section 4.7.

46 The answers to a question in this regard in my questionnaire (see note \*, supra) indicate that this happens in Austria, Estonia (see especially the judgment of the Criminal Chamber of 23 February 2015, case no. 3-1-1-62-14), Latvia and Sweden.

47 Ancillary court decisions are regulated in Article 288 of the Act on Administrative Procedure Law, Article 232 of the Act on Civil Procedure Law and Article 553 of the Act on Criminal Procedure Law.

48 See Article 392 et seq. of the Code of Civil Proceedings.

supplied an unsound financial product. The experiences with this procedure are so positive<sup>49</sup> that since the beginning of 2016 the procedure is also applicable in fiscal cases.<sup>50</sup> In addition, serious consideration is being given to the introduction of a similar preliminary procedure in criminal cases. As a consequence, the Dutch Supreme Court will become increasingly involved in the development of the law. The effect is also that the court is called upon to decide on legal questions in civil cases which would otherwise probably never have been continued in three instances, up to and including the Supreme Court, due to the costs of court fees and legal aid. Furthermore, in an 'ordinary' cassation procedure, the Supreme Court has greater freedom to decide whether to answer a particular question of law to the fullest extent, to keep its legal motivation more restricted, or even to 'evade' a tricky or sensitive question. When a question of law is submitted to the Supreme Court by a lower court for an explicit answer in a preliminary procedure, this forces the hand of the Supreme Court to a greater extent.

A similar possibility of preliminary rulings exists in Poland in criminal cases.<sup>51</sup> The same goes for Montenegro, where the Supreme Court can adopt legal positions of principle at the request of any court.<sup>52</sup> In France, the Court of Cassation is empowered to respond to requests of a lower court for an advisory opinion.<sup>53</sup> These opinions are not binding, but in practice they have great authority and that is what they are meant for. Therefore, this French procedure can be compared to procedures leading to a preliminary ruling.

### 5.2.2. Cassation in the interest of the law

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 therefore 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 frequently arises, and when it is not to be expected that the supreme court will be called on to decide on this question in the near future in normal proceedings. This technique has existed for centuries in France, and has also been adopted in the Netherlands,<sup>54</sup> Spain and Italy. In the Netherlands it is used several times a year, for instance when new legislation raises technical questions to which a quick answer is desirable. The need for this special remedy has decreased since the possibility of preliminary rulings has been introduced in the Netherlands.<sup>55</sup>

### 5.2.3. Interpretative judgments

In some countries, it is possible for certain authorities who are not a party in a case to ask for an interpretative judgment from the Supreme Court to clarify the law. In Bulgaria there is a broad possibility to request an interpretative judgment of the Supreme Court, without any apparent link to a specific case.<sup>56</sup> Such a judgment can be requested by various authorities in the event of contradictory or inaccurate case law. It can be requested, amongst other things, by the President of the Court of Cassation, the Minister of Justice, the Ombudsman and the Chairperson of the Supreme Bar Council. These interpretative judgments are published annually in a bulletin. Similarly, various authorities in Poland can ask the Supreme Court for a resolution to resolve doubt in the interpretation of the law.<sup>57</sup>

49 See the official evaluation by I. Giesen et al., *De Wet prejudiciële vragen aan de Hoge Raad. Een tussentijdse evaluatie in het licht van de mogelijke invoering in het strafrecht* (2016), <<https://www.rijksoverheid.nl/documenten/rapporten/2016/09/28/tk-bijlage-de-wet-prejudiciële-vragen-aan-de-hoge-raad>> (last visited 9 October 2017).

50 See Article 27ga et seq. of the General Act on State Taxes.

51 Article 441 of the Code of Criminal Procedure.

52 Article 28 of the Law on Courts, see <<http://network-presidents.eu/page/montenegro>> (last visited 9 October 2017).

53 Article L441-1 et seq. of the *Code de l'organisation judiciaire*.

54 For further discussion of this phenomenon see the dissertation of W.H.B. den Hartog Jager, *Cassatie in het belang der wet* (1994).

55 See Section 5.2.1.

56 Article 124-131a of the Judiciary System Act, see <[http://www.vssold.justice.bg/spain/7/New\\_JSA\\_SG-64\\_7-8-2007\\_EN\\_pdf.pdf](http://www.vssold.justice.bg/spain/7/New_JSA_SG-64_7-8-2007_EN_pdf.pdf)> (last visited 9 October 2017).

57 See Article 60, § 1 and § 2 of the 2002 Act on the Supreme Court. See also: <[logika.uwb.edu.pl/studies/download.php?volid=44&artid=oa](http://logika.uwb.edu.pl/studies/download.php?volid=44&artid=oa)> (last visited 9 October 2017).

## 6. Influence of foreign and international (treaty) law

### 6.1 Communication with foreign supreme courts

There are factors of an international nature which affect the highest national courts in Europe, and which encourage these courts to be increasingly involved in the development of the law on an international level. This applies all the more strongly in countries with a monist system, a system in which courts have to disregard national legal rules insofar as they violate self-executing rules of an international treaty. In such a system, it is not the legislator but the court – by its interpretation of the treaty – who ultimately determines the legal consequences of that treaty. The ever-growing body of international and in particular European regulation encourages the highest courts to direct their attention to and enter into contact with their colleagues in foreign courts.<sup>58</sup> The relationship between supreme courts is informal and built on cooperation on an equal footing. There is no form of hierarchy between these courts, and none of them is formally or informally bound to follow the views of one or more of the other supreme courts in Europe.

Communication with a foreign supreme court can be useful when it comes to the interpretation of a treaty that is applicable in both countries. It is obvious that a uniform interpretation of the treaty by the courts in both countries is desirable. A difference in interpretation of a treaty for the prevention of double taxation, for instance, might lead to double taxation of an individual, contrary to the objective of the treaty, or to the undesirable effect that an individual with taxable income does not have to pay tax in either country. Information about the interpretation of a rule of EU law by foreign supreme courts can also be useful when the supreme court of a Member State has to decide whether it can give an interpretation of such a rule on its own, or whether this interpretation is so doubtful that there is an obligation to ask the Court of Justice of the European Union for a preliminary ruling.<sup>59</sup>

Apart from common treaties, the case law and experience of foreign courts under their national law can also offer inspiration to national (highest) courts. This applies in particular when a new issue is in question, requiring a sort of pioneering work. In these cases it is especially valuable to investigate possible solutions and to get an idea of their practical effect. Therefore, a number of supreme courts in the EU, including the Dutch Supreme Court, have reached agreement on direct cooperation between their legal staff for the exchange of information. If in the preparation of a case one of these participating courts needs information about foreign law, including the interpretation of a treaty in another country, a law clerk of that court can easily obtain this information almost without obstacle by simply sending an e-mail to his or her counterpart abroad.<sup>60</sup> This is a rapid and simple process, so that a useful answer is generally available within a few weeks. These possibilities are regularly used, and the participating courts regard them as valuable.

### 6.2. Communication with the European Courts

#### 6.2.1. General

Many supreme courts in Europe are also in regular contact with the European Court of Human Rights (ECtHR) in Strasbourg<sup>61</sup> and the Court of Justice of the EU in Luxembourg. Communication between the ECtHR and the (supreme) national courts has been described as a dialogue.<sup>62</sup> It is worthwhile however to recognise that this is not a relationship of absolute equality. When it comes to the interpretation of the European Convention on Human Rights the Court in Strasbourg has the final say. The same goes for the interpretation of EU law by the European Court of Justice. Communication of national courts with the judges

58 Cf. E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013).

59 See Court of Justice 6 October 1982, Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, [1982] ECR 3415, Section 16: '[T]he national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States.'

60 One example is the opinion of the Dutch Advocate-General Bleichrodt with comparative law information about the possibility of the police searching data on a smartphone, ECLI:NL:PHR:2016:1048, Section 40 et seq.

61 The opening of the judicial year of the Strasbourg Court at the end of January, preceded by a conference on human rights, is an excellent meeting place for the European and the highest national courts.

62 The former President of the ECtHR Dean Spielmann referred to this dialogue in 2015, on the occasion of the Thomas More Lecture. The text of this speech is available at: <[http://www.echr.coe.int/Documents/Speech\\_20151012\\_Spielmann\\_Sir\\_Thomas\\_More\\_Lecture.pdf](http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf)> (last visited 9 October 2017).

of these courts are still valuable however, as it is important for all courts concerned to be kept informed of problems that have arisen or might arise. The ECtHR takes serious account of special elements in the field of national law. If for instance a specific interpretation of the European Convention on Human Rights were to result in problems in national practice, it is useful for the ECtHR to be duly informed in advance, before giving a judgment on the problem in question. Once a judgment has been rendered, it becomes far more difficult for the ECtHR to take account of information of this kind. After all, like national courts, the European courts will in principle not reverse their prior case law.

### 6.2.2. Informal communication

Informal communication between the highest national courts and the European courts will enable the highest national courts to further direct the development of the law. In connection with the more informal communication between the European courts and the highest national courts, I would like to mention the network for information exchange which has recently been established between the ECtHR and the highest national courts. This network is intended to promote a rapid exchange of relevant information, with practically no obstacles, between the ECtHR and the highest national courts which are affiliated to the network. A pilot run took place with the French *Cour de cassation* and the French *Conseil d'État* on the one hand, and the ECtHR on the other. The network has since been expanded to other supreme courts in Europe; the Dutch Supreme Court joined the network in 2016.<sup>63</sup> Similarly, the European Court of Justice has encouraged the setting up of a network for judicial cooperation between this supranational court and the constitutional and supreme courts of the Member States.<sup>64</sup>

### 6.2.3. Formal communication – a request for interpretation

National-court judges also have a formal communication channel, namely the reasons they give for a request for a preliminary ruling to the Court of Justice of the EU. There, the national courts can explain any doubts they have about the answer to a question of European Union law. They can list the various possible interpretations and present the arguments for and against these interpretations. In this way, the national courts can ensure that the judges of the Court of Justice are well informed. The national courts can take one step further by specifying and explaining which interpretation of European law they prefer. The Court of Justice appreciates this approach, which is also described as the 'green light procedure'.<sup>65</sup> In this way, the national court expresses the wish to make a decision in a particular direction, and asks for green light from the Court of Justice. It is important for the Court of Justice's decisions to be useful for the national courts, and by this technique the Court of Justice knows that at least one possible decision will certainly be practicable for the referring courts.

It is likely that a similar option for formal communication with the ECtHR will be established within the foreseeable future. I am referring to Protocol No. 16 to the European Convention on Human Rights.<sup>66</sup> The highest national courts can approach the ECtHR on the basis of this protocol with 'questions of principle concerning the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'.<sup>67</sup> The highest national courts will thus be able to focus even more strongly on the development of the law, by posing an important question to the ECtHR in the context of a pending case. In this way, a highest national court can avoid the risk of answering a question of interpretation of the European Convention on Human Rights – to which the case law of the ECtHR offers no clear answer – based

63 More about this network can be found on <<http://www.echr.coe.int/Pages/home.aspx?p=court/network&c>> (last visited 9 October 2017). See also the Steering Committee for Human Rights of the Council of Europe (CDHH), *Report on the longer-term future of the system of the European Convention in Human Rights*, CDDH(2015)R84, Addendum I, Sections 115-116.

64 See <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170033en.pdf>> (last visited 9 October 2017).

65 In the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ C 338/01, 6.11.2012) the Court of Justice refers to this possibility in Section 24.

66 Protocol of 2 October 2013. For this protocol see <[http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n13739062744461326038770\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n13739062744461326038770_pointer)> (last visited 9 October 2017); and L.A. Sicilianos, 'L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole no 16 à la Convention européenne des droits de l'homme', (2014) *Revue Trimestrielle des droits de l'homme*, no. 97, p. 9 et seq.

67 The protocol does not use the expression 'prejudicial questions', but the phenomenon is very closely related.

on their own views, with it emerging years later that the ECtHR in fact interprets the treaty differently. In the intervening years, many cases may have been decided on the basis of the interpretation by the highest national court in question, decisions which subsequently turn out to be incorrect in the light of the later decision by the ECtHR. The sixteenth protocol helps the national court to directly dispose of a whole series of cases, on the basis of the correct interpretation of the treaty. The protocol offers the highest national court a possibility of dialogue with the ECtHR, because in the explanation for its question, the national court can express its doubts concerning the interpretation of the European Convention, with supporting arguments, and can inform the ECtHR of the possible consequences which the various conceivable interpretations of the treaty may have in the context of the national legal system.

## 7. Limitations to judicial law-making

### 7.1. Inherent limitations in the relation with the legislator

As has been extensively discussed above, the highest national courts have gradually become more involved in law-making. How far courts are willing to go in this respect depends on the legal system and the legal culture in their country. But even in countries where courts are very active in this respect, the possibilities for development of the law by a court are of course not unlimited.<sup>68</sup> Completely unrestricted law-making by the courts would not be compatible with the system of checks and balances in a democratic state under the rule of law. In such a state there should be a separation and distribution of powers. The (highest) courts must therefore ensure in this connection that they do not get in the way of the legislator. Legislator and judiciary should not become involved in some sort of arms race, in terms of law-making. It is specifically desirable that these two state powers, both of which have a role in the development of the law, cooperate successfully in this respect. Communication in any form, based on mutual understanding and respect for one another's position, can make a valuable contribution.<sup>69</sup> In his book *The Judge in a democracy*, the former president of the Israeli Supreme Court Aharon Barak addressed this issue. He observes that in a democracy, the court should recognise the central role of the legislator. In his opinion, the undermining of the legislator by the courts means that the courts are effectively undermining democracy.<sup>70</sup> The courts, even the highest courts, are not bodies which determine how society should be structured. The court should not be the architect of society. When it comes to questions of social structure, about which there can be a serious difference of opinion, the choice should be made in a democratic manner through the political decision-making processes. It is not up to courts to make decisive choices in such political or policy-related controversies. The sources of information available to the court are also more limited than those of the legislator, who can initiate (academic) research into existing problems and into the consequences of their possible solutions.<sup>71</sup> The legislator also has the possibility of publishing a draft statute, in order to promote a discussion enriched by contributions from experts, social interest groups and Parliament. All in all, this means that the law-making activities of the (highest) courts are bound by inherent limitations, given the political and policy-based aspects of legislation. These limitations above all are reached in a situation where a court, in its judgments, becomes the arbitrator of problems which are presently being dealt with by the legislator, and in respect of which policy-based or political choices still have to be made. This is most specifically the case if the court is asked to make a decision about such a question at a time when it is the focus of current political debate.

It is not always easy to determine the exact limitations on the law-making task of the judiciary, and to decide whether an issue can be earmarked as (too) political or policy-related. On occasion – even within the legal world – opinions can differ as to whether a court has gone beyond the limitations of its task, and

68 On these limitations see among other things M.W.C. Feteris, *Beroep in cassatie in belastingzaken* (2014), p. 58 et seq.

69 Cf. Opinion no. 18 of the Consultative Council of European Judges (CCJE) of the Council of Europe (2015), 'The position of the judiciary and its relation with the other powers of state in a modern democracy', Section 11.

70 A. Barak, *The Judge in a democracy* (2006), p. 226.

71 In some countries, courts are able to obtain this type of information, to a certain extent, by calling in an 'amicus curiae'. See Section 8 below.

whether or not the court has taken ‘the seat’ of the legislator or other political powers.<sup>72</sup> In his book about the court in a democracy, to which I referred above, Aharon Barak dedicated an entire chapter to this very question. He expressed criticism of the so-called ‘non-justiciability’ doctrine. To put it very briefly, he believes that courts should not arrive too quickly at the decision that they cannot handle a particular case purely because of the argument that the problem in question is too much of a ‘political issue’.<sup>73</sup> Whatever the case, in this area there may be a clear field of tension between the court and the legislator. Courts, in particular the highest national court, must be fully aware of this tension when becoming involved in the development of the law.

## 7.2. Limitations imposed by the existing legislative system

Courts are also bound by the limitations imposed by the existing legislative system. Their decisions must fit into that system and ensure its implementation. The freedom for courts to make new law is thus inherently restricted to a considerable degree. These boundaries depend on the legal 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, whereas obligations in civil law can be accepted without such a legislative basis. In the 1950s, the Supreme Court of the Netherlands gave a decision which can be regarded as a clear example, the ‘*Quint/Te Poel* judgment’. According to this judgment, it is possible in civil law that obligations are based on sources which cannot be found in statutory law. But according to the Supreme Court, those extra-statutory sources can only be accepted if they fit into the system of legislation and tie in with the cases regulated by statute.<sup>74</sup> The extent to which courts are bound by legislation has become slightly less strict since that time, as courts in the Netherlands have more often declared legislation inapplicable due to the violation of a self-executing treaty rule. The principle however has remained, and in my view must continue to remain, that a court can only work on the development of the law within the boundaries laid down by law, albeit that treaty provisions must be considered part of that legal framework.

## 7.3. Limitations based on methods of interpretation

Limitations also depend on the perspective of the court when interpreting legislation. A court that tries to follow the text of the statute as closely as possible, is less inclined to develop the law than a court that gives equal or even more weight to other factors of interpretation, such as legal history, the intention of the legislator, the system of legislation, general principles of law, practical results of the interpretation and generally accepted views in society. But if the text and 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,<sup>75</sup> there will be more room for law-making by the courts if the text of the statute is unclear or ambiguous,<sup>76</sup> if it uses broad and general terms, if the statute gives no solution, or if various statutes contradict each other. It can also be observed that some courts feel freer in the interpretation of older statutes.

## 7.4. Limitations with regard to unwritten rules

Some supreme courts in Europe, in common-law and in civil-law jurisdictions, also accept unwritten rules with no basis in legislation. The Court of Appeal of Malta accepted the doctrine of unjustified enrichment, and thus developed a remedy for instances not covered by codified law.<sup>77</sup> The Supreme Court of Denmark accepted a right of compensation for the less wealthy party when unmarried co-habitants separate,

72 This discussion is very much alive in the Netherlands, following a judgment by the District Court of The Hague on 24 June 2015 (*Stichting Urgenda versus the Kingdom of the Netherlands*, ECLI:NL:RBDHA:2015:7145) in which – put very briefly – the Court decided that the State must do more to reduce the emission of greenhouse gases in the Netherlands. The case has now been submitted for appeal.

73 A. Barak, *The Judge in a democracy* (2006), pp. 177-189.

74 Dutch Supreme Court 30 January 1959, *Nederlandse Jurisprudentie* 1959/548 (*Quint/Te Poel*).

75 Cf. note 24, *supra*.

76 Of course in some cases there can be discussion whether a specific text in a statute is clear or not.

77 Court of Appeal of Malta, *Sciicluna v Watson*, 15 July 1901, Vol. XVIII.i.26, *Falzon et v Chierico et*, 25 March 1912, Vol. XXI.i.452 and *Grech et v Gauci et*, 5 April 1954, Vol. XXXVIII.i.142.

although no statutory rules applied in this situation.<sup>78</sup> The Supreme Court of Latvia applied the principle of proportionality – in addition to written rules – as a ground for reducing excessive contractual penalties. According to the Supreme Court, a reduction must be established in accordance with the sense of justice and general principles of law.<sup>79</sup> The Swedish Supreme Court accepted an obligation to compensate non-pecuniary damage in case of a violation of a constitutional right, although there was no explicit statutory support for damages in such cases.<sup>80</sup> The Dutch Supreme Court in the ‘*Quint/Te Poel* judgment’ (see Section 7.2) also determined the limits of accepting sources of obligations without a statutory base. I would also like to mention the case law of the Tax Chamber of the Dutch Supreme Court on general principles of good governance: if such a principle has no basis in legislation, this does not imply that strict application of the legislation must always prevail. According to the Supreme Court, the unwritten principle must be balanced against the principle that tax legislation should be applied, and under certain conditions this balancing exercise may lead to the conclusion that tax legislation cannot be applied, due to special circumstances of the case.<sup>81</sup>

## 8. Prospects

Finally, I will take a look ahead into the future. Nothing is as difficult to predict as the future. Nevertheless, if I consider the causes which have led the (highest) courts to become more and more involved in the development of the law over the past few decades,<sup>82</sup> I do not expect any of these causes will disappear in the foreseeable future. I therefore expect that in the years to come, the highest national courts in Europe will continue to undertake at least as much law-making work as has been the case to date. As far as the situation in the Netherlands is concerned, with the changes of legislation in the last few years,<sup>83</sup> the legislator has confirmed the importance of the task of the Supreme Court in developing the law. The legislator has offered this court additional instruments to focus even more strongly on that task. This justifies the expectation that the Dutch Supreme Court will indeed focus more strongly on that task. In their response to my questionnaire,<sup>84</sup> most of the respondents from the Network of the Presidents of the Supreme Judicial Courts of the EU answered that they also expect an increase in the law-making activities of their courts.

What can we expect in this field: Will there also be new techniques or new procedures to promote the development of the law by the courts? And if so, will the working methods of supreme courts be affected? As mentioned above, this is not easy to predict. But it is worth observing that when courts assume an increasing task in making new law or developing existing law, they may from time to time need information. For instance they may need expert advice or information about the practical consequences of various solutions between which they have to choose. After all, it is not merely a question of legal technique: in reaching law-making decisions, the related consequences may be an important contributing factor. In certain countries, courts are able to obtain this type of information, to a certain extent, by calling in an ‘*amicus curiae*’,<sup>85</sup> a phenomenon which is well known in the United States<sup>86</sup> and also in the ECtHR.<sup>87</sup> I believe that this phenomenon represents considerable added value in this context, which may well start to play an increasingly important role. In Europe, the *amicus curiae* exists in France,<sup>88</sup> but is seldom used there. In

78 Supreme Court of Denmark, *UfR (Ugeskrift for Retsvæsen)* 1980.480 H, *UfR* 1984.166 H, and *UfR* 1985.607/2 H.

79 Supreme Court of Latvia 14 May 2008, no. SKC-212/2008.

80 Supreme Court of Sweden 23 April 2014, NJA 2014 p. 323 (the *Blake* case), <<https://lagen.nu/dom/nja/2014s323>> (last visited 9 October 2017).

81 See e.g. Dutch Supreme Court 12 April 1978, *Beslissingen in Nederlandse Belastingzaken* 1978/135.

82 See Section 3.

83 Introduction of (i) Article 80a of the Judiciary Organisation Act, mentioned in Section 4, and (ii) preliminary rulings given by the Supreme Court, as mentioned in Section 5.2.1.

84 See note \*, supra.

85 See S. Kochevar, ‘Amici Curiae in Civil Law Jurisdictions’, (2013) *The Yale Law Journal*, p. 1653 et seq.

86 See e.g. P.M. Collins jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008).

87 Article 36(2) of the European Convention on Human Rights.

88 Article L431-3-1 of the Judiciary Organisation Act. See G. Canivet, ‘Formal and Informal Determinative Factors in the Legitimacy of Judicial Decisions: The Point of View of the French Court of Cassation’, in N. Huls et al. (eds.), *The Legitimacy of Highest Court’s Rulings, Judicial Deliberations and Beyond* (2009), p. 138 et seq.

addition, I would especially like to mention England and Wales<sup>89</sup> and also Ireland.<sup>90</sup> In some countries the procurator general can fulfil this function, by giving independent opinions to the supreme court in pending cases. In the Netherlands, in the procedure following a request for a preliminary ruling, the Supreme Court can obtain information from third parties with a view to arriving at a more well-founded response to the legal questions posed.<sup>91</sup> To give an example: before giving a preliminary ruling about attachment law,<sup>92</sup> the Supreme Court received a contribution from the professional organisation of bailiffs. The legislation on preliminary rulings introduced in 2012 even offers the possibility of issuing a public appeal for contributions by the Supreme Court. The Supreme Court has developed a web application for such consultations. I expect that input from third parties will occur more frequently in future in the Netherlands, just as the Dutch legislator also makes use of internet consultations.

Finally, I believe that the development of the law by the highest national courts will become a less autonomous process, and will gradually be influenced by national and international networks with other courts. In Section 6 I outlined developments in this field. I expect that the value of such networks will be more widely recognised, and that they will be used more frequently and intensively in the future. ■

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89 See <<https://www.mreza-mira.net/wp-content/uploads/Amicus-Briefs-CSP-Memo.pdf>> (last visited 9 October 2017).

90 See <<https://www.lawlibrary.ie/media/lawlibrary/media/Secure/20130214PILA-AmicusCuriaegGilmore.pdf>> (last visited 9 October 2017).

91 Article 393 of the Code of Civil Proceedings and Article 27gc, Section 2 of the General Act on State Taxes.

92 Dutch Supreme Court 13 September 2013, <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BZ9958>> (last visited 9 October 2017), *Nederlandse Jurisprudentie* 2014/455.

## Annex 1

### Questionnaire on the topic

#### 'To which extent may or must a Supreme Court contribute to the development of the law'

1. Does the Supreme Court in your country contribute to the development of the law?
2. If the Supreme Court in your country does contribute to the development of the law, are there any legal provisions in which that role is reflected?
3. What are the limits to the law-developing activities of your Supreme Court? Are there any legal provisions that stipulate these limits? If not, who determines these limits?
4. a) What are the relevant factors in your country when deciding how far the judiciary can go with regards to the development of the law?  
b) What are the limits when it comes to the interpretation and application of international treaties?
5. Can you give examples of decisions in which your Supreme Court clearly contributed to the development of the law?
6. a) To what extent does the case law of your Supreme Court contribute to the development of the law? And does it frequently make decisions that contribute to the development of the law?  
b) How far does your Supreme Court go in its interpretation of the law? Can you decide 'praetor legem' or even 'contra legem'? Can you give examples?  
c) How much room is left to the judiciary in your country to develop unwritten rules (rules which are not laid down in legislation)?
7. a) Does your Supreme Court (sometimes) formulate legal rules which are broader than necessary to decide the case in question?  
b) Does your Supreme Court (sometimes) make use of preliminary considerations in which it formulates general principles (like the European Court of Human Rights)?
8. Does your Supreme Court (sometimes) make use of an 'amicus curiae', when preparing an important decision developing the law? If so, can you give examples?
9. a) How relevant is the law of the EU for the development of the law in your country and what is the role of your Supreme Court in this context, in particular in the interaction with the EU Court of Justice?  
b) The same question as far as the European Convention on Human Rights and the European Court of Human Rights are concerned.
10. a) How does the legislator in your country react to any law-developing activities of the Supreme Court?  
b) And what is the general opinion of the academic world on this matter?
11. Does your Supreme Court in any way give feedback to the legislator, e.g. when it discovers shortcomings in existing legislation?
12. How do your Supreme Court's law-developing activities relate to its other tasks (e.g. unity of the law, legal protection in individual cases)?
13. What can we expect in the future regarding the role of your Supreme Court in the development of the law?
14. Is there anything else you would like to share on this topic?